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REPORT
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PREVENTING GREATER UNCERTAINTY IN LABOR-MANAGEMENT RELATIONS ACT

APRIL 9, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1120]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 1120) to prohibit the National Labor Relations Board from taking any action that requires a quorum of the members of the Board until such time as Board constituting a quorum shall have been confirmed by the Senate, the Supreme Court issues a decision on the constitutionality of the appointments to the Board made in January 2012, or the adjournment sine die of the first session of the 113th Congress, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Preventing Greater Uncertainty in Labor-Management Relations Act".

SEC. 2. ACTIVITIES BY THE NATIONAL LABOR RELATIONS BOARD PROHIBITED.

Effective on the date of enactment of this Act, the National Labor Relations Board shall cease all activity that requires a quorum of the members of the Board, as set forth in the National Labor Relations Act (29 U.S.C. 151 et seq.). The Board shall not appoint any personnel nor implement, administer, or enforce any decision, rule, vote, or other action decided, undertaken, adopted, issued, or finalized on or after

January 4, 2012, that requires a quorum of the members of the Board, as set forth in such Act.

SEC. 3. TERMINATION.

The provisions of this Act shall terminate on the date on which—

(1) all members of the National Labor Relations Board are confirmed with the advice and consent of the Senate, in accordance with clause 2 of section 2 of article II of the Constitution, in a number sufficient to constitute a quorum, as set forth in the National Labor Relations Act (29 U.S.C. 151 et seq.);

(2) the Supreme Court issues a decision on the constitutionality of the appointments to the Board made in January 2012; or

(3) the adjournment *sine die* of the first session of the 113th Congress.

SEC. 4. EFFECT OF CERTAIN BOARD ACTIONS.

In the event that this Act terminates pursuant to paragraphs (1) or (3) of section 3, no appointment, decision, rule, vote, or other action decided, undertaken, adopted, issued, or finalized by the Board on or after January 4, 2012, that requires authorization by not less than a quorum of the members of the Board, as set forth in the National Labor Relations Act, may be implemented, administered, or enforced unless and until it is considered and acted upon by a Board constituting a quorum, as set forth in the National Labor Relations Act, or the Supreme Court issues a decision on the constitutionality of the appointments to the Board made in January 2012.

H.R. 1120, PREVENTING GREATER UNCERTAINTY IN LABOR-MANAGEMENT RELATIONS ACT, COMMITTEE REPORT

PURPOSE

On January 4, 2012, President Obama made three unprecedented recess appointments to the National Labor Relations Board (NLRB) while the Senate was regularly meeting in *pro forma* session. On January 25, 2013, the U.S. Court of Appeals for the District of Columbia held unanimously that President Obama's appointments were constitutionally invalid. H.R. 1120, the *Preventing Greater Uncertainty in Labor-Management Relations Act*, narrowly seeks to prevent additional legal and economic uncertainty by prohibiting the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until issues surrounding the current Board quorum are resolved.

COMMITTEE ACTION

Full committee hearing examining President Obama's January 2012 appointments to the NLRB

On February 7, 2012, the Committee on Education and the Workforce held a hearing entitled, "The NLRB Recess Appointments: Implications for America's Workers and Employers." Witnesses discussed the constitutionality and substantive consequences of President Obama's January 2012 appointments to the NLRB while the Senate was regularly meeting in *pro forma* session. Witnesses before the panel included Mr. Charles J. Cooper, Chairman, Cooper & Kirk, PLLC, Washington, D.C.; Mr. Dennis M. Devaney, Member, Devaney, Jacob, Wilson, PLLC, Troy, Michigan; Mr. Stefan J. Marculewicz, Shareholder, Littler Mendelson P.C., Washington, D.C.; and Susan Davis, Partner, Cohen, Weiss and Simon LLP, New York, New York.

Joint subcommittee hearing discussing three pending controversial NLRA issues affecting higher education

On September 12, 2012, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing entitled, "Expanding the Power of Big Labor: The NLRB's Growing Intrusion into Higher Education." Witnesses debated whether university graduate student assistants are statutory employees under the National Labor Relations Act (NLRA); whether university faculty are employees covered by the NLRA or excluded managers; and what the appropriate test is to determine whether a university is a religious institution exempt from NLRA coverage. Witnesses before the panel included Mr. Peter Weber, Dean, Brown University Graduate School, Providence, Rhode Island; Mr. Michael Moreland, Vice Dean and Professor of Law, Villanova University School of Law, Villanova, Pennsylvania; Mr. Walter Hunter, Shareholder, Littler Mendelson P.C., Providence, Rhode Island; and Mr. Christian Sweeney, Deputy Organizing Director, American Federation of Labor—Congress of Industrial Organizations, Washington, D.C.

Subcommittee hearing analyzing the implications of the Noel Canning v. NLRB decision

On February 13, 2013, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing entitled, "The Future of the NLRB: What Noel Canning v. NLRB Means for Workers, Employers, and Unions." Witnesses discussed recent controversial and precedent-changing NLRB holdings and the implications of the U.S. Court of Appeals for the District of Columbia's holding in *Noel Canning v. NLRB*. Witnesses before the panel included Mr. G. Roger King, Of Counsel, Jones Day, Columbus, Ohio; Mr. Raymond J. LaJeunesse, Jr., Vice President and Legal Director of the National Right to Work Legal Defense Foundation, Springfield, Virginia; Mr. Lawrence Z. Lorber, Partner, Proskauer, Washington, D.C.; and Ms. Elizabeth Reynolds, Shareholder, Allison, Slutsky & Kennedy P.C., Chicago, Illinois.

Legislation introduced

On March 13, 2013, Congressman Phil Roe introduced H.R. 1120, the *Preventing Greater Uncertainty in Labor-Management Relations Act*, with 12 cosponsors. Any Board order may be appealed to the U.S. Court of Appeals for the District of Columbia, and the Board does not maintain a constitutional quorum in that court. Therefore, no worker, union, or employer can have confidence in any order issued by the Board. This legislation was necessary to stop the Board from continuing to issue decisions or take other actions that could increase legal and economic uncertainty.

Committee passes H.R. 1120, the Preventing Greater Uncertainty in Labor-Management Relations Act

On March 20, 2013, the Committee on Education and the Workforce considered H.R. 1120, the *Preventing Greater Uncertainty in Labor-Management Relations Act*. Congressman Roe offered an amendment in the nature of a substitute, clarifying that the Board may not appoint any individuals whose appointments require a quorum of the Board. Two additional amendments were offered; however, neither was adopted. The committee favorably reported

H.R. 1120, as amended, to the House of Representatives by a vote of 23–15.

SUMMARY

The *Preventing Greater Uncertainty in Labor-Management Relations Act* addresses the legal and economic uncertainty caused by the Board's continued operation by prohibiting the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until the issues with the current Board quorum are resolved.

COMMITTEE VIEWS

The NLRA, signed into law in 1935, guarantees the right of most private-sector employees [1] to organize and bargain collectively with employers through representatives of their choosing, and to refrain from any and all such activities. The NLRB, an independent federal agency, was created by the NLRA to fulfill two principal functions: 1) determine whether employees wish to be represented by a union; and 2) prevent and remedy employer and union unlawful acts (called unfair labor practices or ULPs).

