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PENDING NOMINATIONS TO THE NATIONAL LABOR RELATIONS BOARD

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE NOMINATIONS OF MARK GASTON PEARCE, OF NEW YORK, TO BE CHAIRMAN, WHO WAS INTRODUCED BY SENATOR SCHUMER, AND RICHARD F. GRIFFIN, JR., OF THE DISTRICT OF COLUMBIA, WHO WAS INTRODUCED BY SENATOR WARREN, SHARON BLOCK, OF THE DISTRICT OF COLUMBIA, WHO WAS INTRODUCED BY SENATOR MURPHY, HARRY I. JOHNSON III, OF VIRGINIA, WHO WAS INTRODUCED BY FORMER SENATOR BYRON DORGAN, AND PHILIP ANDREW MISCIMARRA, OF ILLINOIS, WHO WAS INTRODUCED BY SENATOR ALEXANDER, ALL TO BE A MEMBER, ALL OF THE NATIONAL LABOR RELATIONS BOARD

MAY 16, 2013

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

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PENDING NOMINATIONS TO THE NATIONAL LABOR RELATIONS BOARD

THURSDAY, MAY 16, 2013

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 430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Murray, Sanders, Casey, Franken, Baldwin, Murphy, Warren, Alexander, Isakson, and Scott.

Also present: Senators Schumer and Dorgan.

OPENING STATEMENT OF SENATOR HARKIN

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

The hearing this morning is on the nominations for the National Labor Relations Board.

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, and the ability to join together and speak up for fair wages and good benefits and safe working conditions. These rights are one of the pillars of our middle class, ensuring that 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. I think what few people understand or realize is that workers themselves cannot enforce the National Labor Relations Act. The Board is the only place workers can go if they have been treated unfairly and denied the basic protections that the law provides. Thus, the Board plays a critical role in vindicating workers' rights. In the past 10 years, the NLRB has secured opportunities of reinstatement for 22,544 employees who were unfairly fired. It has also recovered more than $1 billion on behalf of workers whose rights were violated.

The Board is just as essential for our Nation's employers. If an employer, for example, is the victim of a wildcat strike, or is in negotiations with the union and can't get the union to bargain in good faith, the Board is their only recourse. And the NLRB has helped numerous businesses resolve disputes efficiently.

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Because this agency is absolutely critical to our economy and our country and our middle class, it is deeply disappointing to see what has happened to the Board in recent years, including the relentless political attacks endured by the dedicated public servants who work on the Board. To put it plainly, there are clearly many elected officials who are actively trying to shut the NLRB down.

In 2011, when the agency needed new Board members to satisfy its quorum requirements, instead of working together to confirm a bipartisan package of well-qualified nominees, some prominent Senators publicly announced their intention to block any nomination to the NLRB. In a well-publicized statement, one of my colleagues on the other side of the aisle said he would filibuster even if this caused the agency to cease functioning altogether. And to quote him, he said, "The NLRB as inoperable could be considered progress."

It didn't used to be this way. We used to understand and acknowledge that members of the Board had differing views, different ideological perspectives, but all of us agreed that the Board itself should function for the good of our country and our economy. But in recent years, that shared understanding has broken down. The Board has not had five Senate-confirmed members in a decade, in a decade. In my view, that speaks a lot more perhaps to our dysfunction here in the Senate than anything the Board itself has done.

But what most concerns me is how this political game playing is impacting the everyday lives of working people across America. Whether it is the relentless filibustering of nominees that prevents the Board from having a quorum, or ceaseless litigation that delays and denies justice, these attacks on the Board have real consequences for real people.

The litigation surrounding President Obama's recess appointments, for example, has impacted countless working Americans: real people, people like Marcus Hedger, a former printing and pressman from Lake Villa, IL. Marcus worked for a printing company for 9 years, serving as union steward for most of his time there. In 2010, when the company was about to be sold, the owners cracked down hard on Marcus for his role in collective bargaining negotiations. Marcus was fired.

A unanimous, bipartisan panel of the NLRB determined in September 2012 that Marcus was unlawfully fired and ordered that he be reinstated with back pay. But the company appealed that decision to the U.S. Court of Appeals for the D.C. Circuit, and in January that case was delayed due to the recess appointment litigation, leaving Marcus without any recourse. Almost 3 years since his claim was filed with the Board, Marcus is still looking for justice. He doesn't have his job back, and the only job that he could find pays only one-third as much as his previous one. Because of this financial hardship, Marcus just lost his home to foreclosure. Real-life consequences.

And this wasn't just any home, this was his dream home, the home he and his family had scrimped and saved for for their entire lives. It was his slice of the American Dream that was lost through no fault of his own, because the system is broken and couldn't protect his rights.

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Now, let's be clear about why Marcus was fired. He was fired for participating in collective bargaining, a process that our Nation's laws protect and encourage. I have often quoted from the National Labor Relations Act on this point, and I will do so again. The Act states—this is the law,

> "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."

So the National Labor Relations Act doesn't just set up the parameters for collective bargaining. It actually encourages the practice and procedure of collective bargaining. And I am proud to be a citizen of a country that encourages collective bargaining. If my colleagues don't share this view, then they should be honest about their intentions and simply try to repeal the National Labor Relations Act. I think that would be much more appropriate than constantly using procedural threats or political obstructionism and budget game-playing to try to destroy the agency's ability to do the job that it is required by law to do.

Three people sitting before us today have been dedicated, and even courageous, in fulfilling the duties they have been sworn to carry out as members of the Board, despite constant political interference and even personal attacks. The other two nominees before us today have commendably accepted the President's call to serve and are eager to join the Board, even in these tumultuous times. These are five incredibly well-qualified candidates for the National Labor Relations Board. They come from diverse backgrounds, but all are deeply steeped in labor or employment law and would bring rich experiences to the Board. It cannot be disputed that this is a highly skilled, competent, and experienced panel of labor or employment law experts. They deserve to be confirmed. They should be confirmed.

A letter I recently received from 32 management-side and 15 union-side labor attorneys from across the country made this point better than I can. It urged the swift confirmation of the full package of five nominees and said,

> "While we differ in our views over the decisions and actions of the NLRB over the years, we do agree that our clients' interests are best served by the stability and certainty that a full, confirmed Board will bring to the field of labor-management relations."

I couldn't agree more.

I was heartened to hear that my good friend and Ranking Member, Senator Alexander, stated on the floor of the Senate a few months ago that he wants to confirm a full package of Board nominees. I would like to work with Senator Alexander to get that job done so we have a five-member Board.

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I hope that we can put this political game playing behind us, have a good hearing, ask our questions, get things on the record, and confirm a full package of five eminently qualified individuals to be members of the National Labor Relations Board.

With that, I recognize Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you very much, Mr. Chairman. I look forward to this hearing with the five nominees, and I thank them for their willingness to serve.

It is important to have a fully confirmed National Labor Relations Board. This agency is charged, as the Chairman said, with creating stability for employees, employers and unions to allow America's businesses to focus on succeeding and growing. But there is a troubling lack of respect for the constitutional separation of powers and for the Senate's role of advice and consent that is standing in the way of this confirmation process.

The Constitution laid out a balance of powers that has worked pretty well and pretty much as the Founders intended for 227 years. Article I of the Constitution made us different from most governments at the time. Most of our Founders, not all of them but most of them did not want a king, and to ensure that we did not have a king, our country had a Congress, and clear powers were granted to Congress which could not be abrogated. The clearest curb on the power of a monarch or the power of an executive in our Constitution is Article 1 of the Constitution creating the Congress and the Bill of Rights.

Article II enumerates the executive powers of the presidency, and it recognized a very practical reality of the day, long congressional recesses. One of the powers reserved to the Senate is probably the best-known authority of this body. That is Article II, Section 2, requiring the Senate to consent to the appointment of Ambassadors, public ministers, consuls and other officers. We do that for about 1,000 of the President's nominees, and in each of the last two congresses we have worked in a bipartisan way to make it easier for the President to make the nominations and for the Senate to consider them in a reasonable period of time.

The Founders anticipated there would be periods of time when the Senate and the House would not be in session, and the Senate would not be able to consent to such appointments. So they put into the Constitution a provision saying that during these times, the President could make a recess appointment for "vacancies that may happen during the recess of the Senate." At the beginning of this Nation, this was important. In those days, there were long, extended periods of time between the annual sessions of Congress. Members of Congress were spread all over the country. Senator Sam Houston of Texas had to go from Texas to New Orleans, get on a boat, come up the Mississippi River, ride a horse, take a stagecoach, finally get here and take the same route home. So it was envisioned that during the times Senators were gone, the President could make recess appointments.

Some may wonder why we still have recess appointments with modern communications and modern travel, but it is still there in the Constitution. But President Obama, on January 4, 2012, acted

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as though it weren't there at all. The President made recess appointments while the Senate was not in recess. This is unprecedented. It had never been done. It was done during the time when the Senate majority leader, Senator Reid, had proposed a resolution which the Senate unanimously adopted that said the Senate was in session and that it would convene every 3 days.

Now, over time, many Presidents have expanded their use of the recess appointment power, yet no one has gone as far as President Obama did on that day. The Senate must decide when we are in session, not the President. If it were otherwise, there would be no point to having the advice and consent power in the Constitution at all. The President could appoint officials anytime he wished. The Senate could return from lunch and find there is a new Supreme Court Justice.

On January 4, the President made three appointments to the National Labor Relations Board. Two are still there. They have told me—I have met with them and had good meetings—that they felt obligated to stay in their positions, those two members.

After President Obama took this action, the so-called recess appointees began deciding cases, and one of those cases was appealed. The company appealed because it argued that the Board didn't have a required quorum of three valid, constitutionally appointed members. A three-judge panel of the Court of Appeals agreed. It unanimously said these recess appointments violated Article 2, Section 2 of the Constitution, that the President had made recess appointments when there was no recess. That court holds a special place in the American judicial system because all NLRB decisions may be appealed there, and many are.

Therefore, all cases in which these nominees have participated or will participate may also be vacated if their votes provided the Board with the necessary quorum.

Since the so-called recess appointees were sworn in, the NLRB has issued 910 published and unpublished decisions; 206 of those came after the *Noel Canning* case, which is the case at subject. All of these can be appealed to the D.C. Circuit and vacated.

I have met with each of the nominees before us today. I do not question their qualifications. They all have distinguished backgrounds. I know that Ms. Block and Mr. Griffin feel obligated to stay in those positions after a preeminent court ruled that they were invalidly appointed because of the oath they took. I appreciate their candor and their dedication to public service. My problem is not with their qualifications. My problem is that they continue to decide cases after the Federal appellate court unanimously decided they were unconstitutionally appointed.

Not only has the President shown a lack of respect for the constitutional role of the separation of powers and the curb on the executive branch that Article I provides, but I believe these two individuals have as well. This is part of a disturbing pattern of end runs around the Congress, whether it is appointing more tsars than the Romanoffs had or executive orders that stretch the limit of executive authority, or using waiver authority to create, in effect, a national school board, or the Secretary of Health raising money privately for private organizations to do what Congress has refused to do, or whether it is recess appointments when there is no recess.

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It is important for our country's liberties to protect the separation of powers. Therefore, I cannot support the nominations of these two. I also believe their decision to stay on creates enormous opportunity for confusion and waste. I agree, we want certainty. The best way to have certainty is to have five confirmed members of the Board. The President could nominate two equally qualified members who did not sit on the NLRB when a court had decided they were unconstitutionally there.

I don't have the same problem with the three other nominees here today, Chairman Pearce, Mr. Miscimarra, and Harry Johnson. They have been nominated through the regular process, and the best way for the President to ensure certainty is to nominate two well-qualified individuals who did not continue to decide cases after the court said they were unconstitutionally appointed. If he does, I will pledge to work with the Chairman for their speedy confirmation.

Thank you, Mr. Chairman.

[The prepared statement of Senator Alexander follows:]

PREPARED STATEMENT OF SENATOR ALEXANDER

Thank you for holding a hearing on this slate of nominees to the National Labor Relations Board.

It is important to have a fully confirmed NLRB. This agency is charged with creating stability for employees, employers and unions to allow American businesses to focus on succeeding and growing.

But there is a troubling lack of respect for the Constitution, and for Congress's role of advice and consent, that is standing in the way of this confirmation process.

The Constitution laid out a balance of powers that has worked well, and pretty much as the founders intended, for 227 years.

Article I of the Constitution made us different from most other governments of the time. It ensured that we would have no king by granting clear power to Congress which could not be abrogated.

Article II of the Constitution enumerates the executive powers of the Presidency, and it recognized a very practical reality of the day—long congressional recesses.

One of the powers reserved for the Senate is probably the best known authority of this body. That is the advice and consent clause of Article II, section 2, requiring the Senate to consent to the appointment of Ambassadors, public ministers, counsels and other officers.

The Founders anticipated that there would be periods of time when the Senate and the House would not be in session and the Senate would not be able to consent to such appointments.

They put into the Constitution a provision saying that during those times, the President may make a recess appointment for "vacancies that may happen during the recess of the Senate."

At the beginning of this Nation, this was important. In those days, there were long, extended periods between the annual sessions of the Congress, when the Members of Congress were spread all over the country.

Senator Sam Houston of Texas, had to go from Texas to New Orleans, get on a boat, come up the Mississippi River, and then ride

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a horse and take a stagecoach to get here. It took him weeks—same to go home.

With today's modern transportation systems, the practical reality the founders were concerned about is less of a concern.

In fact, although some may wonder why we still have a recess appointment clause, the fact is that it's still there.

But President Obama on January 4, 2012, acted as though it wasn't there at all.

This is the first time any President has made a recess appointment while the Senate wasn't in recess. It was unprecedented. The Senate had unanimously adopted a resolution that it was in session and would convene every 3 days.

Over time, Presidents have expanded their use of the recess appointment power more and more, yet no one has gone as far as President Obama.

The Senate must decide when we are in session, not the President. If it were otherwise, there would be no point to having an advice and consent power in the Constitution at all.

A President could simply appoint any officials at any time. The Senate could return from lunch to find there's a new Supreme Court justice.

On January 4, the President made three appointments to the National Labor Relations Board. Two are still there.

After President Obama took this action, the so-called recess appointees began deciding cases. The Noel Canning company is a small bottling firm in Washington State which lost a case before the NLRB. This company appealed that decision based on the fact that the Board did not have the required quorum of three valid, constitutionally appointed members at the time that the decision was issued.

This January, a three-judge panel of the District of Columbia's U.S. Circuit Court of Appeals agreed. It ruled unanimously that these "recess appointments" violated Article II, Section 2 of the U.S. Constitution. They ruled that the President had made a recess appointment when the Senate was in session.

This court holds a special place in the American judicial system because all NLRB decisions may be appealed here, no matter where the action was initiated. So, it gets a large percentage of those cases.

Therefore, all the cases in which these nominees have participated or will participate may also be vacated, if their votes provided the Board with the necessary quorum.