The NLRB has two components: the Board and the General Counsel. The Board is a quasi-judicial five member body, traditionally consisting of three individuals from the president's party and two from the opposing party, appointed by the president and confirmed by the Senate to staggered five-year terms. The Board decides cases under the NLRA based on formal records in administrative proceedings (subject to review in the U.S. Court of Appeals), conducts secret ballot elections to determine whether employees want to be represented by a union, and promulgates rules to carry out the provisions of the NLRA. A Board quorum consisting of three members is required for the Board to issue decisions, promulgate regulations, and appoint regional directors. NLRB regional functions, including the acceptance and processing of representation petitions, certification of representational elections, and issuance of unfair labor practice complaints, are unaffected by a lack of a Board quorum.

On January 4, 2012, relying on a new legal opinion by the Justice Department, President Obama made three unprecedented recess appointments to the NLRB (Democrats Sharon Block and Richard Griffin, and Republican Terence Flynn) while the Senate was breaking up a long recess with periodic *pro forma* sessions. Since January 4, 2012, the Board has issued approximately 600 decisions. Many of these decisions are highly controversial and have in some cases reversed precedent. Among other things, the Board created new bargaining requirements before an employer can enforce discretionary discipline, reversed longstanding dues-checkoff rules, expanded the scope of concerted activity, virtually eliminated employee "Beck" rights related to lobbying expenses, and rewrote rules governing witness statements taken during an employer investigation.

[1] The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the Railway Labor Act (airlines and railroads), agricultural labor, and supervisors are not covered by the act. 29 U.S.C. 152(2).

On January 25, 2013, in *Noel Canning v. NLRB* (*Noel Canning*), the U.S. Court of Appeals for the District of Columbia unanimously held that because the appointments of Members Block and Griffin were constitutionally invalid the Board lacked a quorum to issue decisions. As a result of the *Noel Canning* decision, every action taken by the Board that relied on intrasession recess[2] appointments to constitute a Board quorum is now in question. Employers, employees, and unions are in legal limbo, struggling with uncertainty as to the enforceability of Board orders—injecting greater uncertainty in a struggling economy.

To prevent additional legal and economic uncertainty caused by President Obama's unprecedented appointments to the NLRB, the *Preventing Greater Uncertainty in Labor-Management Relations Act* prohibits the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until issues surrounding the current Board quorum are resolved.

History of Recess Appointments

Article II, section 2, clause 2 of the U.S. Constitution, the Appointments Clause, gives the president the "Power, by and with the Advice and Consent of the Senate" to appoint officers of the United States. This is "the general mode of appointing officers of the United States . . . confined to the President and Senate jointly."[3]

The Recess Appointment Clause, article II, section 2, clause 3 of the U.S. Constitution, establishes an "auxiliary method of appointment,"[4] authorizing the president "to fill up all Vacancies that may happen during the Recess of the Senate." This "auxiliary method of appointment" was created because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay."[5]

The earliest disagreements as to limits of the Recess Appointment Clause focused on the interpretation of the term "happen." Originally it was understood that the president could only make recess appointments to vacancies that occurred during the recess.[6] In 1792, Edmund Randolph, the first Attorney General, examined whether a newly created position could be filled by a recess appointment.[7] The statute establishing the new position was enacted in April 1792, while the Senate was in session, however, when the Senate recessed in May there was no nomination.[8] Attorney General Randolph concluded that the vacancy happened on the day the office was created; therefore, it could not be filled with a recess ap-

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[2] An intrasession recess refers to a recess of the Senate during a session of the Senate. An intersession recess occurs when Congress adjourns either between the first and second session of a Congress or at the end of a Congress.

[3] Hamilton, Alexander, *The Federalist Papers* No. 67 (March 11, 1788).

[4] *Id.*

[5] *Id.*

[6] Rappaport, Michael B., *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. Rev. 1487, 1518 (2005).

[7] Id. at 1518–9, describing Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 The Papers of Thomas Jefferson, at 165–67 (John Catanzariti et al. ed., 1990).

[8] *Id.*

pointment.[9] Alexander Hamilton, then a Major General in the United State Army, agreed with Attorney General Randolph's interpretation, stating in a similar situation that "It is clear . . . the President cannot fill a vacancy which happens during a session of the Senate."[10] Additionally, there is evidence President George Washington and Congress agreed with this interpretation.[11]

It was not until 1823 that the current, broader view regarding recess appointments was adopted. To ensure that late session vacancies could be filled,[12] Attorney General William Wirt adopted the "may happen to exist" interpretation.[13] In other words, the president may recess appoint to any vacancy that is open during a recess regardless of when the vacancy arose.

For the eighteenth and most of the nineteenth century, "the recess" referred to intersession recesses, those occurring between sessions of Congress.[14] For the first 75 years under the Constitution, there were no intrasession recess appointments, those occurring during a single session.[15] In 1867 the first intrasession recess appointment was made by President Andrew Johnson.[16] However, in 1901, Attorney General Philander Knox, in the first written opinion on the meaning of "the recess," concluded that intrasession recess appointments were unconstitutional.[17] In Attorney General Knox's opinion "the recess" referred only to intersession recesses.[18]

Twenty years later, Attorney General Harry Daugherty broke with precedent and adopted a practical interpretation of the recess appointment clause.[19] According to Attorney General Daugherty, subsequent Attorney Generals, and the Department of Justice's Office of Legal Counsel (OLC), the "constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could 'not receive communications from the President or participate as a body in making appointments.'"[20] While the exact duration allowing for recess appointments is unclear, from January 1981 to December 2011, "the shortest intersession recess during which a President made a recess appointment was 11 days, and the shortest intrasession recess during which a President made a recess appointment was 10 days."[21] The U.S. Supreme Court has not ruled on the meaning of the Recess Appointment Clause; however, U.S. Courts of Appeals are split as to the constitutionality of intrasession recess appointments.[22]

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[9] *Id.*
[10] *Id.* at 1520, *quoting* Letter from Alexander Hamilton to James McHenry, at 94.
[11] See Rappaport, Michael B., *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. Rev. 1487, 1518 (2005).
[12] *Id.* at 1511.
[13] 1 Op. Att'y Gen 631 (1823). *See also* Rappaport, Michael B., *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. Rev. 1487, 1511 (2005).
[14] Rappaport, Michael B., The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1572 (2005).
[15] *Id.*
[16] *Id.*
[17] 23 Op. Att'y Gen. 599 (1901). *See also* Rappaport, Michael B., *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. Rev. 1487, 1573 (2005).
[18] *Id.*
[19] Rappaport, Michael B., *The Original Meaning of the Recess Appointments Clause,* 52 UCLA L. Rev. 1487, 1573 (2005).
[20] 13 Op. O.L.C. 271, 272 (quoting 33 Op. Att'y Gen. 20, 24 (1921)).
[21] Hogue, Henry B., *Recess Appointments: Frequently Asked Questions,* Congressional Research Service, 10 (January 9, 2012).
[22] *See Stephens v. Evans,* 387 F.3d 1220 (11th Cir. 2004), *United States v. Woodley,* 751 F.2d 1008 (9th Cir. 1985), *United States v. Allocco,* 305 F.2d 704 (2d Cir. 1962), and *Noel Canning v. NLRB,* No. 12–1115, slip. Op. (D.C. Cir 2013).

The practical interpretation of the recess appointment clause led to the modern Senate practice of breaking up long recesses with *pro forma* sessions. To ensure President George W. Bush could not make recess appointments, beginning in 2007, pursuant to article I, section 5, clause 2 of the U.S. Constitution, which states the Senate is vested with the power to "determine the Rules of its Proceedings," the Senate began breaking up long recesses with *pro forma* sessions.[23] In November 2007 the Senate Majority Leader, Senator Harry Reid, explicitly stated the Senate would "be coming in for *pro forma* sessions during the Thanksgiving holiday to prevent recess appointments."[24] During the final 14 months of the Bush administration in which the Senate broke up recesses with *pro forma* sessions, President Bush made no recess appointments.[25]

Similar actions were taken by the House of Representatives to ensure President Obama could not make recess appointments during the 112th Congress. Pursuant to article I, section 5, clause 4 of the U.S. Constitution,[26] the House refused to pass any resolution to allow the Senate to recess or adjourn for more than three days.[27] From May 2011 to January 2012, no concurrent resolution was introduced in either the House or the Senate. The Senate was forced to use *pro forma* sessions to break up recesses lasting longer than three days.[28]

President Obama's Unprecedented January 2012 Recess Appointments

No president had exercised the recess appointment power while the Senate was breaking up a long recess with periodic *pro forma* sessions until, relying on a new OLC legal opinion, President Obama made three recess appointments, two Democrats and a Republican, to the NLRB on January 4, 2012. The legal opinion, dated January 6, 2012, stated that the president "has authority under the Recess Appointment Clause . . . to make recess appointments during the period between January 3 and January 23 notwithstanding the convening of periodic *pro forma* sessions."[29] According to the OLC, the Senate could stop recess appointments only "by remaining continuously in session and being available to receive and act on nominations."[30]

Despite the fact that the Senate, days before the appointments, passed the Temporary Payroll Tax Cut Continuation Act of 2011

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[23] Hogue, Henry B., *Recess Appointments: Frequently Asked Questions,* Congressional Research Service, 10 (January 9, 2012).

[24] Sen. Harry Reid, "Recess Appointments," remarks in the Senate, Congressional Record, daily edition, vol. 153 (November 16, 2007), p. S14609.

[25] Hogue, Henry B., *Recess Appointments: Frequently Asked Questions,* Congressional Research Service, 10 (January 9, 2012).

[26] Article 1, section 5, clause 4 of the U.S. Constitution states that "[n]either House, during the Sessions of Congress, shall, without the Consent of the other, adjourn for more than three days."

[27] Hogue, Henry B., *Recess Appointments: Frequently Asked Questions*, Congressional Research Service, 10 (2012).

[28] *Id.*

[29] Memorandum Opinion for the Counsel to the President at 1, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, at 1 (January 6, 2012).

[30] *Id.*

and gaveled in the 112th Congress by unanimous consent [31] during a *pro forma* session, in the opinion of the OLC *pro forma* sessions "do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to receive communications from the President or participate as a body in making appointments.'" [32] The OLC avoided the issue as to the number of days needed to constitute a recess by finding that a *pro forma* session did not break up a recess.[33] However, even the OLC admitted the question as to whether the president may make recess appointments during a recess broken up by *pro forma* sessions is a "novel one, and the substantial arguments on each side create some litigation risk for such appointments." [34]

The constitutionality of the recess appointments and validity of the OLC opinion were immediately questioned by constitutional scholars. Edwin Meese, the 75th attorney general of the United States, and Todd Gaziano, a former OLC employee, wrote the appointments are nothing "more than an unconstitutional attempt to circumvent the Senate's advise-and-consent role . . . It is a breathtaking violation of the separation of powers and the duty of comity that the executive owes to Congress." [35]

In testimony before the Education and the Workforce Committee, Charles Cooper, former Assistant Attorney General of the OLC, stated not only that the OLC's opinion was wrong, it "would allow [the recess appointment power] to swallow the Senate's authority to withhold its consent when it believes a nominee should not be confirmed." [36]

Within days of President Obama's unprecedented recess appointments, interested parties challenged the constitutionality of the January 2012 recess appointments. On January 25, 2013, in *Noel Canning*, the U.S. Court of Appeals for the District of Columbia unanimously held that the appointments of Members Block and Griffin to the NLRB were constitutionally invalid. Cases are still pending in the Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh circuit U.S. Court of Appeals.[37]

Noel Canning v. NLRB

On February 24, 2012, Noel Canning, a division of Noel Corporation, filed a petition for review and to set aside a NLRB order in the U.S. Court of Appeals for the District of Columbia.[38] Noel Canning argued the January 2012 recess appointments to the NLRB

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[31] "Most nominations are brought up by unanimous consent and approved without objection." Rybicki, Elizabeth, *Senate Consideration of Presidential Nominations, Committee and Floor Procedure*, Congressional Research Service, 9 (2011).

[32] Memorandum Opinion for the Counsel to the President at 1, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, at 1 (January 6, 2012), quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24 (1921).

[33] *Id.* at 13.

[34] *Id.* at 4.

[35] Meese, Edwin, and Todd Gaziano, *Obama's Recess Appointments are Unconstitutional*, The Heritage Foundation (January 5, 2012).

[36] The NLRB Recess Appointments: Implications for America's Workers and Employers, Hearing before the Education and the Workforce Committee, 112th Cong., 2nd Sess. at 9 (2012) (written testimony of Charles Cooper) [hereinafter Cooper Testimony].

[37] Recess Appointments Litigation Resource Page, National Chamber Litigation Center, *available at* http://www.chamberlitigation.com/recess-appointments-litigation-resource-page (last visited on March 26, 2013).

[38] *Noel Canning v. NLRB*, No. 12–1115, slip. Op., 3 (D.C. Cir 2013).

were unconstitutional, therefore, "the Board lacked authority to act for want of a quorum."[39] The U.S. Chamber of Commerce and the Coalition for a Democratic Workplace intervened in support of the employer. Republican Senators and Speaker John Boehner filed amicus briefs in the case, arguing the appointments were unconstitutional.