Since this important court ruled that their decisions would not be upheld, the invalid recess appointees have continued to decide cases.

Since the so-called recess appointees were sworn in, the NLRB has issued 910 published and unpublished decisions—206 of those came after the *Noel Canning* decision. All of these can be appealed to the DC Circuit and vacated.

Let me be clear, I have met with each of the nominees before us today and they are all fine people. I do not question their qualifications.

I know that Sharon Block and Richard Griffin feel obligated to stay in their positions even after a preeminent court ruled that

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they were invalid because of the oath they took when they were sworn in at the NLRB. I appreciate their candor and dedication to public service.

The problem here is not the qualifications of these two nominees. The problem is that they continued to decide cases after the Federal appellate court unanimously decided they were unconstitutionally appointed.

Not only has the President shown a lack of respect for the Constitutional role of the separation of powers and the curb on executive power that Article I provides, but I believe that these two individuals have as well.

Therefore, I cannot support their nominations.

In addition, I believe their decision to stay on creates enormous opportunity for confusion and waste. If the Supreme Court agrees with the unanimous Federal court, this creates that many more cases that will be vacated and that much more uncertainty.

I do agree that the best way to create certainty is to have five more confirmed members of the Board. And the best way for that to happen is for the President to nominate five well-qualified persons and to do it in a way that follows his prerogatives under the Constitution.

I don't have the same problem with the other three nominees here today, Chairman Pearce and Phil Miscimarra and Harry Johnson. They have been nominated through the regular process. And the best way for the President to ensure certainty is to nominate two well-qualified individuals who will respect the constitutional prerogatives of the power of advice and consent.

Finally, I want to address any claim that the Senate was holding up these nominations. It simply holds no weight when you look at the calendar.

The two unconstitutional appointees here today were originally nominated for their positions on December 15, 2011, just 20 days before the President took this unprecedented action.

This committee did not even receive these nominees' applications until January 25—that's 21 days *after* they were appointed on Jan 4. Members had no opportunity to conduct background checks or otherwise evaluate the nominees.

Adding insult to injury, the President chose to take this action on January 4, rather than January 2 when the Senate did adjourn between sessions. This 2-day difference means these unconstitutional appointments last a full 2 years, rather than one.

Again, I urge these two individuals to respect the court's ruling and leave the Board immediately. And I urge the President to submit two new nominees for these two positions.

Should he do so, I pledge to work for their swift consideration here at the HELP Committee.

The CHAIRMAN. Thank you, Senator Alexander.

First, I will recognize Senator Alexander for purposes of an introduction.

Senator ALEXANDER. Thank you, Mr. Chairman.

I am pleased to introduce the distinguished nominee, Phil Miscimarra. He is currently a partner in the Labor and Employment Group of Morgan Lewis and Bockius in Chicago, where he has been since 2005. He has been a senior fellow at the Wharton

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School of Business. He received his B.A. from Duquesne, an MBA from Wharton, and a J.D. from the University of Pennsylvania Law School. I met with him, as I have the other nominees. I find him to be knowledgeable about our system. He has written entire books about the NLRB. I am glad to present him to the committee.

The CHAIRMAN. Thank you, Senator Alexander.

Now I will recognize Senator Murphy for purposes of an introduction.

STATEMENT OF SENATOR MURPHY

Senator MURPHY. Thank you very much, Chairman Harkin, Ranking Member Alexander, for letting me introduce a dedicated public servant and very capable member of the National Labor Relations Board. Sharon Block is a current Board member who has dedicated her life to public service. She has served with integrity as a Board member since January 2012, and previously she served as Deputy Assistant Secretary for Congressional Affairs at the Department of Labor and as the senior labor and employment council for this committee, where she worked for Senator Kennedy.

Ms. Block has also served as a senior attorney to Chairman Robert Battista at the National Labor Relations Board. From 1994 to 1996, she was the Assistant General Counsel at the National Endowment for the Humanities after receiving her degree from Georgetown University Law Center, where she won the John F. Kennedy Labor Law Award.

Ms. Block grew up in Westport, CT, and her parents, who I believe are here today, still reside in Wilton, CT. We are very proud of the work that she has done, and America's workers and businesses are counting on us to make sure that she can continue this important work as a Board member at the NLRB.

Thank you, Mr. Chairman, for allowing me to introduce Ms. Block before the committee today.

The CHAIRMAN. Thank you, Senator Murphy.

Next I will recognize Senator Warren for the purposes of an introduction.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Mr. Chairman.

It is my pleasure to introduce Richard F. Griffin, Jr., who has served on the NLRB since January 2012. Richard is a law school graduate of Northeastern University in Boston, and for 28 years he has worked for the International Union of Operating Engineers. Seventeen of those years he spent as their general counsel. The operating engineers have a special place in my heart. My big brother operated a big crane and was a member of this union. I have had a chance to meet many of their members. They are honest people, hard workers who have literally helped build our country.

As counsel, Mr. Griffin has helped cleanup the union and has served as a trustee for the central pension fund to assure the retirement security of over 100,000 participants, including my brother. Thank you.

He has also had extensive experience working as counsel for the NLRB. He served both Democratic Board member John Fanning

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and President Reagan's appointee, Republican Chairman Donald Dotson.

We are pleased to have you here today with us and to share your testimony, and we are very pleased to welcome your wife and your daughter, who I understand are also with you. Thank you very much for being with us. Massachusetts is proud of you, and we look forward to your testimony today and your service on the NLRB.

The CHAIRMAN. Thank you very much, Senator Warren.

I would like to call to the table our former colleague and good friend, former Senator Byron Dorgan of North Dakota, for the purposes of an introduction.

Senator Dorgan, welcome back to the Senate.

STATEMENT OF SENATOR DORGAN

Senator DORGAN. Mr. Chairman, thank you very much. Members of the committee, it is nice to be here and nice to see all of you. I will be mercifully brief. I know you have five nominees, and you have already had another hearing earlier this morning.

I was just thinking as I was sitting here that with all the difficulty of nominations, it is still an enormously hopeful sign that when their country calls, people come to these tables and say I will serve, and that is the case again this morning.

I am here to introduce a friend and colleague named Harry Johnson. Harry is someone who has a distinguished career. He is a native Virginian. He is a friend. He is a Harvard graduate, has a very distinguished career in law in California working for Arent Fox, and I have had the opportunity to work with him and know him well and commend him to you.

He is smart, honest, and experienced. I am convinced he will make a very positive contribution to this Board. It seems to me that when you put someone who is both serious and thoughtful on a board like this at this time, it certainly will help, not hurt, the workings of that board.

If I might make just one additional comment. Our country is blessed, I think, that over time, when the question is asked who will lead, that there are always people who stand up in this country and say I will lead and answer that call, and Harry Johnson is one of them. They, as you know, and their families often pack up, including their children and their belongings, and move halfway across the country to serve their country. That is the case today with Harry Johnson. He is an awfully good choice. I am proud that the President has asked him to serve, proud that he has volunteered to serve, and hope that he will have very strong support among the committee members this morning.

Mr. Chairman, thank you very much.

The CHAIRMAN. Senator Dorgan, thank you very much for being here and for that introduction. You are always welcome to appear before this committee, on this or anything else. Thank you very much, Senator Dorgan.

Senator Schumer was going to be here for the purposes of an introduction of Chairman Pearce, but I think he is tied up in the immigration hearing in the Judiciary Committee. So if Mr. Pearce doesn't mind, I will take Mr. Schumer's place and introduce the Chairman.

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Mark Gaston Pearce is currently the Chairman of the National Labor Relations Board, and has served as a member of the NLRB since March 2010. Formerly a founding partner at Creighton Pearce Johnson and Giroux, Chairman Pearce has been in the practice of labor and employment law for more than three decades. At the start of his career, Chairman Pearce worked as a field attorney and later a district trial specialist with Region III of the National Labor Relations Board.

Senator Schumer, we welcome you. I didn't know if you were going to get out of that immigration markup or not.

STATEMENT OF SENATOR SCHUMER

Senator SCHUMER. A few minutes respite is welcome. It's much more pleasant to be here.

The CHAIRMAN. Thank you, and welcome to the committee. I just started to introduce Mr. Pearce, but I will yield to you for the purposes of an introduction.

Senator SCHUMER. Thank you, Chairman Harkin and Ranking Member Alexander, and all of my colleagues here today. I know you are pressed for time, so I will try to be brief.

I am so pleased to be able to introduce an esteemed attorney and a native of Brooklyn, NY, my home borough, who made his home at the other end of our great State in a wonderful place called Buffalo, NY, and that is Mark Pearce to this committee.

For some of you, this is a reintroduction. President Obama appointed Mark to serve on the NLRB and was confirmed by the full Senate for a term ending August 27, 2013. After a year as a member of the Board, Mark was sworn in as its chairman, and today I would ask the committee to approve his nomination so he can continue his important work and the Board can be productive under his continued leadership.

Mark's intellect, his experience and his dedication make him not only an outstanding public servant but also a tireless advocate for the issues he cares so much about, the unquestionable need for fair labor practices and fair representation for union workers.

Before coming to Washington, Mark was a founding member of the Buffalo, NY law firm of Creighton Pearce Johnson and Giroux. Mark practiced labor and employment law before State and Federal courts and agencies. He served by appointment of the Governor on the New York State Industrial Board of Appeals, and throughout his career he has represented individuals, as well as public and private sector labor unions, in all matters involving employment and labor relations, including civil service, employment discrimination, collective bargaining contract compliance, arbitration, and Taylor Law prosecution.

Mark has not just served on the Board and in the courtroom, but he has been committed to helping the next generation by working in the classroom. He taught at Cornell University's School of Industrial Labor Relations. He is a Fellow in the College of Labor and Employment Lawyers. So Mark's unquestionable dedication, experience and intelligence make him extremely qualified to serve on the NLRB, and I recommend his nomination without reservation and urge his swift confirmation.

Thank you, Mr. Chairman.

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The CHAIRMAN. Senator Schumer, thank you very much for being here and for appearing before this committee, and Godspeed on immigration reform. Thank you very much, Senator Schumer.

Now I will call to the witness table our nominees. It will be, from left to right, Chairman Pearce, Mr. Griffin, Ms. Block, Mr. Johnson, Mr. Miscimarra.

Again, we welcome you all here to the committee. I thank each and every one of you, as a lot of the introducers have said, for your willingness to serve on this very crucial and important independent board.

Your statements will all be made a part of the record in their entirety. I would ask if you would sum up in 5 minutes or less so that we can then get into our question-and-answer period.

We will start with our distinguished Chairman, Mr. Pearce. Again, welcome back to the committee, and please proceed as you so desire.

STATEMENT OF MARK GASTON PEARCE, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, BUFFALO, NY

Mr. PEARCE. Thank you, Chairman Harkin, Senator Alexander, and members of the committee. It is a great honor to appear before you today, as well as to be considered for another term as a member of the National Labor Relations Board.

I am joined here by my wife, Nancy. My daughter, Naima, could not make it.

I was born, as Senator Schumer said, in Brooklyn, one of five children. My parents, Jamaican and Cuban-born immigrants, came to the United States with the idea that with honest, hard work, one can accomplish almost anything in this great country.

My mother was a factory worker, and my father worked as a laborer and handyman. They saved, bought real estate, started small businesses, and turned their hopes into reality. Although possessed of little formal schooling, my parents instilled in their children a sense of the importance of education. They lived to see me become a practicing attorney, and my mother proudly saw me confirmed as a member of the National Labor Relations Board. I graduated from Erasmus Hall High School in Brooklyn, Cornell University, and several of my college summers were spent working electrical construction as a college helper. The recent installation of the Freedom Tower in New York City reminded me that during two of these summers, I had the amazing experience of working on the original Twin Towers, a monument to American labor and ingenuity that will not be forgotten.

I received my law degree from the State University of New York at Buffalo, and it was in Buffalo, that great working-class city, where I fell in love with my wife and with labor law, in that order. As a law student, I was assigned to the NLRB's Buffalo regional office through the school's work-study program. This exposure was transforming. I saw that through the enforcement of the Act, significant issues affecting workers, employers and unions were being addressed and industrial peace was being attained. I knew immediately that this was what I wanted to do.

This became the focus of my studies and my subsequent employment. I worked for 15 wonderful years in Buffalo at the regional

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office as a field attorney and district trial specialist, enforcing the Nation's primary labor law throughout the United States. I eventually left the NLRB to go into private practice. I co-founded a Buffalo law firm specializing in labor and employment law. I practiced extensively before the National Labor Relations Board and also represented clients before State and Federal courts and agencies. I taught courses at Cornell, and I served as a certified mediator for the U.S. District Court of the western District of New York. Mediation training became a valuable tool in my efforts at the Board to seek common ground where there are divergent views.

In 2010, I had the honor and privilege to be nominated, appointed and confirmed as a member of the National Labor Relations Board, the very agency in which I started my career. The following year, that honor and privilege was even further heightened by being named Chairman of the Board. As Chairman, I have gained an even deeper appreciation for the work of the agency and its importance to employees, employers and unions.

In the last fiscal year alone, over 20,000 unfair labor practice charges were filed with the agency by members of the public. As a result of effective Board enforcement of the Act, more than 1,200 workers were offered reinstatement, and over $44 million were recovered by employees in back pay and reimbursement of union fees, dues or fines. And during the same period, the Board processed close to 2,500 election petitions and conducted more than 1,600 representation elections. For a small agency, the Board has touched the lives of many Americans.

For almost 2 years I have represented the agency as one of the leaders and principal spokespersons. I have embraced the responsibility of Chairman, and I am grateful for the opportunity to serve in this manner. If it pleases the Senate, it would be my privilege to continue to serve on the Board.

I thank you for this opportunity to offer these remarks, and I welcome your questions.

[The prepared statement of Mr. Pearce follows:]

PREPARED STATEMENT OF MARK GASTON PEARCE

Thank you, Chairman Harkin, Senator Alexander, and members of the committee.

It is a great honor to appear before you today as well as to be considered for another term as member of the National Labor Relations Board.

I am joined here by my wife, Nancy McCulley. Our daughter Naima could not be here today.

I was born and raised in Brooklyn, NY as one of five siblings. My parents, Jamaican and Cuban immigrants, came to the United States with the idea that with honest hard work one can accomplish almost anything in this great country.

My mother was a factory worker and my father worked as a laborer and handyman. They saved, bought real estate, started small businesses and turned their hopes into reality. Although possessed of little formal schooling, my parents instilled in their children a sense of the importance of education. They lived to see me become a practicing attorney and my mother proudly saw me confirmed as a member of the National Labor Relations Board.

After graduating from Erasmus Hall High School in Brooklyn, I earned a bachelor's degree from Cornell University. Several of my college summers were spent working electrical construction as a college helper in New York City. During two of these summers I had the amazing experience of working on the World Trade Center, a monument of American labor and ingenuity that will never be forgotten.

I received my law degree from the State University of New York at Buffalo. And it was in Buffalo, that great working-class city, where I fell in love with my wife and with labor law (in that order).