On January 25, 2013 the U.S. Court of Appeals for the District of Columbia held unanimously in *Noel Canning* that the January 2012 recess appointments to the NLRB were constitutionally invalid.[40] Relying on the Constitution's natural meaning as it would be understood at the time of its ratification, the court held that "the Recess" (emphasis added) refers to intersession recesses, "the period between sessions when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President."[41] It rejected the administration's argument that "Recess" referred to any recess, stating that the Constitution would read "*a* recess" (emphasis added) if it was meant to include any recess.[42] Two of the three judges went further, stating that the vacancy must happen during "the Recess" for the president to exercise the Recess Appointments Clause.[43]

NLRB Acting General Counsel Lafe Solomon called the *Noel Canning* decision "profound, enormous, significant" and Chairman Pearce acknowledged it "has a sweeping potential."[44] Despite recognizing its significance, on the day *Noel Canning* was decided NLRB Chairman Pearce chose to ignore the Board's responsibility to foster certainty and predictability for employees, unions, and employers. Instead, he made clear that the Board will continue to function despite questions as to the constitutionality of two of the three Board members. He stated, in part, "the Board respectfully disagrees with [the Court's] decision and believes the president's position in the matter will ultimately be upheld."[45] The statement closed with "the Board". . . will continue to perform our statutory duties and issue decisions."[46]

Labor Relations Uncertainty: The Need for Legislation

The U.S. Court of Appeals for the District of Columbia's holding in *Noel Canning* has far-reaching implications on the validity of all intrasession recess appointments that must ultimately be settled by the Supreme Court. In the meantime, it is being used as controlling authority to invalidate decisions issued by the current Board. Only three things are certain: decisions issued by the current Board cannot be relied upon, every losing party will be justified in filing an appeal, and no prevailing party can be assured they will ever benefit from a Board-ordered remedy. The Board's continued operation will only perpetuate confusion and completely frustrate

[39] *Id.* at 3.
[40] *Id.* at 30.
[41] *Id.* at 17, 30.
[42] *Id.* at 17.
[43] *Id.* at 44.
[44] Dube, Lawrence E., *NLRB Officials Describe Efforts to Stay Ahead of Noel Canning and Looming Sequestration*, Daily Labor Report (February 27, 2013).
[45] Statement by Chairman Pearce on recess appointment ruling, NLRB (January 25, 2013), *available at* http://www.nlrb.gov/news/statement-chairman-pearce-recess-appointment-ruling.
[46] *Id.*

labor relations stability. This uncertainty is not what the NLRA anticipated and cannot be permitted.

Under the NLRA, "any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or . . . in the *United State Court of Appeals for the District of Columbia* [emphasis added]." [47] In other words, unlike other courts of appeals, aggrieved parties can always appeal a Board order to the U.S. Court of Appeals for the District of Columbia.

In the U.S. Court of Appeals for the District of Columbia, the holding in Noel Canning is controlling and the Board is afforded no deference on constitutional issues.[48] The U.S. Court of Appeals for the District of Columbia is "bound to follow circuit precedent until it is either overruled by an en banc court or the [U.S.] Supreme Court."[49] When applying the NLRA, "a Board rule is entitled to considerable deference so long as it is rational and consistent with the Act, even if it represents a departure from the Board's prior policy." [50] No such deference is accorded the Board on constitutional issues. Accordingly, all prior and future orders issued by a Board that relied on intrasession appointments to constitute a quorum could be overturned on constitutional grounds regardless of the decisions' merit. Additionally, former Board Member Dennis Devaney, testifying before the Education and the Workforce Committee, highlighted the fact that as regional staff will apply the most recent decisions, "the effect of the decisions will not be limited to the aggrieved party . . . the decisions will extend to all parties covered by the NLRA." [51]

Ultimately, employees, unions, and employers will be forced to endure costly litigation to overturn the Board's orders and taxpayer funds will be wasted in the defense of the Board's orders. At a February 2012 Education and the Workforce Committee hearing, Stefan Marculewicz, a management side attorney with Littler Mendelson, P.C., testified regarding the difficult situation in which employers find themselves:

> Companies trying to comply with the law will face a dilemma of whether to comply with decisions issued by this Board or refuse to do so. For many, waging a lengthy legal battle will prove too costly in time, money and other resources to justify the expenditure. Many employers will simply comply. However, if the law created by this Board is ultimately annulled in the courts, it will be very difficult indeed to pick up the pieces.[52]

While not a perfect analogy, the events surrounding *New Process Steel, L.P. v. NLRB (New Process Steel)* provide some idea of the

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[47] 29 U.S.C. 160(f).

[48] *Maxwell v. Snow,* 409 F.3d 354, 358 (D.C. Cir. 2005). See also *Brewster v. Commissioner,* 607 F.2d 1369, 1373 (D.C. Cir. 1979).

[49] *Id.*

[50] *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 775 (1990).

[51] The NLRB Recess Appointments: Implications for America's Workers and Employers, Hearing before the Education and the Workforce Committee, 112th Cong., 2nd Sess. at 3 (2012) (written testimony of Dennis Devaney) [hereinafter Devaney Testimony].

[52] The NLRB Recess Appointments: Implications for America's Workers and Employers, Hearing before the Education and the Workforce Committee, 112th Cong., 2nd Sess. at 3 (2012) (written testimony of Stefan Marculewicz) [hereinafter Marculewicz Testimony].

instability caused by the Board's continued operation. Over 27 months, starting in 2008, the NLRB issued approximately 600 rulings in unfair labor practice and representation cases with only two members.[53] With one Democrat member and one Republican member, the Board was largely limited to areas of settled law. While the decisions were largely noncontroversial, almost 100 appeals were filed with the federal appeals courts challenging the two-member Board's authority to issue decisions.[54] On June 18, 2010 in *New Process Steel*, the Supreme Court held that the NLRB must maintain a membership of at least three members to constitute a quorum.[55] All decisions issued by the two-member Board were overturned and nearly 100 cases were remanded from federal court to the Board. For nearly two years, employers were forced to comply with Board decisions that were ultimately overturned.

As noted above, unlike the relatively benign decisions overturned by New Process Steel, many of the Board decisions issued over the past year are highly controversial and have in some cases overturned longstanding Board precedent. In testimony before the Education and the Workforce Committee, Roger King, Of Counsel at the Jones Day law firm, stated that "the current Board has exercised no restraint and indeed has pursued an aggressive agenda of overturning decades of precedent and greatly expanding the reach of the Act . . . rais[ing] significant public policy issues regarding how our nation's labor policy should be established and labor laws should be enforced."[56] The enforceability of these and any future decisions is in limbo. At least 38 cases, filed by employers, unions, and employees, are being held in abeyance in the U.S. Court of Appeals for the District of Columbia alone.[57] However, challenges to NLRB actions are not limited to the federal court. The actions of NLRB regional directors and NLRB administrative law judges are being challenged based on *Noel Canning*.[58]

As the U.S. Supreme Court has recognized, achieving labor relations stability was the "primary objective of Congress in enacting the National Labor Relations Act."[59] The Board's continued operation in the wake of *Noel Canning* will only perpetuate confusion and completely frustrate the stability of labor relations. Additionally, former Board Member Devaney underscored that "uncertainty created by questions about the legality and authority of these appointments will further contribute to doubts about the agency and its mission."[60] Board decisions govern virtually every private workplace across the country, affecting the lives of millions of workers and employers. Greater uncertainty will only exacerbate the jobs crisis plaguing the nation. Given the significance of these cir-

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[53] *New Process Steel v. NLRB,* 130 S. Ct. 2635, 2639 (2010).

[54] Kaplan, Roger, *Board Begins Review of Cases in Light of New Process Steel Remands*, Union & Labor Law Review (August 9, 2010), *available at* http://www.efcablog.com/2010/08/articles/nlrb/board-begins-review-of-cases-in-light-of-new-process-steel-remands/.

[55] *New Process Steel v. NLRB,* 130 S. Ct. at 2635.

[56] The Future of the NLRB: What Noel Canning vs. NLRB Means for Workers, Employers, and Unions, 113th Cong., 1st Sess. at 4 (2013) (written testimony of G. Roger King) [hereinafter King Testimony].

[57] Recess Appointments Litigation Resource Page, National Chamber Litigation Center, *available at* http://www.chamberlitigation.com/recess-appointments-litigation-resource-page (last visited on March 26, 2013).

[58] Dude, Lawrence E., *NLRB Officials Describe Efforts to Stay Ahead of Noel Canning and Looming Sequestration*, Daily Labor Report (February 27, 2013).

[59] *Colgate-Palmolive-Peet Co. v. NLRB,* 338 U.S. 355, 362–3 (1949).

[60] Devaney Testimony at 3.

cumstances, the Education and the Workforce Committee was compelled to consider and approve H.R. 1120, the *Preventing Greater Uncertainty in Labor-Management Relations Act*.

Conclusion

To prevent greater uncertainty in the struggling economy, Congressman Roe introduced and the House Education and the Workforce Committee passed H.R. 1120, the *Preventing Greater Uncertainty in Labor-Management Relations Act*. The act prohibits the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until issues with the current Board are resolved. While the administration has announced that it will appeal the *Noel Canning* decision to the Supreme Court, to date, no *writ of certiorari* has been filed.[61] Additionally, the president has apparently elected not to work cooperatively with Democratic and Republican Senators to nominate and confirm individuals to the NLRB, choosing instead to nominate the same individuals—Sharon Block and Richard Griffin—whose previous appointments spurred the current legal controversy. In the meantime, the Board continues to take actions that are subject to appeal in a court that does not recognize the Board quorum, thus putting those actions—and the workers, employers, and unions affected by them—in legal limbo. In short, the Board's continued action is inconsistent with the National Labor Relations Act. Moreover, it is destructive to the economy. *The Preventing Greater Uncertainty in Labor-Management Relations Act* is essential to force the Board to stop taking actions that increase legal uncertainty and ultimately hurt the economy.

SECTION-BY-SECTION ANALYSIS

Section 1. Provides that the short title is the "Preventing Greater Uncertainty in Labor-Management Relations Act."

Section 2. Prevents the NLRB from engaging in any activity requiring a quorum (3 members) of the Board and forbids the NLRB from enforcing any action that required a Board quorum, taken on or after January 4, 2012, until one of the legislation's sunset provisions, found in section 3, is met.

Section 3. Provides three circumstances under which restrictions on future actions of the Board are lifted: 1) all members of the NLRB are confirmed by the U.S. Senate in a number sufficient to constitute a quorum; 2) the U.S. Supreme Court determines the constitutionality of the January 2012 recess appointments; or 3) the first session of the 113th Congress adjourns (the date upon which the January 2012 recess appointments end).

Section 4. Ensures that the Board does not enforce actions that relied upon the January 2012 recess appointments to constitute a quorum without review and approval by a constitutionally appointed Board quorum or a decision on the constitutionality of the January 2012 recess appointments from the U.S. Supreme Court.

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[61] *NLRB To Seek Supreme Court Review in Noel Canning v. NLRB,* National Labor Relations Board (March 12, 2013), *available at* http://nlrb.gov/news-outreach/news-releases/nlrb-seek-supreme-court-review-noel-canning-v-nlrb (last visited on March 26, 2013).

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 1120 prohibits the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until issues surrounding the current Board quorum are resolved.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 1120 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: March 20, 2013

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: No. 1 Bill: H.R. 1120 Amendment Number: 2

Disposition: Defeated by 16 - 23

Sponsor/Amendment: Mr. Andrews - Democratic substitute to strike all after the enacting clause

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)		X		Mr. MILLER (CA) (Ranking)			X
Mr. PETRI (WI)		X		Mr. ANDREWS (NJ)	X		
Mr. McKEON (CA)		X		Mr. SCOTT (VA)	X		
Mr. WILSON (SC)		X		Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)		X		Mrs. McCARTHY (NY)	X		
Mr. PRICE (GA)		X		Mr. TIERNEY (MA)	X		
Mr. MARCHANT (TX)		X		Mr. HOLT (NJ)	X		
Mr. HUNTER (CA)		X		Mrs. DAVIS (CA)	X		
Mr. ROE (TN)		X		Mr. GRIJALVA (AZ)	X		
Mr. THOMPSON (PA)		X		Mr. BISHOP (NY)	X		
Mr. WALBERG (MI)		X		Mr. LOEBSACK (IA)	X		
Mr. SALMON (AZ)		X		Mr. COURTNEY (CT)	X		
Mr. GUTHRIE (KY)		X		Ms. FUDGE (OH)	X		
Mr. DesJARLAIS (TN)		X		Mr. POLIS (CO)	X		
Mr. ROKITA (IN)		X		Mr. SABLAN (MP)	X		
Mr. BUCSHON (IN)		X		Mr. YARMUTH (KY)	X		
Mr. GOWDY (SC)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mrs. ROBY (AL)		X					
Mr. HECK (NV)		X					
Mrs. BROOKS (IN)		X					
Mr. HUDSON (NC)		X					
Mr. MESSER (IN)		X					

TOTALS: Aye: 16 No: 23 Not Voting: 2

Total: 41 / Quorum: 14 / Report: 21

Date: March 20, 2013

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: No. 2 Bill: H.R. 1120 Amendment Number: _____

Disposition: Ordered favorably reported to the House by a vote of 23 - 15.

Sponsor/Amendment: Mr. Petri - motion to report the bill to the House, as amended.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. MILLER (CA) (Ranking)			X
Mr. PETRI (WI)	X			Mr. ANDREWS (NJ)		X	
Mr. McKEON (CA)	X			Mr. SCOTT (VA)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)			X
Mrs. FOXX (NC)	X			Mrs. McCARTHY (NY)		X	
Mr. PRICE (GA)	X			Mr. TIERNEY (MA)		X	
Mr. MARCHANT (TX)	X			Mr. HOLT (NJ)		X	
Mr. HUNTER (CA)	X			Mrs. DAVIS (CA)		X	
Mr. ROE (TN)	X			Mr. GRIJALVA (AZ)		X	
Mr. THOMPSON (PA)	X			Mr. BISHOP (NY)		X	
Mr. WALBERG (MI)	X			Mr. LOEBSACK (IA)		X	
Mr. SALMON (AZ)	X			Mr. COURTNEY (CT)		X	
Mr. GUTHRIE (KY)	X			Ms. FUDGE (OH)			X
Mr. DesJARLAIS (TN)	X			Mr. POLIS (CO)		X	
Mr. ROKITA (IN)	X			Mr. SABLAN (MP)		X	
Mr. BUCSHON (IN)	X			Mr. YARMUTH (KY)		X	
Mr. GOWDY (SC)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mrs. ROBY (AL)	X						
Mr. HECK (NV)	X						
Mrs. BROOKS (IN)	X						
Mr. HUDSON (NC)	X						
Mr. MESSER (IN)	X						

TOTALS: Aye: 23 No: 15 Not Voting: 3

Total: 41 / Quorum: 14 / Report: 21

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 1120 is to prohibit the NLRB from enforcing any action taken since January 4, 2012, or taking any further action, for which a Board quorum is required, until issues surrounding the current Board quorum are resolved. The Committee expects the NLRB to comply with these provisions and implement the changes to the law in accordance with these stated goals.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 1120 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 1120 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 1120 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 21, 2013.