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As a law student, I had the good fortune to be assigned to the NLRB's Buffalo regional office through the school's work-study program. This exposure was transforming. I saw that through the enforcement of the Act, significant issues affecting workers, employers and unions were being addressed and industrial peace was being attained.

I knew immediately that this was what I wanted to do and it became the focus of my studies and subsequent employment. I worked for 15 wonderful years at that Buffalo regional office as a field attorney and District trial specialist enforcing the Nation's primary labor law throughout the United States.

I eventually left the NLRB to go into private practice. I co-founded a Buffalo law firm specializing in labor and employment law. I practiced extensively before the National Labor Relations Board and also represented clients before State and Federal courts and agencies. I taught courses at Cornell University's labor extension program and served as a certified mediator for the U.S. District Court for the western District of New York. Mediation training became a valuable tool in my efforts at the Board to seek common ground where there are divergent views.

By appointment of the Governor, I served the State of New York as a board member of the Industrial Board of Appeals. There, I worked with the other members of a bipartisan board to resolve appeals of findings of the New York State Department of Labor.

In 2010, I had the honor and privilege to be nominated, appointed and confirmed as a member of the National Labor Relations Board, the very agency in which I started my legal career. The following year the honor and privilege took new heights when I was designated as chairman. As chairman I have gained an even deeper appreciation for the work of the agency and its importance to employees, employers and unions.

In the last fiscal year alone, over 20,000 unfair labor practice charges were filed with this agency by members of the public. As a result of effective Board enforcement of the Act, more than 1,200 workers were offered reinstatement, and over $44 million were recovered for employees in back pay or reimbursement of union fees, dues or fines. And during the same period, the Board processed close to 2,500 election petitions and conducted more than 1,600 representation elections. For a small agency, the Board has touched the lives of many Americans.

For almost 2 years I have represented the agency as one of its leaders and principal spokesperson. I have embraced the responsibilities of chairman and am grateful for the opportunity to serve in this manner. If it pleases the Senate it would be my privilege to continue to serve on the Board.

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

The CHAIRMAN. Your timing is perfect, 5 minutes exactly. Thank you.

Mr. Griffin, welcome, and please proceed.

STATEMENT OF RICHARD F. GRIFFIN, JR., MEMBER, NATIONAL LABOR RELATIONS BOARD, WASHINGTON, DC

Mr. GRIFFIN. Chairman Harkin, Senator Alexander, and members of the committee, I am honored to appear before you today as a nominee for the National Labor Relations Board. When I started as an NLRB staff lawyer in 1981, I did not hope that such an opportunity, the pinnacle of any labor lawyer's career, would be possible for me. I am humbled by the opportunity to serve and greatly appreciate the confidence that President Obama expressed by nominating me.

I am joined by my wife Claire, my daughter Emma, and my son Charlie. It is impossible for me to express the full extent of my appreciation for my family's love and support.

I also want to credit my parents, Richard F. Griffin, Sr., and Jane Flanagan Griffin. They have set the example in their life which I have tried to emulate throughout mine. Their work ethic—they are both 80 years old and working more than full-time; my father is a lawyer, my mother is a research scientist—is a standard

I can only aspire to. Their active engagement in numerous civic and professional committees in my hometown of Buffalo, NY has been an inspiration.

I was educated in the Catholic schools in Buffalo, at Yale University, and at Northeastern University School of Law. During law school, through the school's unique co-op program, I worked for the United Auto Workers in Detroit and for a small labor law firm in Chicago. These experiences confirmed my desire to practice labor law. The field offered an opportunity for bridging differences, solving problems, and making people's lives better that suited my interests and engaged my abilities.

After law school I went to work at the NLRB on the staff of Board Member John Fanning. Appointed by President Eisenhower in 1957, Mr. Fanning is an NLRB legend. He served 25 years as a Board member. He truly believed in the national labor policies stated in Section 1 of the Act,

> "to encourage collective bargaining and to protect 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 for other mutual aid or protection."

Grave respect for these statutory principles was ingrained in me by the fine lawyers who worked for Mr. Fanning. I took what I learned from them to work for the new Board Chairman, Donald Dotson, when Mr. Fanning's term was up and our staff was reassigned. You would be hard-pressed to find any two Board members who were farther apart on the ideological spectrum than Mr. Fanning and Chairman Dotson, yet I worked successfully for both of them and, in fact, received the exact same annual evaluation from both.

In 1983, I went to work in the legal department in the International Union of Operating Engineers and stayed there for the next 28 years. I advised the officers and staff of the union on organizing representation issues, pension and healthcare issues, and internal governance requirements. I also served for 9 years as a union trustee on the Operating Engineers central pension fund, a very large jointly trusteed fund where I worked closely with the fund's management trustees to assure the retirement security of the fund's more than 100,000 participants.

In my last 17 years at the Operating Engineers, I was the union's general counsel. During that time, I represented an organization that in terms of assets, employees, and receipts was the equivalent of a mid-sized business enterprise. I dealt with the legal issues that the lawyer for any such enterprise would face, from property tax appeals to complying with the Financial Accounting Standard Board's pronouncements. The union had responsibilities as an employer to comply with all laws governing employers, as well as to abide by the collective bargaining agreements with several unions that represented that organization's employees.

These experiences, as a staff lawyer at the NLRB, as a union lawyer, and as the general counsel of a mid-sized enterprise, give me a useful and, I believe, fairly unique perspective on the cases coming before the Board. Since my recess appointment I have tried to bring that perspective to bear, working with wonderful col-

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leagues, Chairman Pearce and Member Block, both of whom bring their own broad range of labor law experiences, as well as deep knowledge of the Act, to our deliberations. I have done so guided by the talented, diverse and experienced career NLRB staff. There are no finer lawyers in government service than those working for the Board. I hope to do so in the future with two new learned and capable colleagues, Phil Miscimarra and Harry Johnson.

If confirmed, I pledge to work impartially and to the best of my ability with my colleagues and the Board's career staff to strike the appropriate balance between employee rights and management interests that is the Board's central task. Thank you very much for your consideration of my nomination, and I look forward to your questions.

[The prepared statement of Mr. Griffin follows:]

PREPARED STATEMENT OF RICHARD F. GRIFFIN, JR.

Chairman Harkin, Ranking Member Alexander and members of the committee.

I am honored to appear before you today as a nominee for the National Labor Relations Board. When I started as an NLRB staff lawyer in 1981, I did not hope that such an opportunity—the pinnacle of any labor lawyer's career—would be possible for me. I am humbled by the chance to serve on the Board and greatly appreciate the confidence President Obama expressed by nominating me.

I would like to introduce my wife Claire and my daughter Emma; my son Charlie is unable to be here today. It is impossible for me to express the full extent of my appreciation for my family's love and support.

I also want to credit my parents—Richard F. Griffin, Sr. and Jane Flanigen Griffin. They set the example, both in their professional and personal lives, which I have tried to emulate throughout mine. Their work ethic—they are both 80 years old and still working more than full-time, my father as a lawyer and my mother as a research scientist—is a standard I can only aspire to; their active engagement in numerous civic and professional activities in my hometown of Buffalo, NY has been an inspiration.

I was educated in the Catholic schools in Buffalo, at Yale University and at Northeastern University School of Law. While at Northeastern—through the school's unique co-op program, where students alternate work quarters with academic quarters—I worked in the United Auto Workers General Counsel's office in Detroit and for a small labor law firm in Chicago. These experiences confirmed my desire to practice labor law—the field offered an opportunity for bridging differences, solving problems and making people's lives better that suited my interests and engaged my abilities.

After law school, I went to work at the NLRB on the staff of Board Member John Fanning. Appointed by President Eisenhower in 1957, Mr. Fanning was the longest serving Board member in the history of the agency—he served 25 years. He truly believed in the national labor policies stated in Section 1 of the Act:

> "to encourage the practice and procedure of collective bargaining and to protect 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 for other mutual aid or protection."

Grave respect for these guiding statutory principles was ingrained in me by the fine lawyers who worked for Mr. Fanning. I took what I learned from them to work for the new Board Chairman appointed by President Reagan, Donald Dotson, when Mr. Fanning's term was up and our staff was reassigned. You would be hard pressed to find any two Board members who were farther apart on the ideological spectrum than Mr. Fanning and Chairman Dotson. Yet, I worked successfully for both of them and, in fact, received the exact same annual evaluation from both.

In 1983 I went to work in the legal department of the International Union of Operating Engineers and stayed there for the next 28 years. I advised the officers and staff of the International Union on organizing and representation issues under the National Labor Relations Act, on the pension and health care requirements of ERISA, and on internal governance requirements under the Labor-Management Reporting and Disclosure Act, to name just a few of my responsibilities. I also served for 9 years as a union trustee on a very large jointly trusteed pension fund, where

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I worked with the management trustees—many of whom were executives of large employer associations—to assure the retirement security of the fund's more than 100,000 participants.

For my last 17 years at the Operating Engineers, I was the International Union's general counsel. In that capacity, in addition to dealing with all the organization's union-side labor law questions, I represented an organization that, in terms of number of employees, annual receipts, and assets approximated a mid-sized business enterprise. I dealt with the legal issues that the in-house general counsel of any such enterprise would face—everything from property tax appeals on the headquarters building to how to comply with the Financial Accounting Standards Board pronouncements on the union's financial statements. In the employment law area, the union had responsibilities as an employer to comply with all of the laws governing employers, as well as to abide by the collective bargaining agreements with several unions that represented the organization's employees.

My combination of work experiences—as an NLRB staff attorney, as a union lawyer, and as the general counsel of a mid-sized enterprise—give me a useful and, I believe, fairly unique perspective on the cases coming before the Board. Since my recess appointment in January 2012, I have tried to bring that perspective to bear working with wonderful colleagues, Chairman Pearce and member Block, both of whom bring their own broad range of labor law experiences, as well as deep knowledge of the Act, to our deliberations. I have done so guided by the talented, diverse and extremely experienced career NLRB staff—there are no finer lawyers in government service than those working for the Board. And, I hope to do so in the future with two new learned and capable colleagues—Philip Miscimarra and Harry Johnson III. If confirmed, I pledge to continue to work impartially and to the best of my ability with my colleagues and the Board's career staff to strike the appropriate balance between employees' rights and legitimate management interests that is the Board's central task.

Thank you very much for your consideration of my nomination and I look forward to your questions.

The CHAIRMAN. Thank you again, Mr. Griffin. You all are right on 5 minutes. I appreciate that.

Now we will turn to Ms. Block. I remember not too long ago, you used to sit right here. Welcome back, Ms. Block.

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

Ms. BLOCK. Thank you, Chairman Harkin, Senator Alexander, and members of the committee. I am so honored to appear before you as a nominee for the National Labor Relations Board. I assure you that I fully appreciate the seriousness of your task in assessing my fitness for the position for which the President has nominated me. As Chairman Harkin alluded to, I have spent a fair amount of time in this room, sitting behind Senator Kennedy when I served as senior labor and employment counsel to the committee, or sitting in one of the chairs just behind me in my role as Deputy Assistant Secretary of Labor for Congressional Affairs when department witnesses testified here. And I welcome the same scrutiny of my nomination that I have witnessed in this room of others.

Watching the members of this committee do their work I believe prepared me well for taking on the role of member of the National Labor Relations Board. My experience working on the MINER Act for the committee has been particularly instructive for my tenure as a Board member.

I first came to work for Senator Kennedy in the wake of the terrible Sago Mine disaster. Senators Kennedy, Enzi, Murray and Isakson recognized the urgency of the need to protect American miners and told us, their staff, to get a bill done to improve mine safety. I learned from participating in those negotiations many important lessons, the value of considering the perspectives of all

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stakeholders, the necessity of finding practical solutions that do more than just sound good on paper, and the virtue of principled compromise. No senator involved in the negotiations got everything he or she wanted in the resulting legislation, but through your hard work, open dialog, and willingness to compromise, you achieved a great bill that has made a difference for workers and employers, and I have tried to apply these lessons to my work as a Board member.

My service as a long-time career attorney at the NLRB also has prepared me well for service as a Board member. At the Board, I learned from the most talented and dedicated government attorneys how to represent the public interest. While I was fortunate to represent the Board in many high-profile cases during my earlier tenure at the Board, what made the biggest impact on me were the smaller cases, the cases where the parties have no interest in making law or engaging in ideological debate. Instead, they are the cases where the Board, as a neutral adjudicator, brings resolution to parties who just want to have their voices heard and their views fairly considered.

These are the kinds of cases that dominate the Board's docket today, as in the past. The overwhelming majority of cases that I have participated in as a Board member, serving with both Democrats and Republicans, have been unanimous decisions that applied long-standing precedent. The importance of these cases cannot be overstated. It is through these cases that the Board fulfills its mission of preserving industrial peace. We bring resolution and repose to the worker who seeks reinstatement after being unlawfully discharged, and we affirm the right of an employer to move forward in running his or her business when the facts show that a genuine impasse in negotiations exists so that the collective bargaining process will and can continue.

As you know, as Chairman Harkin alluded to, there is no private right of action under the Act. So employees, employers, and unions are dependent on the Board to ensure that the system for resolving their disputes that Congress created still works. So it is incumbent on us to move all cases as efficiently and fairly as possible.

In my experience on the Board, again with both Democrats and Republicans, we have done so in the spirit of respectful collegiality. I discuss every case with the career attorneys on my staff who have both management and labor experience. When I served as senior counsel to former Board Chairman Robert Battista, I always appreciated the frank case discussions he not only allowed but encouraged, and I have continued that tradition with my staff. They know that as a former career attorney, I will never underestimate the value of their contributions.

I would just like to add that being nominated and serving as a Board member is the greatest honor of my professional life. I have been in public service almost all of my career. The longest span of my service has been as a career civil servant with the Board. When I first came to the Board as a staff attorney and during the 10 years I served in that role, I never dreamed that I would one day be a Board member. But when the President asked me to serve, I was surprised, humbled and awed. This nomination means so much to me because I believe the mission of the Board means so much

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to the tradition of fairness and dignity in the American workplace, and I believe a fully confirmed Board is the best way to honor and support that important tradition.

In closing, I would like to thank two sets of people here who have been so important to me during the past 17 months. First, my colleagues Mark Pearce and Richard Griffin. The Board has had no finer members, and I am so grateful for the experience of serving with them. I would also like to thank my family who are here with me, my husband Kevin Hovland, my children Charlotte and Eli, my parents Lois and Joseph Block, and my uncle Michael Fuchs, for all their love and support.

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

[The prepared statement of Ms. Block follows:]

PREPARED STATEMENT OF SHARON BLOCK

Thank you Chairman Harkin, Senator Alexander, and members of the committee. I am so honored and humbled to appear before you as a nominee to be a member of the National Labor Relations Board.

I assure you that I fully appreciate the seriousness of your task in assessing my fitness for the position for which the President has nominated me. I have spent a fair amount of time in this room—sitting behind Senator Kennedy when I served as Senior Labor and Employment Counsel to the committee or sitting in one of the chairs just behind me in my role as Deputy Assistant Secretary of Labor for Congressional Affairs when Department witnesses testified here. I welcome the same scrutiny of my nomination that I have witnessed in this room of others.

Watching the members of this committee do their work, I believe, prepared me well for taking on the role of member of the National Labor Relations Board. My experience working on the MINER Act for the committee has been particularly instructive for my tenure as a Board member. I first came to work for Senator Kennedy in the wake of the terrible Sago mine disaster. Senators Kennedy, Enzi, Murray, and Isakson recognized the urgency of the need to protect American miners and told us, their staff, to get a bill done to improve mine safety.

I learned from participating in those negotiations many important lessons: the value of considering the perspectives of all stakeholders; the necessity of finding practical solutions that do more than sound good on paper; and the virtue of principled compromise. No Senator involved in the negotiations got everything he or she wanted in the resulting legislation, but through your hard work, open dialogue, and willingness to compromise you achieved a great bill that has made a difference for workers and employers. I have tried to apply these lessons to my work as a Board member.

My service as a long-time career attorney at the NLRB also has well-prepared me for service as a Board member. I started my career representing management in employment law matters at Steptoe and Johnson. I then came to the Board when my career was still in a formative stage. At the Board, I learned from the most talented and dedicated government attorneys how to represent the public interest.

While I was fortunate to represent the Board in many high profile cases during my earlier tenure at the Board, what made the biggest impact on me were the smaller cases—the cases where the parties have no interest in making law or engaging in ideological debate. Instead, they are the cases where the Board, as a neutral adjudicator, brings resolution to parties who just want to have their voices heard and their views fairly considered.

These are the kind of cases that dominate the Board's docket today as in the past. The overwhelming majority of cases I have participated in as a Board member—serving with both Democrats and Republicans—have been unanimous decisions that applied long-standing precedent. The importance of these cases cannot be overstated. It is through these cases that the Board fulfills its mission of preserving industrial peace. We bring resolution and repose to the worker who seeks reinstatement after being unlawfully discharged. We affirm the right of an employer to move forward in running his or her business when the facts show that a genuine impasse in collective-bargaining negotiations exists so the bargaining process will continue.

As you know, there is no private right of action under the Act. Employees, employers and unions are dependent on the Board to ensure that the system for resolv-

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ing their disputes that Congress created works. So it is incumbent on us to move all cases as efficiently and fairly as possible.

In my experience on the Board, with both Democrats and Republicans, we have done so in a spirit of respectful collegiality. I discuss every case with the career attorneys on my staff, who have both management and labor experience. When I served as senior counsel to former Board Chairman Robert Battista, I always appreciated the frank case discussions he not only allowed, but encouraged. I have continued that tradition with my staff. They know that as a former career attorney, I will never underestimate the value of their contributions.

I would just like to add that being nominated and serving as a Board member is the greatest honor of my professional life. I have been a public servant almost all of my career. The longest span of my service has been as a career civil servant with the Board. When I first came to the Board as a staff attorney, I never dreamed that I would one day be a Board member. When the President asked me to serve, I was surprised, humbled, and awed. This nomination means so much to me because I believe that the mission of the Board means so much to the tradition of fairness and dignity in the American workplace and that a fully confirmed Board is the best way to honor and support that tradition.

In closing, I would like to thank two sets of people here who have been so important to me during the past 17 months. First, my colleagues Mark Pearce and Richard Griffin. The Board has had no finer members, and I am so grateful for the experience of serving with them, debating with them, and learning from them. I also would like to thank my family who are here with me today, my husband, Kevin Hovland, my children, Charlotte and Eli, my parents, Lois and Joseph Block, and my uncle, Michael Fuchs, for all their love and support.

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

The CHAIRMAN. Thank you, Ms. Block, and we welcome you, and we welcome all the members of your family who are here also.

Mr. Johnson, welcome again, and please proceed as you so desire.

STATEMENT OF HARRY I. JOHNSON III, MEMBER-DESIGNATE, NATIONAL LABOR RELATIONS BOARD, PACIFIC PALISADES, CA

Mr. JOHNSON. Chairman Harkin, Ranking Member Alexander, and other members of this committee, thank you for the privilege of my being with you here today and of being able to meet with you, some of you previously, and your staffs. I'd like to thank Senator Dorgan for his extremely gracious introduction. I would like to thank President Obama for the great honor of this nomination. And thanks finally to the folks sitting with me here at this table, the three Democratic nominees and the other Republican nominee, for their own personal courtesy to me as we move through this post-nomination process together.

I would also appreciate the brief privilege of introducing you to some people who are here with me today as well, my family. My wife Monica, sitting a few rows back over my right shoulder, has had an impressive career herself after graduating from Harvard Law School. She served as a lawyer and a mediator, and then chose to stay home to create a home for our family. I couldn't be here before you today at this proceeding without her support.

I would like to introduce you to our 10-year-old daughter Sophia, and our 8-year-old daughter Natalia, a few rows behind me again, both impressive students, hard-working athletes, and most importantly to us, young people with kind and generous hearts.

I would like to introduce you to my parents, Captain Harry I. Johnson, Jr., a retired enlistee in the Navy in World War II, served on the USS Wisconsin as an electrician's mate and then as a physician in the Naval Reserves, for a total of 43 years of service; and

my mother Jolene Johnson, Lieutenant Commander retired, who served in the Navy Nurse Corps for 21 years; and finally my brother Dr. Scott Johnson, an accomplished economist who came down here from Boston today, and I had some friends come up from my hometown of Roanoke, VA. And I thank them.

To the matter at hand, this is the second half of the most important job interview that I have ever had. Confirmation by the Senate is a crucial part of this process, and in the remaining time I hope to give you a brief window into who I am and what I believe.

I am currently in private practice with the law firm of Arent Fox LLP, founded in the District in 1942, with its founders having all come from distinguished careers in government service. I work in the firm's Los Angeles office. My practice since I graduated from Harvard Law School in 1994 has been in employment law, mostly representing companies from the very large to the very small. It has included a good deal of traditional labor law, including proceedings in unfair labor practice cases and representation cases before the National Labor Relations Board.

In the end, however, what I just told you is merely a list of relevant qualifications and achievements. For nomination to the Board, beliefs are just as important. So let me tell you what I believe concerning the National Labor Relations Act.

The Board is one of the oldest Federal agencies, and thanks to the hard work of its dedicated career staff, it serves an incredibly important and multifaceted role in our country and its free enterprise system. I believe in free enterprise. But we cannot have a free enterprise system without a system of labor law, just like we can't have a free enterprise system without property law or contract law. I believe that the Board must serve as an honest broker when it decides labor law cases and should never pick winners and losers based on ideology rather than the law.

In my mind, the Board should always remember that if good-faith employers cannot operate because of a regulatory environment that suffocates their ability to create economic success, then there will not be jobs, there will not be employees, and ultimately there cannot be viable labor unions. I think we would all be saddened, and justifiably saddened, at such a result.

We cannot choose the times in which we live, and I did not choose the time back in July of last year when someone would call and ask me to serve my country in this capacity. If I could have chosen, I would have preferred my potential service on the Board to come at a time when the agency was not enmeshed in profound constitutional and political disagreements, but here we are, and here I am because I said yes.

If confirmed, I would translate that yes into working as hard as I could that we have a functioning Board fairly adjudicating the important issues that come before it. To paraphrase Winston Churchill, I can only give the American people my blood, toil, tears, and sweat, and nearly two decades of salient experience. But if confirmed, I will give you the full measure of all my efforts in serving as a guardian of the Act and all it represents.

Thank you, and I look forward to answering all of your questions.

[The prepared statement of Mr. Johnson follows:]

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PREPARED STATEMENT OF HARRY I. JOHNSON III

Chairman Harkin, Ranking Member Alexander, and other committee members, thank you for the privilege of being here with you today and of allowing me to meet previously with some of you and your staff members.

Senator Dorgan, thank you also for such a gracious introduction. Thanks, finally, to the three Democratic nominees and the other Republican nominee for their personal courtesy to me as we moved through the post-nomination process together.

I would also appreciate the privilege of briefly introducing you to some people whom I would like to thank as well. I would like you to meet my wife Monica, sitting here behind me, who has had an impressive career in her own right from Harvard Law School through private practice as a lawyer and mediator, and then who chose to create a home for our family. I could not be before you here today without her support. I would like to introduce the committee to our 10-year-old daughter, Sophia, and 8-year-old daughter, Natalia. They are both impressive students, hard-working athletes (especially at basketball), and most importantly to us, young people with kind and generous hearts.

I would like to introduce you to my parents, Captain Harry I. Johnson, Jr. (retired) who enlisted in the Navy in World War Two, served on the USS Wisconsin as an electrician's mate and later in the Naval Reserves as a physician for a total of 43 years, and my mother Jolene Johnson, Lieutenant Commander (retired), who served in the U.S. Navy Nurse Corps for 21 years. And I would like to introduce you to my brother, Dr. Scott Johnson, an accomplished economist.

They have all been my constant guidance and inspiration. Finally, I thank my friends who have traveled here from my hometown of Roanoke, VA to attend today.

This is the second half of the most important job interview that I have ever had. Confirmation by the Senate is a crucial part of this process, and with my remaining time, I hope to give you a brief window into who I am and what I believe.

I am currently in private practice with the law firm of Arent Fox LLP, founded in the District in 1942, with its founding partners having come from distinguished careers in government service. I work in the firm's Los Angeles office. My practice since I graduated from Harvard Law School in 1994 has been in employment law, mostly representing companies, from the very large to the very small. That has included a good deal of traditional labor law, representing employers in both adversarial proceedings and representation cases before the National Labor Relations Board.

In the end, however, that is merely a list of relevant achievements and qualifications. For a nomination to the Board, beliefs are just as important. Let me tell you what I believe concerning the National Labor Relations Act.

The Board is one of the oldest Federal agencies, and thanks to the hard work of its dedicated career staff serves an incredibly important and multifaceted role in our country and its free enterprise system. I believe in free enterprise. But we cannot have a free enterprise system in a modern America without labor law, just like we cannot have a free enterprise system without property law or contract law. I believe that the Board must serve as an honest broker when it decides labor law cases and should never attempt to pick winners and losers based on ideology rather than the law. In my mind, the Board should always remember that if good faith employers cannot operate because of a regulatory environment that suffocates their ability to create economic success, then there will not be jobs, there will not be employees, and ultimately there cannot be viable labor unions. I think we would all be justifiably saddened by those results.

We cannot choose the times in which we live. And I did not choose the time—back in July of last year—when someone would call and ask me to serve my country in this capacity. If I could have chosen, I would have preferred my potential service on the Board to have come at a time when the agency was not enmeshed in profound constitutional and political disagreements. But here we are, and here I am, because I said "yes." If confirmed, I would translate that "yes" into working as hard as I could that we have a functioning Board fairly adjudicating the important issues coming before it. To paraphrase Winston Churchill, I can only give the American people my blood, toil, tears and sweat, but that is exactly what I will give you, along with nearly two decades of salient experience. Thank you and I look forward to answering all of your questions.

The CHAIRMAN. Thank you very much, Mr. Johnson.

Mr. Miscimarra, again, welcome, and please proceed.

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STATEMENT OF PHILIP ANDREW MISCIMARRA, B.A., MBA, J.D., MEMBER-DESIGNATE, NATIONAL LABOR RELATIONS BOARD, HINSDALE, IL

Mr. MISCIMARRA. Thank you. Chairman Harkin, Ranking Member Alexander and other committee members, thank you for the opportunity to testify today. Senator Alexander, thank you for your introduction.

My wife Mary Lynn and my three sons, Andrew, Joseph and Eric, are here today, also seated behind me, and I'm grateful to have their support. If I'm confirmed, they will be making their own sacrifice in the interest of public service similar to the sacrifices made by your own family members.

I also appreciate President Obama's nomination. For a labor lawyer, there is no higher honor than being considered for the National Labor Relations Board. The Board deals with rights that are important to nearly everyone, affecting whether and how people can work to support their families or run successful businesses, with a big impact on communities and State and local governments.

For me, these have never been abstract concepts. I grew up in Pittsburgh, PA. My father was the son of Italian immigrants and he worked for the city of Pittsburgh. My brother Tony spent a summer working in a steel mill. I began work at age 14 as a caddie. I worked in a movie theater. Then I got a job at the local Carnegie Library in Pittsburgh. For many years I worked as a musician represented by Local 6471 of the American Federation of Musicians.

In my family, I learned firsthand about keeping an open mind regarding labor-management issues. At one point, my mother was a member of the Pittsburgh Public School Board. My older sister Pat, while living at home, was a Pittsburgh public school teacher who participated in a 57-day strike that kept 62,000 students from going to school. The affected students included my younger sister Julie, whose high school graduation was jeopardized by the dispute.

The teachers picketed every day. Some teachers, my older sister's friends, regularly came to our house. They put their picket signs outside with the signs facing the street, and everybody came inside where my mother invariably made them breakfast or served them coffee in the kitchen. Everybody was treated with respect, and nobody was forced to abandon their very different, strongly held opinions.

I have applied the same principles while representing employers and dealing with unions and employees for 30 years. I have advanced clients' interests by focusing on substantive issues and working to foster constructive relationships with opposing counsel and unions. I have lived in the Chicago area for most of my career, since 2005 as a partner with Morgan Lewis and Bockius. I have also had the good fortune of being affiliated for over three decades with the Center for Human Resources at the University of Pennsylvania's Wharton Business School in Philadelphia.

If I'm confirmed, three things would guide my service on the Board. First, I have great respect for the years of work done by Congress and by this committee which produced the National Labor Relations Act, including the Act's amendments. If confirmed,

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I will remember that labor law policy originates with Congress, not with members of the NLRB.

Second, Board members come and go. But if confirmed, I will do everything I can to recognize the Board's many career professionals and staff members who do much of the Board's hard work and contribute so much in their public service.

Finally, labor lawyers operate in a world where it can be difficult to find common ground. I embrace the reality that parties and often Board members can have sharp disagreements and strongly held views. Former Chairman John Fanning stated the one factor every NLRB case has in common is the presence of at least two people who see things completely different. I respect everyone who has served or is willing to serve on the Board. Regarding some policy issues, my fellow nominees and I may not always agree. If confirmed, I will approach every decision with an open mind. I will share my opinions in a constructive way. I will try to forge agreements with fellow Board members, I will be open to differing views.

Above everything else, I will do my best to discharge the responsibility placed on every NLRB member, which is to apply the law as written consistent with what Congress intended. I recognize the Senate and this committee must carefully evaluate every nominee, and that includes myself. It is a privilege to be here. I look forward to the committee's questions. Thank you.

[The prepared statement of Mr. Miscimarra follows:]

PREPARED STATEMENT OF PHILIP ANDREW MISCIMARRA, B.A., MBA, J.D.

Chairman Harkin, Ranking Member Alexander, and other committee members, thank you for the opportunity to testify today.