Hon. JOHN KLINE, *Chairman,*
Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1120, the Preventing Greater Uncertainty in Labor-Management Relations Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

H.R. 1120—Preventing Greater Uncertainty in Labor-Management Relations Act

H.R. 1120 would prohibit the National Labor Relations Board from undertaking activity that requires a quorum of the members of the Board. Further, the bill would prohibit the Board from implementing, administering, or enforcing any decisions finalized on or after January 4, 2012. Those prohibitions would terminate when either all members for the Board are confirmed by the Senate in a number sufficient to constitute a quorum, when the Supreme Court issues a decision as to the constitutionality of the appointments made to the Board in January 2012, or when the first session of the 113th Congress adjourns sine die.

Enacting H.R. 1120 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. H.R. 1120 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 1120. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

MINORITY VIEWS

H.R. 1120, "THE PREVENTING GREATER UNCERTAINTY IN LABOR-MANAGEMENT RELATIONS ACT"

113TH CONGRESS, 1ST SESSION

APRIL 3, 2013

Committee Democrats oppose H.R. 1120. This legislation requires the National Labor Relations Board ("NLRB" or "Board") to cease all activity that requires a quorum of Board members. H.R. 1120 shuts down the NLRB, rendering critical rights and protections afforded workers and employers under the National Labor Relations Act ("NLRA") unenforceable. A right without a remedy is no right at all. This legislation allows a party to ignore election results. It leaves workers, unions, and employers alike vulnerable to unfair labor practices. By throwing yet another wrench into the NLRB processes, it creates new uncertainty and instability in labor-management relations and our economy generally.

Committee Republicans introduced H.R. 1120 and voted it out of Committee in less than five legislative days. Not a single hearing was held on the bill. There was no opportunity to examine the implications of H.R. 1120, no objective assessments by any experts, and no evaluation of the impact on the millions of workers and employers who will be affected by this legislation.

H.R. 1120 will be devastating to workers and employers. It will frustrate workers' right to organize, shutting down elections altogether or allowing an incumbent party to simply ignore the election results or force ballots to go uncounted. It promotes strikes as the only viable means of addressing unfair labor practices. It makes it impossible for workers illegally fired for exercising their NLRA rights to actually get their jobs back in many regions. It makes it highly unlikely that they will in other regions. It creates an incentive for frivolous appeals and litigation. It enables employers to unlawfully ship jobs overseas. During the Committee mark-up, Democratic members questioned the impact H.R. 1120 will have on these issues to no avail.

This legislation is also an attack on Presidential appointment power. Presidents have recess appointed hundreds of individuals to positions at various agencies and throughout the federal courts. Contrary to Committee Republicans' politicized view of President Obama's appointment of Sharon Block, Richard Griffin, and Terrence Flynn, these appointments were within the long standing interpretation of the President's Constitutional Appointment power and necessary to keep a critical agency functioning in the face of Republican obstructionism.

This Committee has important work to do to rebuild the middle class. Instead of working to ensure Americans have good jobs, pro-

tecting workers' pensions and retirement security, raising the minimum wage, and dealing with issues of discrimination in employment, Committee Republicans have decided to continue to use Committee time and resources to advance an anti-worker agenda. H.R. 1120 demonstrates that a top priority for Committee Republicans is to rush politically motivated legislation to the floor that eviscerates the rights of workers to organize and collectively bargain.

HOUSE REPUBLICANS' UNPRECEDENTED ASSAULT ON THE NLRB

House Republicans have committed unprecedented resources to attacking the NLRB. These attacks come at a telling time. In 2012, 7 million private sector workers belonged to a union, while the number of unemployed workers remained above 12 million. Adding in the underemployed nets 25 million workers looking for decent jobs. Yet, rather than working to help create jobs or find people meaningful employment, House Republicans' focus has been on attacking the small sliver of the workforce that is not only employed but consistently earns higher wages and benefits than its nonunion counterparts. For political and ideological reasons, attacking organizations that secure jobs for workers with decent pay and benefits, or the agency that administers and enforces the rights of these workers, is a top priority of the House Republicans. This is tragic, and its utter counterproductivity is one of the many reasons why the American people view Congress so unfavorably.

Last Congress, one of the first legislative items House Republicans considered included an amendment to shut down the NLRB. Committee Republican Tom Price offered Amendment 410 to H.R. 1, the fiscal year (FY) 2011 spending bill, to defund the NLRB and shut it down completely.[1] Representative Rosa DeLauro (D–CT) characterized the amendment as "a step backward for democracy."[2] A majority of the Republican caucus voted in favor of the amendment, including HELP Subcommittee Chairman Roe, sponsor of H.R. 1120. Democrats unanimously opposed the amendment, and it failed.[3]

Additional attacks on the NLRB include: a budget that would have forced the Board to furlough all of its employees for much of FY 2011, a bill to remove all prosecutorial and rulemaking authority from the Board, and a bill that would abolish the NLRB completely, shifting its current authority to other agencies.[4] The FY 2012 spending bill, H.R. 3070, included various provisions aimed at defunding the NLRB's rulemaking and enforcement authority. These include the:

- Prohibition of funding used to develop, implement, and enforce rules.
- Prohibition on funding to enforce the NLRB's *Specialty Healthcare* decision.
- Prohibition on funding to enforce the NLRB's *Lamon's Gasket* decision.

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[1] *Available at* http://www.thomas.gov/cgi-bin/bdquery/D?d112:54:./temp/~bdy3W8::.

[2] *Available at* http://www.gpo.gov/fdsys/pkg/CREC-2011-02-16/pdf/CREC-2011-02-16-pt1-PgH957-2.pdf#page=1 at H1031.

[3] *Available at* http://clerk.house.gov/evs/2011/roll075.xml.

[4] H.R. 2926, *available at* http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2926.

Republicans also included several riders to other FY 2012 House Appropriations bills.

- A rider to H.R. 2055 (*Military Construction and Veterans' Affairs spending measure*) prohibiting funding for the development, implementation, and enforcement of rules relating to electronic voting in elections.
- A rider to H.R. 5326 (*Commerce Justice and Science spending measure*) eliminating funding for the NLRB's prosecutorial authority to litigate against states enacting laws in violation of the NLRA.