My wife, Mary Lynn, and my three sons—Andrew, Joseph and Eric—are seated behind me. I am grateful to have their support, and if I am confirmed, they will be making their own sacrifices in the interest of public service.

I also appreciate President Obama's nomination. For a labor lawyer, there is no higher honor than being considered for the National Labor Relations Board (NLRB). The Board deals with rights that are important to nearly everyone: affecting whether and how people can work, support their families, or run successful businesses, with a big impact on communities and State and local governments.

For me, these have never been abstract concepts. I grew up in Pittsburgh, PA. My father was the son of Italian immigrants, and he worked for the city of Pittsburgh. My brother, Tony, spent a summer working in a steel mill. I began work at age 14 as a caddy, I worked at a movie theater, then I got a job at the local Carnegie Library. For many years, I worked as a musician—a pianist, arranger, and musical director—represented by Local 60–471 of the American Federation of Musicians.

In my family, I learned first-hand about keeping an open mind regarding labor-management issues.

At one point, my mother was a member of the Pittsburgh Public School Board; my older sister, Pat—while living at home—was a Pittsburgh Public School teacher who participated in a 57-day strike that kept 62,000 students from going to school; and the affected students included my younger sister, Julie, whose high school graduation was jeopardized by the dispute.

The teachers picketed every day, and some teachers—my older sister's friends—regularly came to our house, they put their picket signs outside (facing the street), and everybody came inside where my mother made them breakfast or served them coffee in the kitchen. Everyone was treated with respect. And nobody was forced to abandon their very different, strongly held opinions.

I have applied these same principles while representing employers—and dealing with unions and employees—for 30 years. I have advanced clients' interests by focusing on substantive issues and working to foster constructive relationships with opposing counsel and unions.

I have lived in the Chicago area for most of my career—since 2005, as a partner with Morgan Lewis & Bockius LLP.

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I have also been affiliated, over three decades, with the Center for Human Resources at the University of Pennsylvania's Wharton Business School in Philadelphia. My Wharton work has included research and writing, including three books about the NLRB. Rather than choosing sides, my books are directed to practitioners on *all* sides by summarizing—and hopefully making it easier to understand—the sometimes complicated legal principles developed by the Board and the courts.

If I am confirmed, three things would guide my service on the Board.

First, I have great respect for the years of work done by Congress—and by this committee—which produced the National Labor Relations Act (NLRA) including the Act's amendments. If confirmed, I will remember that labor law policy originates with Congress, not with members of the NLRB.

Second, Board members come and go, but, if confirmed, I will do everything I can to recognize the Board's many career professionals and staff members who do much of the Board's hard work and contribute so much in their public service.

Finally, labor lawyers operate in a world where it can be difficult to find common ground. I embrace the reality that parties—and, often, Board members—can have sharp disagreements and strongly held views. Former Chairman John Fanning served on the Board under Democrats and Republicans, and he stated:

> "As someone who . . . participated in some 25,000 decisions of the Board, I can assure you that the one factor every [NLRB] case has in common . . . is the presence of at least two people who see things completely different." [1]

I respect everyone who has served or is willing to serve on the Board. Regarding some policy issues, my fellow nominees and I may not always agree. If confirmed, I will approach every decision with an open mind, and I will share my opinions in a constructive way. I will try to forge agreements with fellow Board members, and I will be open to differing views. Above all, I will do my best to discharge the "difficult and delicate responsibility" placed on every NLRB member,[2] which is to apply the law as written, consistent with what Congress intended.

I recognize that the Senate and this committee must carefully evaluate every nominee, including myself. It is a privilege to be here, and I look forward to the committee's questions. I ask to have an extended version of my opening placed in the record.

Thank you.

The CHAIRMAN. Thank you, Mr. Miscimarra, and I welcome you and your family members who are all here also.

Thank you. I think just from listening to all of you and reading your testimony, I think it is clear that every single one of you is eminently qualified for this position, no doubt in my mind.

We will start a series of 5-minute questions.

My first question is for Mr. Pearce. I want to ask that, despite the Board's important role in creating industrial peace I just discussed and others have discussed, it has come under increasing attack in the last several years. Most recently, concerns have been raised about the legitimacy of the National Labor Relations Board's continued operations following the D.C. Circuit Court decision in the *Noel Canning* case. While the D.C. Circuit itself acknowledged that its decision in this matter was in conflict with three other circuit courts of appeals, and despite the fact that the case has been appealed to the Supreme Court, some of my colleagues have argued that the Board should have shut down in the wake of the decision.

Chairman Pearce, why do you feel the Board can continue to operate after the *Noel Canning* decision was issued?

Mr. PEARCE. Thank you, Chairman. In addition to the points that you have made, there is also the fact that historically the NLRB has functioned in the wake of constitutional challenges. We were

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[1] John Fanning, "The National Labor Relations Act: Its Past and Its Future," in William Dolson and Kent Lollis, eds., First Annual Labor and Employment Law Institute 59, 63 (1984), *quoted in* Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. LAB. RES. 699, 713 (Fall 2001).

[2] (*NLRB* v. *Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)).

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born of controversy. In 1935 through 1937, our legitimacy was challenged in the courts. We continued to function. And when the Supreme Court finally decided the issue, we still had managed to serve the public.

But most importantly, we owe it to the public to continue to work. Every day the Board provides a forum for workers, employees, employers, and unions to come forward and to air their issues. This forum ensures that economic security is provided and protected from industrial unrest. There is no private right to action, as has been said several times. The NLRB is the only forum. It is the only recourse that a lot of people have.

The statute of limitations for unfair labor practices continues to run. Obligations under the National Labor Relations Act are not suspended while litigation goes on over the issue of whether or not the Board's composition is correct. And such issues hold no countenance for a person who has lost their job because they wanted to join a union and they are about to lose their home. It does not hold any consequence for an employee or worker who was being discriminated against by a union because they are not a member of a union.

The CHAIRMAN. Before my time runs out, I want to ask Mr. Griffin and Ms. Block a followup to that. Some have suggested, in fact requested, that you resign from your positions because of the *Noel Canning* case. Since that is on appeal, I have often thought that was an Alice in Wonderland approach, first the sentence, then the verdict. I just wonder if you have any comment on why you feel that you can continue to function in light of the *Noel Canning* case.

Mr. Griffin.

Mr. GRIFFIN. Well, Chairman Harkin, you have indicated the conflict that the D.C. Circuit expressed with the other circuits and its own decision in *Noel Canning* with respect to the issue of intrasession versus inter-session appointments arising during the recess questions. So there is a conflict under our system. The Supreme Court decides the conflict. The Solicitor General on our behalf has asked the Supreme Court to resolve the matter.

I was appointed and asked to serve. I took an oath to serve, and under the circumstances, since the Supreme Court had not rendered a final judgment on the constitutional question, and for all the reasons that the Chairman indicated in terms of the important work that we do, I felt it was very important to continue to do the important work of the Board that I took an oath to do.

The CHAIRMAN. Ms. Block, do you have anything to add, why you feel you should continue to serve rather than resign?

Ms. BLOCK. Thank you, Chairman. I appreciate the opportunity to address that, and I certainly agree with everything that my colleagues have said.

The public that we serve relies on us to give them a fair hearing and to bring resolution. So in thinking about how I could best uphold my oath that I took to do that and to protect the institution of the Board, as my colleagues have said, I thought it was incumbent upon me to continue to provide that service while these issues were worked out in the litigation. I want to share with you a little bit of what my thought process was quickly.

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I thought about some of the people who had brought their cases to us during the year. We know that during the past year and a half, while these issues have been percolating, employers have continued to consent to elections, parties have continued to settle cases with us. Parties have also not filed petitions for review when we have issued decisions.

So when I thought about some of those people who brought cases to us, I thought about a discriminatee in a case, Carrie Salt. The employer we found, in a bipartisan, unanimous decision of the Board—it was Member Hayes, Member Griffin, and myself—the employer had engaged in bad-faith bargaining. They just came to the bargaining table, didn't really want to come to an agreement, and then started unlawfully imposing unilateral actions on the employees throughout seniority. As a result of this unlawful action, there was a 73-year-old employee who had worked for the employer for 42 years who, as a result of these unlawful actions, was forced to change his job from being a truck driver on the surface of the mine to working 11-hour shifts underground.

He came to us because he wanted a fair hearing, and he wanted some resolution. When I thought about him and people like him who rely on the Board, in light of the circumstances, the ongoing litigation, I felt the best way that I could fulfill the oath that I took when I accepted this job was to continue to function.

The CHAIRMAN. Thank you both very much. My time is obviously out.

Senator Alexander.

Senator ALEXANDER. Thanks, Mr. Chairman.

This morning, the Third Circuit Court of Appeals issued a decision concluding that an NLRB panel lacked the requisite number of members to exercise the Board's authority, because one panel member was invalidly appointed during an intra-session break.

We have yet another circuit that agrees with the D.C. Circuit, and is consistent with the decision of the D.C. Circuit, that recess appointments are supposed to be made during recesses. Otherwise we have a situation where the President can just ignore Article I, the principal curb upon the power of the executive.

I would observe also that while I agree it's better to have a quorum, it's better to have five members, and I've said in my earlier remarks that I admire the qualifications of all five of the individuals here, that my problem is with continuing to serve after such an unprecedented lack of respect for the prerogatives of Congress and the separation of powers.

In the meantime, even if there weren't a quorum, the NLRB would still be able to function. The NLRB could investigate unfair labor practices, prosecute unfair labor practices, and conduct elections. Administrative law judges could adjudicate unfair labor practices. The General Counsel could issue memoranda. So there are a number of actions the NLRB can continue to take while matters are resolved.

You have to balance, it seems to me, the confusion that is going to be caused when hundreds of cases are vacated, or subject to being vacated, when it is decided that the Board decides so many cases without a quorum.

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The chairman noted that there are strong passions, that sometimes people on the Republican side wish the NLRB weren't, I think you said, "it's progress if it weren't in session."

There are strong passions on the other side, too. I would ask to put in the record a *New York Times* article from 2007. It talks about how the union leaders' discontent with the labor board had grown so intense that several hundred union sympathizers demonstrated in front of the NLRB headquarters, chanting shut it down for renovations.

[The article referred to can be found in Additional Material.]

And so they would be happy if the board did nothing until a Democrat was in the White House. And Senator Reid, the majority leader at that time, said that the Senate was considering holding *pro forma* sessions of the Senate to prevent President Bush from naming Mr. Battista as a recess appointment. Senator Reid then did that, and President Bush respected the Senate's own decision about when it was in session and when it was not.

Mr. Pearce, I have a question for you, if I may, about the *Excelsior* list. 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.

You led a regulatory effort to expand that requirement to include telephone numbers, email addresses, employee work locations, shifts, and job classifications. I would think a lot of employees wouldn't want all of that personal information shared without their consent and wouldn't want to be harassed about whether or not to join a union.

If you are confirmed, will you continue to pursue this broad expansion of information that started with only names and addresses? Wasn't that rule adopted at a time when there weren't so many other pieces of personal information? A name and address was one piece of information, but now you are asking for email addresses, telephone numbers, work locations, shifts, and job classifications.

Are you going to continue to insist on that? And if you are, why wouldn't you allow employees to at least opt out of providing that kind of personal information?

Mr. PEARCE. Thank you, Senator.

Currently, the board's regulation asks for the Excelsior list, requires the Excelsior list, and that was pursuant to a decision that is decades old.

Senator ALEXANDER. Right. Before the Internet invaded our privacy.

Mr. PEARCE. Of course. Of course.

We all are creatures or victims of technology. The National Labor Relations Board evolves with the technology. Otherwise, it couldn't effectively enforce the act.

In so doing, it is appropriate and responsible for us to look at the technological advances that are typical in the communication between workers and between employers.

Senator ALEXANDER. So you have to have a list of employees' email addresses to keep up with modern technology?

Mr. PEARCE. What I am saying, Senator, is that——

Senator ALEXANDER. Yes or no?

Mr. PEARCE. I can't answer that yes or no.

Senator ALEXANDER. Good. Maybe there is progress here.

Mr. PEARCE. What I am saying is that all of that has to be evaluated and taken into consideration. There is a proposal that has not become a rule that is under consideration by the Board as to what would be appropriate in this day and age for fair and equal contact of employees.

Now, there are cases that we have decided with respect to unfair and unreasonable harassment. And if those circumstances come up, those things would be addressed.

But right now, Excelsior Underwear is the regulation. How we evolve from that remains the consideration of the Board.

Senator ALEXANDER. Thank you for your answer. And I hope the Board will think of privacy, as well as technology.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander.

The list I have is Senator Murray, Senator Isakson, and Senator Casey, Senator Scott, and Senator Baldwin, and then Senator Warren.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman, thank you very much for holding this hearing. This is not a routine hearing by any stretch of the imagination. This is a hearing very much about the vision and future of our country. It's a hearing about whether we believe the laws of our country that protect workers and employers alike should be enforced. It is a hearing about the future opportunities we have to have good jobs in our economy, protect our shrinking middle class, providing opportunities for workers to improve their conditions, and ensuring smooth relations between workers and employers to make sure that we have an efficient operation of our economy.

I have heard some claim that this is a hearing about our unions. But that is inaccurate, because the NLRB and its rulings protect all private sector workers in the American workplace, regardless of whether they are in a union, for exercising their rights.

And those rights have led to many significant improvements across our economy: higher pay and better benefits, safer working conditions, fewer injuries and death, and the strongest economy in the world.

It's no shock that as collective bargaining and the unionization rates have declined, wages have stagnated, and income inequality has arisen, and our economy has struggled. And it's noteworthy that many of these problems arose about the same time that a prolonged attack on the NLRB commenced.

For well over 30 years now, the normal process of nominating and confirming board members has been nonexistent. Partisan blocking of nominees has now largely prevented this Board from operating on a routine basis and has made enforcement of worker rights very difficult.

For 35 years, recess appointments have become all too routine. And for nearly 30 years, the Senate has been forced to regularly consider packages of nominees in order to get any nominees on the Board.

This is no way to run an agency. And I suspect that is exactly why we are where we are now.

Many people just don't want the NLRB to function at all. But I worry about what that says about our values and what will happen to our economy and our society if we allow that to happen, where workers' rights are protected, where there is one fewer check on rising income equality, and where individuals are increasingly left on their own in an economy that is very indifferent to those without protections.

That is why I believe it is really important, Mr. Chairman, that we move to act quickly, approve this package of five nominees, not because I agree with each and every one of them individually. I have some concerns about some of the individuals. But I don't deny at all that they are all qualified and experienced and can and should serve.

And I thank each one of you for your willingness to do this.

I hope that we can move quickly to this. And I will just ask a series of questions, if you can each just respond yes or no.

First of all, do you agree that the Senate should consider your nominations as a package?

Mr. PEARCE. Yes.

Mr. GRIFFIN. Yes.

Ms. BLOCK. Yes.

Mr. JOHNSON. I would like to say that the political and constitutional questions are way above and beyond my purview. I can only represent myself.

If I were a Senator, I would confirm me.

[Laughter.]

Mr. MISCIMARRA. I wouldn't presume to advise the Senate with respect to how they should address these nominations.

I will say that the fellow nominees, all of them, have been very gracious in my dealings with them. I would be willing to serve on the Board with any nominees that the Senate would choose to confirm.

Mr. JOHNSON. That goes for me as well.

Senator MURRAY. Good. Then I will just ask you directly: Do you agree that each of the nominees sitting at the table this morning is highly qualified to serve and deserves to be considered as part of a package?

Mr. PEARCE. Yes.

Mr. GRIFFIN. Yes.

Ms. BLOCK. Yes.

Mr. JOHNSON. I have no doubt as to all the nominees' qualifications.

Mr. MISCIMARRA. I agree.

Senator MURRAY. Very good.

And if confirmed, will each of you pledge to meet the highest standards of integrity, professionalism, and objectivity?

Mr. PEARCE. Certainly.

Mr. GRIFFIN. Yes.

Ms. BLOCK. Absolutely.

Mr. JOHNSON. Of course.

Mr. MISCIMARRA. Yes.

Senator MURRAY. All right.

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If confirmed, does each of you agree that your job is to apply existing law and congressional intent first, and to recognize that while each of you brings different experiences and background, to not allow your personal biases to interfere with your impartial application of the law?

Mr. PEARCE. Yes.

Mr. GRIFFIN. Yes.

Ms. BLOCK. Yes.

Mr. JOHNSON. Of course, squared.

Mr. MISCIMARRA. Yes.

Senator MURRAY. Mr. Chairman, I think that says very specifically to us as a committee that this is a group that is highly qualified and that we should move forward as a package to confirm.

I would just add one thing, and that is I spoke a minute ago about the growing income inequality. Pay equity is a very important tool for American women to help close the income gap. I want to submit for the record a letter from 30 organizations concerned about what women are paid and pay equity, and are calling for a smoothly functioning NLRB. And it says why we need to move all five nominees quickly and confirm them.

Thank you, Mr. Chairman.

The CHAIRMAN. Without objection, we will include those.

[The information referred to can be found in Additional Material.]

The CHAIRMAN. Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

Welcome to all of the nominees.

Chairman Pearce, thank you for your service. I have a question for you.

Under your leadership as chairman, or during your term as chairman, why did the NLRB undo decades of precedent in the Specialty Healthcare decision?

Mr. PEARCE. Specialty Healthcare was a decision involving certified nursing assistants. These were 53 certified nursing assistants that wanted to unionize to form their own bargaining unit without having people in the cafeteria or people in other areas of the facility that had nothing to do with their jobs be included in the unit.

What we did do was apply traditional standards to assessing what an appropriate unit is.

It has been a tenet of the law that we determine an appropriate union, not the most appropriate unit. And these 53 people were just that.

The National Labor Relations Board's decision was consistent with assessments of what would be an appropriate bargaining unit where we're consistent with what the courts have considered. The D.C. Circuit in Blue Man Vegas made the determination that our assessment and the factors that we take into consideration were the correct ones.

Senator ISAKSON. Then let me ask you this question, taking the term "appropriate," which were the words that you used, that you considered, your regional director, following that decision, ruled that the second and fifth floor shoe departments of Bergdorf Good-

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man could form a union. Was that appropriate, in the same context that the Specialty Healthcare was?

Mr. PEARCE. The assessment, again, was whether or not there was a sufficient community of interest to constitute a bargaining unit.

The median bargaining unit in this country is 27 employees. The Bergdorf Goodman group was much larger than that. So if nothing else, we remained consistent with what the median has been in this country.

Senator ISAKSON. But is it appropriate—excuse me, I don't want to lose all my time—is it appropriate, in the sense of common sense, to allow micro-unions within a single establishment, to have multiple unions that you have to deal with in terms of all negotiations, the limitation that puts on cross-training for employees to serve in different departments within the same building, in the same unit?

It seems to me, taking the Specialty Healthcare decision, if appropriate, and applying it to a retail establishment with a plethora of different departments within it, and saying each one of them can organize and bargain as a unit, is counterproductive to consistency, customer service, and the health of the environment in which the people live and work.

Mr. PEARCE. This is all fact specific. Each case is assessed based on its particular facts.

For example, we decided a case in Home Depot where we determined, using that same Specialty Healthcare standard, that a unit of the entire staff of employees was the appropriate unit. Furthermore, employers have used Specialty Healthcare to assess whether or not their petitions for units have been correct.

One case, Odwalla, which was a petition for a group of employees that carved out another set of employees, it was the employer who cited Specialty Healthcare for the proposition that there was an overwhelming and community of interest between the excluded employees and those that had been included in the unit, and we agreed with them.

Senator ISAKSON. Thank you for your answer.

Mr. Griffin, let me ask you a question, and I guess Ms. Block as well. And thank you for your comments in your statement about the MINER Act. You did outstanding work, as did Senator Murray and Senator Kennedy and Senator Enzi, on that piece of legislation.

You both were publicly nominated for your position in December before the January appointment, is that correct?

Mr. GRIFFIN. That is correct, Senator.

Senator ISAKSON. As I understand it, the paperwork had not even gotten to the committee to go through the confirmation process by January 4, when you were appointed in a recess appointment, is that correct?

Mr. GRIFFIN. I don't know what the status of the paperwork was, Senator. We had completed all the forms that we were responsible for when we were nominated.

Senator ISAKSON. I think I am correct in both of those statements. Assuming that I am, do you know of any reason why the President chose, when he could have waited 10 more days and gone

through the regular order, to go ahead and make a recess appointment on January 4, given the fact you had been nominated on the 11th of December?

Mr. GRIFFIN. Senator, I was not consulted by the President with respect to his exercise——

Senator ISAKSON. You wouldn't know one way or another.

Mr. GRIFFIN. But the one thing that I will point to is that, because member Becker's appointment was up January 3, the Board could not function. It was down to only two Board members.

So in order for the Board to function, it was necessary for the President to act, so that there would be a sufficient number of Board members to process the Board's business.

Senator ISAKSON. Other than that reason, Ms. Block, do you know of any reason why they would move ahead and expedite the appointment?

Ms. BLOCK. No. Like member Griffin, I wasn't consulted about the decision.

Senator ISAKSON. OK.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Casey.

STATEMENT OF SENATOR CASEY

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

I want to thank all of the nominees for your willingness to serve, your appearance here, and of course the commitment and sacrifice of your families. We are grateful for that.

I think in this hearing and throughout what will be a long debate about these issues, it is instructive, and I think, more than that, essential to recall at least two eras of our history. One, the bad news, the before; and then the good news, the after—before and after the National Labor Relations Act was enacted.

The bad news played out in my home State of Pennsylvania in ways that probably no other State can match, unfortunately for Pennsylvania, where you had for decades, for generations, awesome corporate power that didn't allow workers to have—forget having a union—didn't allow them to have basic rights and would grind people into the pavement on a regular basis.

That was the history of our State. Homestead in Pittsburgh is one example of that.

I grew up in northeastern Pennsylvania, where anthracite coal miners' lives were completely dominated by a company, the kind of low-wage servitude which we can't even imagine today.

That was the history prior to the enactment of the National Labor Relations Act.

The good news is the country took a turn in the right direction after a lot of struggle and a lot of blood and literally people dying.

Chairman Harkin was mentioning before about the declared policy in the act itself. The declared policy of the United States, "to eliminate the causes of certain substantial obstructions to the free flow of commerce"—the free flow of commerce—"and to mitigate and eliminate these obstructions," and it goes on from there.

Earlier in the findings, it says this,

> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce"——

Commerce, I will say it again,

> "from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest."

And it goes on from there.

When we talk about the Act, when we talk about the Board that carries out the requirements of the Act, we are talking about commerce. We are not talking about one side being favored over the other.

I think it is important that we remember that. We should also remember, I think, the history of some of our Presidents. We have had Democratic and Republican Presidents using recess appointments for a generation at least.

In fact, if you look at the record, whether it was an intra-session recess appointment or inter-session, every President since Reagan has recess appointed a member to the Board.

Ronald Reagan made 240 recess appointments. Bill Clinton made 139. George W. Bush, 171. And George H.W. Bush, 74.

So as we debate this, we should remember our history and make sure that we don't go in the direction where we were at the turn of the last century. Unfortunately, we have been taking a turn in that direction lately.

What are we confronted with now? Today we have a conflict about the National Labor Relations Board. It is a political conflict. Some might call it an ideological conflict.

What we don't need now—the last thing we need here in Washington or across the country—is more rancor, more division, more ideology, at a time we need this Board fully functioning. We need five people to get confirmed here.

Any Senator who is standing in the way of getting five people confirmed and having a functioning Board has a lot of explaining to do, certainly in light of that history, but also in light of the urgency of today, which is to have the free flow of commerce and the jobs that come from that.

We have a lot to cover, and I know my time is just about over, but I will submit some questions for the record. But I do want to, first of all, thank the first person I'll question, and then I'll submit other questions, Mr. Miscimarra, for your mentioning of various parts of Pennsylvania, but more importantly growing up in Pittsburgh and having a lot of education in Philadelphia.

I want to thank you especially for the words in your statement about common ground, about being open and having an open mind. And I would ask you, in the context of that, and I know we are short on time, I would just ask a very specific question about the Board itself. Do you support the Board's rulemaking authority?

Mr. MISCIMARRA. The Act specifically authorizes the Board to engage in certain types of rulemaking. The Board is engaged——

Senator CASEY. Give me a yes or no to that, and then, of course, you can——

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Mr. MISCIMARRA. I do, and I believe any consideration of rulemaking, if I were concerned, would depend on a couple of things. It would be a careful consideration of the need for the rule, also the authorization in the Act for any rulemaking, the content of any rule, and the process adhered to or followed by the Board for purposes of getting input and otherwise complying with the requirements of the Administrative Procedures Act.

Senator CASEY. I have more questions, but I am way over time now.

The CHAIRMAN. Thank you, Senator.

Senator Scott.

STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Mr. Chairman.

Thank you all for taking the time to meet with me this week. And certainly, this is a time in our history when public service is not necessarily as comfortable as it used to be, so I truly appreciate your willingness to continue to serve.

And while we will obviously have some disagreements with our questions, our goal is to make sure that we continue to find the ability to have our economy firing on all cylinders.

When I think about the recent days, it seems to me that the rule of law has been under attack. We have seen in the news the IRS. We have seen the AP phone records scandal. The HHS. And these issues have undermined the confidence the American people should have in their government.

And when I think about the NLRB over the past few years, this seems to be a Board that has been about picking winners and creating losers through its decisions in the two rules.

The NLRB should be a neutral arbitrator, an impartial and unbiased board protecting the rights of both the employers and employees. But instead, the Board has become an activist board, from my perspective.

Several examples of such, when we look at things like the rule on deducting union dues even after the agreement has ended, it appears to me that there is a theme that suggests that we are no longer looking at an impartial board, but a board that has within its intent the desire to create an outcome. Forcing employers to continue to deduct union dues after a bargaining agreement has expired seems to me to overturn 51 years of precedents.

The second issue that we just discussed was the case of micro-unions. As few as two employees with the same classification having an opportunity to form a union seems to strip away some of the opportunities and the authority of the employers.

I think of, specifically, the Northrop Grumman Shipbuilding, where 223 technicians out of 2,400 employees formed what I would consider a micro-union. This is troublesome, from my perspective.

The third example is the courtesy work rules. I think that was the case where a motor company, Knauz Motors, Inc., had a courtesy rule that was struck down. This was, to me, just a common sense rule.

As a former employer, I will tell you that this is just mind-boggling, from my perspective. I read what the rule was:

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> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite, friendly to our customers, our vendors, our 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 to be unlawful, continued that employees would reasonably believe that this prohibits statements of protest or criticism of the employer.

That, to me, just boggles the mind, when in fact, a common-sense courtesy rule has been the practice forever in business. You want your employees to be as courteous as possible. Yet that simple rule was struck down and found to be unlawful.

I think of the notice of posting rule that requires the display of posters making sure that employees know that they can join unions. It would seem that if you were looking for a balanced approach, not picking winners or losers, you would have a poster that said that you could decertify a union as well.

A fifth example would be the ambush or the quickie elections. We see the average election, I understand, takes 38 days. And yet, with the ambush elections, we whittle it down to 10 days. That does not provide the employer or the employee to go through the process of making a sound decision.

And finally, I know this is not a case that the NLRB, the Board itself, decided on, but without question, when you look at the opportunity to create a better economy, without any question, you look no further than the *Boeing* case when the general counsel made a decision to try to shift jobs away from one State to another State.

My question to you is, how can we expect the Board to return to being a neutral arbitrator when there are so many examples of anything but an impartial application of the law?

Mr. Pearce.

Mr. PEARCE. Thank you.

I respectfully disagree with the premise of your question that we are not a neutral arbitrator. We have been a neutral body, and I speak for my colleagues to say that this Board has made its decisions with full integrity.

Remember, half of my career I was a field attorney with the National Labor Relations Board. That is what I did. I enforced the Act.

You listed several different areas that you have taken issue with. I have to say with respect to rules, and you cited the courtesy rules, rules are the province of the employer. The employer has a lot of control over their workplace, and the Board respects that.

Any rule, however, that is so vague as to infringe upon or tends to infringe upon the section 7 rights of their employees to engage in protected, concerted activity will be scrutinized and considered problematic if a reasonable employee can conclude from reading that rule that the protected activity under the law, a law decided by Congress, that protected activity under the law would be curtailed.

Senator SCOTT. Thank you, Mr. Pearce.

Let me just end with this: I want to once again read this rule. That, to me, is interesting, your response.

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

I would simply suggest, sir, that this, I would not consider vague. And I do not see how this has to be struck down or found unlawful.

Thank you, sir.

The CHAIRMAN. Thank you, Senator Scott.

Senator Baldwin.

STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you, Chairman Harkin. And thank you for holding this hearing on the five individuals before us to sit on the National Labor Relations Board.

I am very pleased that we are holding this hearing today with the nominees in attendance. But as a new member of this body, I am baffled that the Senate has failed to confirm members to the National Labor Relations Board in many, many years.

The main purpose behind the NLRB is rather simple, to administer the National Labor Relations Act, and certainly to provide a venue to remedy unfair labor practices.

Yet, I fear that some of my colleagues believe that it is more important to ensure that the NLRB is not able to function properly. And that is deeply disappointing.

I am hoping that this nomination hearing is a step in the right direction of ensuring that millions of private sector workers in America have a place that will provide a remedy to such unfair labor practices that are found to exist.

I strongly support a fully functioning NLRB with five numbers. I think confirming the entire slate will ensure that the NLRB is working for American workers and American employers.

I hail from a State which has had a lot of focus recently on collective bargaining rights, particularly in the public sector. I know we are here with a focus on the private sector, but Wisconsin has certainly been an area where many citizens have tuned into the importance of collective bargaining.