Since gaining control of the House, Committee on Education and the Workforce Republicans have held no fewer than nine hearings attacking the NLRB.

1. Feb. 11, 2011: *Emerging Trends at the National Labor Relations Board* [5]
2. May 26, 2011: *Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation* [6]
3. July 7, 2011: *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice* [7]
4. Sep. 22, 2011: *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board* [8]
5. Oct. 12, 2011: H.R. 3094, *Workforce Democracy and Fairness Act* [9]
6. Feb. 7, 2012: *The NLRB Recess Appointments: Implications for America's Workers and Employers* [10]
7. July 25, 2012: *Examining Proposal to Strengthen the National Labor Relations Act* [11]
8. Sep. 12, 2012: *Expanding the Power of Big Labor: The NLRB's Growing Intrusion into Higher Education* [12]
9. Feb. 11, 2013: *The Future of the National Labor Relations Board (NLRB): What Noel Canning v. NLRB Means for Workers, Employers, and Unions* [13]

In addition, other Committees have held hearings attacking the NLRB. These include:

House Committee on Appropriations

10. Apr. 6, 2011: *Budget Hearing—National Labor Relations Board—Chairman and Acting General Counsel* [14]

House Committee on Oversight and Government Reform

11. June 17, 2011: *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise* [15]

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[5] *Available at* http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=223394.
[6] *Available at* http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=242129.
[7] *Available at* http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=249459.
[8] *Available at* http://edworkforce.house.gov/Calendar/EventSingle.aspx?EventID=260180.
[9] *Available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=263036.
[10] *Available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=277173.
[11] *Available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=303444.
[12] *Available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=307454.
[13] *Available at* http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=319410.
[14] *Available at* http://appropriations.house.gov/Calendar/EventSingle.aspx?EventID=236067.
[15] *Available at* http://oversight.house.gov/index.php?option=com_content&view=article&id=1339%3A6-17-11-qunionization-through-regulation-the-nrlbs-holding-pattern-on-free-enterpriseq&catid=12&Itemid=1.

12. Feb. 1, 2012: *Uncharted Territory: What are the Consequences of President Obama's Unprecedented 'Recess' Appointments?* [16]

House Committee on Small Business

13. Oct. 5, 2011: *Adding to Uncertainty: The Impact of DOL/NLRB Decisions and Proposed Rules on Small Businesses* [17]

In addition to these hearings, the Committee also reported out two anti-worker bills that went on to pass the House. H.R. 2587, the *Protecting Jobs from Government Interference Act*, also referred to as the "Job Outsourcer's Bill of Rights," stripped the NLRB of its authority to order an employer to restore work to the U.S. that had been illegally outsourced in violation of the NLRA.[18] Under H.R. 2587, an employer could retaliate against an organizing drive by shipping jobs to Mexico or China, and the NLRB would have no authority to order the jobs back to the U.S. In 2000, the NLRB ordered an employer to bring jobs back from Mexico after it closed a portion of its California plant and moved the jobs to Tijuana after U.S. workers successfully organized a union. With H.R. 2587, Republicans have enabled the employer to outsource those jobs. H.R. 2587 made it easier than ever to ship jobs overseas.[19] This bill passed by 238–186 with an overwhelming 230 supporting votes from the Republican caucus.[20]

Another House-passed and Republican-sponsored bill, H.R. 3094, the *Workforce Democracy and Fairness Act*, more appropriately referred to as the "Election Prevention Act," would frustrate workers' attempts to hold elections for union representation.[21] The legislation mandated arbitrary delays in any worker petition for a union election. For instance, no election could occur sooner than 35 days after the filing of a petition.[22] However, there was no limit on how long an election might be delayed.[23] H.R. 3094 enables unscrupulous employers to pressure employees into abandoning their organizing efforts.[24] This bill, sponsored by Committee Chairman John Kline, passed 235–188 with a majority of Republicans supporting it.[25]

A FUNCTIONING NLRB IS KEY TO PROTECTING WORKERS' RIGHTS

For more than 75 years, the National Labor Relations Act (NLRA) has provided Americans the right to band together in unions and bargain for a better life. From the beginning, the National Labor Relations Board has administered and enforced this law on behalf of workers and employers. Under the law, it is illegal to retaliate against workers for exercising their rights. These dec-

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[16] *Available at* http://oversight.house.gov/wp-content/uploads/2012/06/02-01-12-Full-Committee-Hearing-Transcript.pdf.
[17] *Available at* http://smallbusiness.house.gov/Calendar/EventSingle.aspx?EventID=262090.
[18] *Available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112–2587.
[19] *Available at* http://democrats.edworkforce.house.gov/blog/gops-job-outsourcers%E2%80%99–bill-rights-facts-hr–2587.
[20] *Available at* http://clerk.house.gov/evs/2011/roll711.xml.
[21] *Available at* http://www.govtrack.us/congress/bill.xpd?bill=h112–3094.
[22] *Available at* http://democrats.edworkforce.house.gov/blog/facts-republicans-hr-3094-election-prevention-act.
[23] *Id.*
[24] *Id.*
[25] *Available at* http://clerk.house.gov/evs/2011/roll869.xml.

ades-old rights include the right to strike or the right to form or join a union or even to simply sign a petition asking for a raise or better safety equipment.

The freedom to organize and collectively bargain depends upon the effectiveness of the NLRA and the rights of workers that are enshrined within the Act. Section 1 of the Act declares "it is the policy of the United States" to encourage "the practice and procedure of collective bargaining and [to protect] the exercise by workers of full freedom of association, self-organizing 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." [26]

Section 7 of the Act establishes the fundamental rights of workers to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ." [27] Section 8 lays out a variety of prohibitions for both employer and union behavior. For example, employers may not interfere with, coerce, intimidate, or discriminate against employees in the exercise of their Section 7 rights. Section 9 lays out the NLRB-administered process for providing workers with elections to certify or decertify a union as their exclusive bargaining representative.

To ensure that these rights are meaningful, workers must have the ability to enforce their rights. While the NLRA does not require specific remedies, Section 10(c) of the Act provides that the Board may order "such affirmative action . . . as will effectuate the policies of [the] Act." [28] The Supreme Court has held that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress." [29] Unlike modern employment statutes, such as the Civil Rights Act, there is no individual right of action under the NLRA for retaliation due to an employee seeking to exercise their statutory rights. This means that workers cannot bring a claim in the courts. Aggrieved workers' only source of recourse is to file a complaint with the NLRB and their remedies are generally limited, unlike in the court system. For example, the law only requires employers to reinstate employees unlawfully discharged, post a notice promising to never do it again, and pay the employee back wages minus what the worker earned or should have earned in the interim. In 2003, the average back-pay amount was a mere $3,800.[30]

RECESS APPOINTMENTS NECESSARY TO KEEP NLRB FUNCTIONING

NLRB Could Not Function Without Recess Appointments

The NLRB, by statute, has five members who serve five-year terms.[31] However, for more than two years, (January 1, 2008 to

[26] 29 U.S.C. § 151.
[27] 29 U.S.C. § 157.
[28] 29 U.S.C. § 160(c).
[29] *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).
[30] "Strengthening America's Middle Class through the Employee Free Choice Act," Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Schiffer, at 6).
[31] 29 U.S.C. 153.