I think many believe the collective bargaining between employers and unions is just about a fight over money. And my experience is that collective bargaining often encompasses more than just dollars. And I wonder if you can all speak to the examples of the kinds of concerns that you have seen, and issues around negotiations, that are beyond compensation.

As I said, we've gotten a quick study on all of those issues in the public sector in the State of Wisconsin. You have expertise in the private sector. I know there are five of you. Our time is limited, but why don't I start with you, Chairman Pearce, to address that topic.

Mr. PEARCE. I would just point out one example that apparently is very germane to the consideration of this esteemed body, and that is the *Noel Canning* case. In *Noel Canning*, it was determined by this Board that a negotiated collective bargaining agreement that an employer refused to execute constituted a violation of the law. That was agreed to by the D.C. Circuit Court.

They agreed that our assessment of the unfair labor practice was the correct one.

I'll turn this over to my colleague.

Mr. GRIFFIN. Certainly, there are many areas of collective bargaining that are other than wages—health care benefits, pension benefits.

In my service prior when I worked for the Operating Engineers Union, a major focus of negotiations was jointly trusteed training funds that train people on heavy equipment and on new pieces of equipment. And when you work out of a hiring hall in the construction industry, the more pieces of equipment that you know how to operate, the more employable you are, and the more valuable you are and the more able you are to support your family.

So that was a focus of negotiations, because these pieces of equipment are very expensive. Employers want people to be adequately trained. Financing and providing training was a major portion of the collective bargaining with respect to the union that I represented.

Ms. BLOCK. I would add that this is one that I think is incredibly important. It's something I had some experience with when I worked with the committee. It's safety and health.

We actually recently had a case where we upheld the right of the union to bargain with the employer over access to a workplace where there had been a fatal accident, and the union thought it was important for them to be able to come in and see the scene of the accident in order to ensure that the employees who remained in the workplace had a safe and healthful workplace.

I think we frequently see safety and health issues raised in collective bargaining, again, completely apart from any monetary interest but, really, a vital employee interest.

Mr. JOHNSON. Thank you, Senator.

Really quickly, I would echo that safety is an important issue that is frequently addressed in collective bargaining. But things sometimes come up in contracts that wouldn't necessarily spring to mind immediately.

Some employers, employees, there was the case recently that the Board adjudicated involving a cell phone policy. Under what circumstances can you make calls from your work phone?

Mr. MISCIMARRA. I will just briefly add that in my career, I have seen a multitude of issues, ranging from innovative health care solutions, issues with technology and training, very difficult specific customer issues or manufacturing problems that have been dealt with jointly at the bargaining table.

STATEMENT OF SENATOR SANDERS

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

Let me say from the onset that I think we have five qualified candidates, and I intend to support them.

What I think these candidates know, and everybody up here knows, this discussion is not about them. They are qualified. They should be voted out. They should take their position immediately.

What this debate is about is Republican obstructionism. As soon as I leave this meeting, I am going to the Environment and Public Works Committee meeting, which I sit on the Environment and

Public Works Committee, to see if we can get Gina McCarthy appointed as EPA director.

At the last meeting, Republicans did not show up at that meeting. They boycotted it.

Mr. Chairman, let me just quote from an article written by James Fallows on the Atlantic Web site. This is what he said,

> "Since the Democrats regained majority control of the Senate 6 years ago, the Republicans under Mitch McConnell have applied filibuster threats under a variety of names at a frequency not seen before in American history. Filibusters used to be exceptional. Now they are used as blocking tactics for nearly any significant legislation or nomination. The goal of this strategy, which maximizes minority blocking power in a way not foreseen in the Constitution, has been to make the 60-vote requirement seem routine."

That is what Mr. Fallows said.

Senate Republicans have been intent to bottleneck, obstruct, delay, and derail nearly every order of Senate business as part of a dedicated political strategy.

In fact, since Democrats took control of the upper chamber in 2007, the Senates of the 110th, 111th, and 112th Congress witnessed the three highest totals of filibusters ever recorded.

So what we are seeing here is nothing new. You guys just happen to be in the way right now. It has nothing to do with you personally, so do not take it personally.

What we are seeing now on almost every single level is to make government dysfunctional. And everybody knows, and I know my good friend Senator Alexander, and he is a good friend, understands this is a political tactic.

And I am not here to criticize that tactic. You are in the minority. You are using your position to advance your ideas in the best way that you can. I think it is a great disservice to the American people, but you are doing what you can in terms of using the rules.

Now the real question is, what does the majority do? That, to me, is the question. The minority is doing everything it can in this case to make it impossible for working people who are on the job to have their rights protected, so that tomorrow if some fellow out there, some woman out there, tries to organize a union, gets fired against the law, that worker will have no recourse.

If an employer abuses an employee against the law, that worker will have no recourse.

The function of the NLRB is to protect the rights of workers in terms of labor negotiations, and the right to form a union. If there is no NLRB, those workers will have no rights, and I think that is a terrible, terrible thing.

But that is very clear about what the Republicans want. We shouldn't beat around the bush. These are qualified candidates. They should be allowed to do the job that the NLRB provides for them to do.

Now the question, Mr. Chairman, is what happens. My guess is that they will in fact get a majority vote out of this committee, probably with everybody on this side voting for them, everybody on that side voting against them. Their nominations will then go to the floor of the U.S. Senate.

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Everything being equal, our Republican friends will once again filibuster and demand 60 votes. We will not get 60 votes.

The NLRB come August, I believe, will then become dysfunctional, and millions of workers will lose the protections that have been enshrined by law for decades. What happens then?

I am not here to criticize the Republicans. They are doing what they believe is best. It is part of a long-term strategy to obstruct, make it impossible for the President or any of us to do what we is think is right, in terms of protecting, in this case, American workers.

Mr. Chairman, let me suggest to you what I think we should do. If, once again, this effort is obstructed, if the goal is to prevent the NLRB from functioning in terms of protecting the rights of American workers, I think we should change the rules and take a majority vote to not only see that these people are seated so that they can do their job, but that other nominees who have been clearly obstructed also have a chance to do their job.

I think the American people see this institution as dysfunctional and one of the main reasons is that the minority, who has every right in the world to make their case—if Senator Alexander wants to go on the floor for 15 hours, I will support his right to do that.

But at the end of the day in America, majority is supposed to rule. That's what elections are about. We won with a majority rule. The President won with a majority.

The majority does not rule anymore, and millions of working people are suffering as result.

So, Mr. Chairman, here is my suggestion. If these nominees in fact get the votes that they need, which I suspect they will, they go to the floor, I will be very distraught if we do not seat them because of another filibuster.

And I would hope that we would use the rules of the Senate so that majority rules. And if we need 51 votes to seat them, let us do it.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Alexander's name was invoked. I will recognize him.

Senator ALEXANDER. Thanks, Mr. Chairman.

I respect the Senator from Vermont. He has a different view of the Senate than I do.

I was reading John Meacham's book about Thomas Jefferson the other night, and there was an evening when Jefferson and Adams sat down after dinner. And I am paraphrasing very carefully from memory, but Adams said to Jefferson, Jefferson wrote, that "without a Senate, we would lose the Republic."

The idea that a popularly elected assembly majority vote could protect our liberties is a chimera of the imagination. So our Founders have always envisioned the Senate as different than a majority rule body.

You go over to the House of Representatives. They have a Rules Committee, and if you win the House of Representatives by one vote, you have nine Democrats in the majority and four Republicans. That is a majority body and it runs like a fast train through there.

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And if we had a majority party here, why then you would have the tea party express run through the Senate and then some liberal group the next Congress. So that is just a different view.

As far as filibusters go, I introduced into the record earlier the information from the *Washington Post* that on March 18, President Obama's Cabinet nominations have been treated more rapidly than the last three Presidents in the second term. By now, I suppose it would be about even.

And I would remind the Senator that the number of Supreme Court justices in the history of the Senate who have been defeated by a filibuster, who have been denied their seats by a filibuster has been zero.

The number of district judges who have been defeated, who have been denied their seat by filibuster is zero. The number of Cabinet members who have been denied their seat by a failed cloture vote is zero. And the number of circuit judges who have been denied their seat by cloture votes is five Republicans, all started by the Democrats in the 1990s, and two Democrats.

So I favor up or down votes. And this dispute is about respect for Article I. I won't repeat that since I said it earlier.

I respect the Senator's different view of the Senate, but I disagree with it.

Senator SANDERS. If I could, very briefly, I understand where Senator Alexander is coming from. But when one party chooses to use the rules in an unprecedented way to make this institution dysfunctional, then I think we have to look at new ways.

Senator ALEXANDER. Mr. Chairman, the President has made recess appointments in an unprecedented way when there wasn't a recess. I mean, if Senator Byrd were here, I think he would be talking about that.

Senator SANDERS. We have strong disagreements. Thank you.

The CHAIRMAN. Really.

Senator Warren.

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

Mr. Chairman, I actually have to start out I think here with an apology, and that is to Charlie Griffin.

When I welcomed Mr. Griffin, I welcomed his wife and his daughter. Charlie, I did not know you were here, so you are very welcome here. And we are very pleased you are here.

I hope you are enjoying this.

[Laughter.]

I will add, though, into this. I am very concerned when Senators use procedural technicalities or filibusters to block any nominations to the NLRB. This is not based on any substantive problem with the nominees but on fundamental hostility to the work of the Board.

Like the consumer agency, the Environmental Protection Agency and the Department of Labor, the NLRB is an agency of the Federal Government that was created by Congress. Its existence is part of our Federal law. And yet, the NLRB nominees face the same problems that Rich Cordray has faced at the consumer agency, that Gina McCarthy faces at the Environmental Protection Agency, and that Tom Perez faces at the Department of Labor.

This is about complete obstructionism because a minority of Senators don't like the agencies, and they don't like the work these agencies do.

In my view, this kind of a obstructionism is a violation of the Senate's fundamental constitutional role to advise and consent on nominations.

By all means, Senators can vote against nominees with whom they disagree. But these nominees deserve a vote, and I hope they get a vote. And I think that's what this is about today.

I also want to make it clear, we have heard from five qualified individuals who will be voted on as a package. I certainly don't agree with the views of all five of the individuals. I find it very troubling, for example, that one of the nominees was hired by the Chamber of Commerce specifically to curb the NLRB's regulatory authority. But this is not about whether I agree or any of us agree with individual views of the ideology of each nominee.

This is about whether or not the NLRB can function at all. It is about giving both workers and employers a fair chance to have their voices heard and their disputes resolved. That's what we are here today to move forward.

And I will support a package of five nominees.

Now, I have a couple questions, but one of them comes from what Senator Scott raised. He seemed to imply that the NLRB is working hard to make sure that all employees in America are not courteous. And I surely think that cannot be the case.

So I tried to find out what I can about the case in particular that he talked about. And there are two parts to it that interested me.

The first is that—I understand that the *Karl Knauz Motors* case is the one we are talking about here—is a case where the employee used social media that affected the employer, complained about his or her job. And in that case, the NLRB ruled that the company could terminate the employee for derogatory comments about the company. Is that correct?

Mr. PEARCE. Yes. I'd like to clear a couple of things up.

First of all, if I can say a little bit about that courtesy rule. We do not have an issue with courtesy. We had an issue with the sentence that said, prohibiting saying anything unfavorable about the employer, was the problem.

And consequently, that rule had to be dealt with because of that vagueness.

Now Karl Knauz, with respect to the social media piece, you had two postings. One posting was by the salesman of a video of the son of the customer, a 13-year-old son of a customer, jumping into the car that the customer had just test drove, running over his father's foot and crashing the car into a pond at the dealership. And the posting was "whoops."

The other posting, this was a BMW dealership and they were having a promotional celebration. They were offering water and hot dogs. That posting was: What kind of low-rent outfit is this? Words to this effect. We're trying to sell fancy cars, and this is what they're offering to the customers.

Now, the first posting involving the accident was the posting that was the basis for which the employer terminated the employee. We concluded that that was not protected activity. That was done on

an individual basis as a lark. It was kind of snarky. It had nothing to do with terms and conditions of employment. Consequently, we found there was no violation.

With respect to the hot dogs——

Senator WARREN. I am sorry, let me just make sure, for all of us who don't do labor law all the time, it means the employer could fire the employee for that posting?

Mr. PEARCE. That's right.

Senator WARREN. Thank you.

Mr. PEARCE. And the other one about the hot dogs, we reserved on it, because it wasn't in front of us.

Senator WARREN. OK, good. I just wanted to be clear about what's happening to the American workplace. Thank you.

Mr. Chairman, I see I am out of time. I will submit questions for the record.

Thank you all very much. And I do want to say again, I know this is tough, to take on public service like this, particularly now, and particularly when there are much larger debates that go on that are not having to do with you specifically.

I am grateful to all of you for your willingness to serve, and I have no doubt that all five of you would serve the NLRB and serve this country well.

Thank you.

The CHAIRMAN. Thank you, Senator.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Sorry, I'm going to be able to ask only one question. I have to get back to the Judiciary Committee, and I'm sorry that I missed the rest of the hearing.

How's it going?

[Laughter.]

First, I want to thank all of you for agreeing to serve on the National Labor Relations Board. This Board plays the important role of protecting the rights of both employers and workers. However, the lack of a full board and the D.C. Circuit's *Noel Canning* decision has hampered the Board's ability to protect these rights.

Susie Stetler is one of the workers waiting for her rights to be vindicated. Susie is a school bus driver from Elk River, MN. She was terminated because her employer wanted to "get rid of" employees who previously tried to organize a union. The NLRB found that Ms. Stetler's rights had been violated and ordered the company to rehire Ms. Stetler and provide back pay.

Ms. Stetler's employer appealed the NLRB decision to the D.C. Circuit. Because of the *Noel Canning* decision, the court will not rule on the merits of her case. It is now 8 months after the NLRB decision. Susie has not been rehired. She is still waiting for $40,000 in back pay.

Either Mr. Griffin or Ms. Block, if the Senate confirmed a full five-member board, what would that mean for workers like Ms. Stetler, who are waiting for their cases to be resolved? And would it keep future workers from being put in that same horrible situation of waiting?

Ms. BLOCK. Thank you, Senator. I remember Ms. Stetler's case.

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I think if we were to be confirmed as a Board, we would have to figure out what to do about the pending cases. But I think your second point is absolutely right and crucial, that there would not be any more Susie Stetler's, because we would be able to move forward, make our decisions, and then seek enforcement in the Courts of Appeals, and get, essentially, an up-and-down vote from the court as to whether we made the right decision under the labor law or not.

Mr. GRIFFIN. I agree with member Block completely.

The answer to the uncertainty that is caused by the constitutional challenge under *Noel Canning* is to have a confirmed board.

Senator FRANKEN. OK, thank you. I'm sorry I have to go back because I have an amendment that I have to introduce in the Judiciary Committee, but thank you all.

I had questions for you guys too.

It was nice meeting you, Mr. Johnson, before.

Mr. Miscimarra, I'm sorry I did not get a chance to meet you.

Mr. MISCIMARRA. Likewise.

Senator FRANKEN. But good luck. It seems like everything is falling into place.

[Laughter.]

The CHAIRMAN. I thank everyone, for your attendance and for the questions.

I thank the nominees for being here. And for their willingness to serve.

I am almost tempted to engage in a little bit of give-and-take on the constitutional background of the U.S. Senate, but I will reserve that for some other time on the floor or something.

I have just been involved in trying to get rid of the filibuster for 20-some years, so I do have views on Senate rules and the ability of the minority to block legislation. I would just say very succinctly that I have long felt that there should be a rule for the Senate to be able to slow things down, not to rush to judgment, to be able to have due deliberations so that the rights of the minority are not run roughshod over.

But in the end, at some point, the majority must be enabled to act. It should be the right of the minority to be able to amend, to offer amendments, and, yes, to be able to slow things down, to get the public aware of what the majority is trying to do. But not to, in the end, be able to absolutely stop something with a minority of the vote.

But that is one person's opinion.

Again, I thank you all very much. I am hopeful that we can move these nominations very rapidly, with the concurrence of our Ranking Member. I hope to be able to move them sometime very soon.

The record will remain open for 10 days. Written questions must be submitted by close of business of this Friday, and then we will keep the record open for the responses to those written questions. But after 10 days, we will do our duty and move the nominees.

Again, thank you all very much. Does anyone have anything else they wanted to add before we adjourn?

Mr. JOHNSON. Thank you for your time, Senators. Thank you very much.

The CHAIRMAN. I am sorry, Mr. Johnson.

Mr. JOHNSON. I just said thank you for your time, Senator.

The CHAIRMAN. Thank you.

It was Senator Leahy who first said this, maybe it has been around longer than that. But he once said that "Senators are a constitutional impediment to the smooth functioning of staff."

[Laughter.]

I just learned that we are moving the nominees next Wednesday morning, so thank you.

The committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

[The New York Times, December 14, 2007]

CRITICS SAY LABOR BOARD FAVORS BUSINESS

(By Steven Greenhouse)

Senate and House Democrats attacked the Republican-led *National Labor Relations Board* at a congressional hearing on Thursday, saying its recent decisions had favored employers over workers.

The Democrats focused on 61 board decisions issued in September that, among other things, made it harder for unions to organize workers and harder for illegally fired employees to collect back pay.

"This board has undermined collective bargaining at every turn, putting the power of the law behind lawbreakers, not law victims," said Senator *Edward M. Kennedy*, the Massachusetts Democrat who is Chairman of the Senate Health, Education, Labor, and Pensions Committee.

At the hearing. Wilma B. Liebman, a Democratic member of the five-member board, which oversees unionization rules for workers in private industry, repeatedly clashed with the board's Republican chairman, Robert J. Battista.

"Virtually every recent policy choice by the board," Ms. Liebman said, "impedes collective bargaining, creates obstacles to union representation or favors employer interests."

Mr. Battista, whose term expires Sunday, took strong issue with the Democrats' criticism.

"Notwithstanding the special interest group rhetoric we may be hearing about the N.L.R.B., the agency is carrying out its statutory mission," said Mr. Battista, a labor lawyer from Detroit who represented many corporations.

He said the labor board had significantly cut delays in handling unfair labor practice cases and had collected $110 million in back pay last year for workers who had been improperly retaliated against for union activity.

The White House has remained mum on whether it will reappoint Mr. Battista. A senior Democratic Senate staff member said yesterday that Democratic Senators were likely to resist confirming him.

Republican leaders mocked the combined hearing by House and Senate members, saying it was improper to summon members of an adjudicatory panel before Congress to defend their decisions. The Republicans asserted that the hearing was reward to organized labor for helping Democrats in their campaigns.

Representative Howard P. McKeon of California, the ranking Republican on the House Education and Labor Committee said,

> "Today's hearing is a transparent attempt by Democratic leaders to appease the labor union special interests that helped put them in office by attacking decisions of the N.L.R.B. that they do not view as sufficiently pro-union."

Labor leaders are pressing the Democratic presidential candidates and congressional Democrats to back legislation that would make it far easier for workers to unionize.

In the decision that came under fiercest attack yesterday, the labor board ruled 3 to 2 in September that when a company agrees to grant union recognition after a majority of workers sign cards or a petition saying they want one, an election must be held—in effect vacating the union recognition—if 30 percent of the workers sign another petition within 45 days saying they want a vote to get rid of the union.

Ms. Liebman and the Democratic legislators said that the decision showed an anti-union tilt and that it gave 30 percent of the workers the power to overrule majority sentiment. Mr. Battista defended the ruling, saying it merely gave workers the chance to vote in a secret ballot election on whether they wanted to keep the union.

Several Democrats accused the board's majority of hypocrisy because on the same day it decided this case it issued another ruling that allowed a company to cut off recognition of its union after a majority of workers submitted a petition seeking a vote to get rid of it. The Democrats asked why the labor board did not insist on a secret ballot election under such circumstances.

The union movement's discontent with the labor board has grown so intense that several hundred union sympathizers demonstrated in front of the board's Washington headquarters last month, chanting that it should be "shut down for renovations."

Labor leaders say they would be happy if the board did nothing until a Democrat was in the White House. In addition to the expiration of Mr. Battista's term Sun-

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day, the appointments of two other members end later this month when the congressional session ends.

An aide to the Senate majority leader, *Harry Reid*, said the Senator was considering holding pro forma sessions of the Senate to prevent President Bush from renaming Mr. Battista as a recess appointment.

At Thursday's hearing, a hotel housekeeper, Feliza Ryland, testified about her fight to win back pay after the board ruled in 2001 that she and 43 other workers had been illegally fired in 1996 in a labor dispute with Grosvenor Resorts in Orlando, FL.

"It has now been more than 11 years since I was unlawfully fired," Ms. Ryland said, "and I am still waiting to see the back pay, still waiting to see justice."

In a decision in September, the board sharply reduced the workers' back pay, saying they forfeited the right to full back pay because they picketed for several weeks in an effort to get their jobs back instead of looking for new jobs. The board's majority wrote that giving full back pay would "reward idleness."

MAY 14, 2013.

Hon. TOM HARKIN, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. LAMAR ALEXANDER, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ALEXANDER: As management lawyers representing employers and union lawyers representing unions and employees, we are writing to urge swift confirmation of the full package of five members of the National Labor Relations Board (NLRB): Mark Pearce, Philip Miscimarra, Richard Griffin, Harry Johnson, III, and Sharon Block.

This is a highly experienced group of nominees. Each of the nominated individuals brings decades of experience under the National Labor Relations Act and our labor-management system.

While we differ in our views over the decisions and actions of the NLRB over the years, we do agree that our clients' interests are best served by the stability and certainty that a full, confirmed Board will bring to the field of labor-management relations. The last several years have been tumultuous, and the recent decision by the U.S. Court of Appeals for the DC Circuit in *Noel Canning* has thrown greater uncertainty into our labor-management system.

We urge the Senate to confirm the full bipartisan package of nominees to the NLRB without delay.

Respectfully submitted,

Darryl Anderson, *Washington*, *DC* (U)[1]; Duane Beeson, *Oakland*, *CA* (U); Howard L. Bernstein, *Chicago*, *IL* (M)[2]; Burton Boltuch, *Oakland*, *CA* (M); Robert Bonsall, *Sacramento*, *CA* (U); Max Brittain, *Chicago*, *IL* (M); Ronald W. Brown, *Sacramento*, *CA* (M); Barbara Camens, *Washington*, *DC* (U); Wendy Chierici, *Philadelphia*, *PA* (U); Irwin H. Cutler, Jr., *Louisville*, *KY* (U); Joel A. D'Alba, *Chicago*, *IL* (U); Robert A. Dufek, *Potomac*, *MD* (M); Charles Elbert, *St. Louis*, *MO* (M); Philip C. Eschels, *Louisville*, *KY* (M); John H. M. Fenix, *Westlake*, *OH* (M); Ronald Fisher, *St. Louis*, *MO* (M); Joe Gagliardo, *Chicago*, *IL* (M); Brent Garren, *New York*, *NY* (U); Gerald A. Golden, *Chicago*, *IL* (M); Joyce Goldstein, *Cleveland*, *OH* (U); Barry A. Hartstein, *Chicago*, *IL* (M); H. Victoria Hedian, *Baltimore*, *MD* (U); Judith Droz Keyes, *San Francisco*, *CA* (M); Richard Laner, *Chicago*, *IL* (M); Gregory T. Lodge, *Toledo*, *OH* (M); Stanley Lubin, *Phoenix*, *AZ* (U); Stephen Macri, *New York*, *NY* (M); Thomas Mandler, *Chicago*, *IL* (M); Matt Miklave, *New York*, *NY* (M); Deb Millenson, *Washington*, *DC* (M); Fred A. Ricks Jr., *St. Louis*, *MO* (M); Laurence Rosoff, *Camden Co.*, *NJ* (M); Steven B. Rynecki, *Milwaukee*, *WI* (M); Richard Seryak, *Detroit*, *MI* (M); Stephen D. Shawe, *Baltimore*, *MD* (M); W.V. (Bernie) Siebert, *Denver*, *CO* (M); Stanley Silverstone, *White Plains*, *NY* (M); Gary L. Simpler, *Baltimore*, *MD* (M); Leslie Tarantola, *Camp Springs*, *MD* (U); Marilyn Teitelbaum, *St. Louis*, *MO* (U); Carl Tomenberg, *Chicago*, *IL* (M); John J. Toner, *Washington*, *DC* (M); Carl E. Ver Beek, *Grand Rapids*, *MI* (M); Marc G. Whitefield, *Farmington Hills*, *MI* (M); Joe Yastrow,

[1] (U) = Union Attorney.
[2] (M) = Management Attorney.

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Chicago, IL (M); Amy Young, *Washington, DC* (U); and Barbara Zibordi, *Washington, DC* (U).

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW)
MAY 15, 2013.

Hon. TOM HARKIN, *Chairman*,
Hon. LAMAR ALEXANDER, *Ranking Member,*
Senate Committee on Health, Education, Labor, and Pensions,
428 Senate Dirksen Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ALEXANDER: On behalf of the undersigned organizations, all of whom work to promote economic opportunity and security for women, we write to urge the committee to do its part to ensure a smoothly functioning National Labor Relations Board. To that end, we urge you to carefully consider the bipartisan package of five nominees before you, and facilitate their movement through the confirmation process. Without swift action on the bipartisan package, the NLRB will be left without the necessary quorum of at least three members. As the economic recovery picks up steam, now is not the time to undermine an agency so critical to the Nation's workforce.

As organizations devoted to advancing policies in support of fair pay, we know that there is much work to be done to close the gender wage gap. As we continue to urge Congress to pass the Paycheck Fairness Act (S. 84/H.R. 377), we also believe working families need a functioning, fully staffed National Labor Relations Board to protect their right to an important strategy in the fight for economic security: collective bargaining.

The National Labor Relations Board has long worked to ensure the rights of employees to bargain collectively, if they choose to do so. This work is particularly meaningful for women. Throughout our Nation's history, women have played a significant role in improving workers' lives. Their courage and contributions changed the labor movement and in turn helped shape our society. Today, close to half of all the Nation's workers are women, and women make up roughly 45 percent of union members. If their share of the unionized workforce continues to grow at the current pace, by 2020 the majority of union members will be women.[1]

Unions have always been important to advancing women's economic security. Union wage and benefit structures are typically more transparent than those for non-union workplaces, which in turn helps to decrease wage discrimination. According to the U.S. Department of Labor, the typical full-time woman union worker has weekly earnings equal to 88 percent of a male union worker.[2] In contrast, women overall make only 77 cents on average for every dollar earned by a man.[3] Further, the Center for Economic and Policy Research found there is not only wage improvement but also a benefit advantage for women in unions relative to their non-union counterparts. According to that report:

> "The data suggest that even after controlling for systematic differences between union and non-union workers, union representation substantially improves the pay and benefits that women receive. On average, unionization raised women's wages by 11.2 percent—about $2.00 per hour—compared to non-union women with similar characteristics. Among women workers, those in unions were about 19 percentage points more likely to have employer-provided health insurance and about 25 percentage points more likely to have an employer-provided pension."[4]

Pay equity is particularly critical in today's economy, where approximately 40 percent of women are acting as the primary breadwinners in their households and more than 60 percent are breadwinners or co-breadwinners.[5] Giving women more tools to

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[1] John Schmitt, Center for Economic and Policy Research. (December 2008). *Unions and Upward Mobility for Women.* Retrieved May 13, 2013 from *www.cepr.net/index.php/publications/reports/unions-and-upward-mobility-for-women-workers/.*

[2] U.S. Department of Labor, Bureau of Labor Statistics. (January 23, 2013). *Union Members—2012.* Retrieved May 13, 2013, from *www.bls.gov/news.release/union2.nr0.htm.*

[3] U.S. Census Bureau. (September 2012). *Income, Poverty, and Health Insurance Coverage in the United States: 2011—Report and Detailed Tables.* Retrieved May 13, 2013, from *www.census.gov/prod/2012pubs/p60-243.pdf.*

[4] Ibid.

[5] American Progress. (2009). *The Shriver Report: A Women's Nation Changes Everything; The New Breadwinners.* Retrieved May 13, 2013, from *www.americanprogress.org/issues/2009/10/pdf/awn/chapters/economy.pdf.*

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help them take home every dollar they earn is crucial not only to families' economic security, but also to growth of the Nation's economy as a whole.

The National Labor Relations Board also plays an important role in the American economy and the growing recovery. We urge the committee to take action on the full bipartisan package of nominees so that the Board has the full complement of members necessary to conduct the people's business.

Please feel free to contact Lisa Maatz at the American Association of University Women, 202–785–7720 or *maatzl@aauw.org*, with any questions.

Sincerely,

American Association of University Women (AAUW); 9 to 5; Alliance for Justice; American Federation of State, County and Municipal Employees (AFSCME); American Federation of Teachers; Catalyst; Clearinghouse on Women's Issues; Coalition of Labor Union Women (CLUW); Digital Sisters; Equal Pay Coalition NYC; Equal Rights Advocates; Family Forward Oregon; Feminist Majority; Institute for Science and Human Values, Inc.; International Brotherhood of Teamsters; Legal Momentum; MomsRising; National Coalition on Black Civic Participation (NCBCP)/Black Women's Round Table; National Committee on Pay Equity; National Council of Jewish Women; National Council of Women's Organizations; National Gay and Lesbian Task Force; National Partnership for Women & Families; National Women's Law Center; National Women's Political Caucus; People For the American Way; Secular Women; Turning Anger into Change; Ultra Violet; US Women's Chamber of Commerce; Women Employed; Women's Law Project.

[Whereupon, at 12:05 p.m., the hearing was adjourned.]

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