March 27, 2010) the Board operated with only two members (Wilma Liebman (D) and Peter Schaumber (R)) because the Senate failed to confirm nominees to fill vacancies on the Board.[32] The over 500 decisions issued during this time were generally non-controversial because they had to be unanimous. However, in numerous cases, the Board's orders and decisions were challenged on the basis that the NLRB lacks authority to act with only two members.[33] Although five courts of appeals held that the NLRB could act with only two members,[34] the Supreme Court resolved a split among the Circuit Courts of Appeal and in a 5–4 ruling held that the NLRB does not have the authority to act without a quorum of three members.[35] The Board lacked a quorum from January 1, 2008 to March 27, 2010.

The Board regained a quorum in March 2010 when President Obama, recognizing the need to have a fully-functioning Board, appointed Craig Becker and Mark Pearce during a Congressional recess.[36] The Board was once again reduced to 2 members after Chairwoman Liebman's term expired in August 2011 and Craig Becker's term expired on January 3, 2012. The next day, January 4, President Obama used his recess powers and appointed three new members to the Board: Democratic nominees Sharon Block, and Richard F. Griffin, Jr., and Republican nominee Terence F. Flynn. Although all three Members were appointed on the same day, the President had previously nominated each appointed Member.[37]

Republican Obstruction of Appointments

President Obama made the Board recess appointments at a time when there had been an escalating battle surrounding the confirmation process and relentless Republican attacks on the NLRB. Senate Republicans openly admitted that they would utilize procedural tactics to prevent confirmation. Senator Lindsey Graham even vowed to block all nominees to the NLRB, saying "the NLRB as inoperable could be considered progress." [38]

Obstruction of President Obama's appointments has not been limited to his nominations to the Board. In the 111th Congress alone, the Republican Minority required cloture votes on President Obama's nominees 21 times—more than in any previous Congress in history.[39] As of January 26, 2012, 74 nominees were pending

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[32] *See Talk about Recess Appointments Follows Senate's Defeat of Cloture Motion on Becker*, 30 Daily Lab. Rep. A–10 (Feb. 17, 2010).

[33] Brief for the National Labor Relations Board, *New Process Steel, LLP v. NLRB*, No. 08–1457 (2010). *Available at* http://www.justice.gov/osg/briefs/2009/3mer/2mer/2008-1457.mer.aa.pdf.

[34] *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 41 (1st Circuit 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 424 (2d Circuit 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654, 660 (4th Circuit 2009); *New Process Steel, LLP v. NLRB*, 564 F.3d 840, 845 (7th Circuit 2009); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849, 852 (10th Circuit 2009).

[35] *New Process Steel, LLP v. NLRB*, No. 08–1457 (Supreme Court of the United States 2010). *Available at* http://www.supremecourt.gov/opinions/09pdf/08-1457.pdf.

[36] Both Mark Pearce and Brian Hayes (R) were confirmed by the Senate in June 2010.

[37] Terrence Flynn was nominated by President Obama in January 2011 and had been working at the Board as chief counsel to Member Hayes. Both Sharon Block and Richard Griffin were nominated on December 14, 2011.

[38] Senator Tom Harkin (IA). "Recess Appointments." Congressional Record 158: 12 (January 26, 2012) p. S88 *Available at* http://www.gpo.gov/fdsys/pkg/CREC-2012-01-26/pdf/CREC-2012-01-26.pdf

[39] Richard S. Beth and Betsy Palmer, *Cloture Attempts on Nominations*, March 9, 2012, CRS RL32878, p. 4.

consideration on the Senate floor while 107 are held up in committee because of ideological differences.[40]

Republicans have also worked to prevent nominations by interfering with the President's power to make recess appointments. In 2011, almost 80 freshman Representatives requested that Speaker Boehner, Majority Leader Cantor, and Majority Whip McCarthy take "all appropriate measures to prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[41] Signatories to this letter include seven Committee Republicans: Representatives DesJarlais, Rokita, Bucshon, Gowdy, Barletta, Roby, and Heck.[42]

In 2011, the Republican Majority began scheduling pro forma sessions in the House—in an attempt to withhold adjournment consent and prevent the Senate from recessing. As a result, the Senate has held pro forma sessions roughly every three days during breaks based on a prior Department of Justice ("DOJ") memo suggesting that a three-day recess minimum is needed to trigger appointment authority. However, the Eleventh Circuit in *Evans v. Stephens* held that the "Constitution, on its face, does not establish a minimum time that an authorized break in the Senate must last to give legal force to the President's appointment under the Recess Appointment Clause."[43] Prior to making the recent recess appointments the President consulted DOJ. On January 6, 2012, DOJ issued a memorandum opinion for the counsel to President Obama that reaffirmed this principle. The DOJ concluded that the President had discretion to determine that the Senate was unavailable to perform its advise-and-consent function and to exercise his recess appointment power.[44]

NOMINATIONS AND RECESS APPOINTMENTS TO NATIONAL LABOR RELATIONS BOARD, 2009—MARCH 2013[45]

Congress	Nominee (a)	Presidential action	Date	Final Senate status (b)	Subsequent action	Date
111	Brian Hayes	Nominated	7/9/2009	**Confirmed**		6/22/2010
111	Mark Gaston Pearce.	Nominated	7/9/2009	**Confirmed**		6/22/2010
111	Mark Gaston Pearce.	Recess appointment announced.	3/27/2010			
111	Mark Gaston Pearce.	Nominated	4/21/2010	Referred	Returned to President.	12/22/2010
111	Craig Becker (c).	Nominated	7/9/2009	Reported	Returned to President.	12/24/2009
111	Craig Becker (c).	Nominated	7/9/2009	Reported	Returned to President.	12/24/2009
111	Craig Becker	Nominated	1/20/2010	**Cloture rejected**.	Returned to President.	8/5/2010
111	Craig Becker	Recess appointment announced.	3/27/2010			

[40] Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. Times (Jan. 7, 2012)

[41] Congressman Jeff Landry et al., Letter to Speaker Boehner, Majority Leader Cantor and Majority Whip McCarthy, June 15, 2011.

[42] *Id.*

[43] *Evans v. Stephens,* 387 F.3d 1220, 1224 (11th Cir. 2004).

[44] Department of Justice memo *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, January 6, 2012 at 23.

NOMINATIONS AND RECESS APPOINTMENTS TO NATIONAL LABOR RELATIONS BOARD, 2009—MARCH 2013 [45]—Continued

Congress	Nominee (a)	Presidential action	Date	Final Senate status (b)	Subsequent action	Date
111	Craig Becker ..	Nominated	4/21/2010	Referred	Returned to President.	12/22/2010
112	Craig Becker ..	Nominated	1/26/2011	Referred	Withdrawn	12/15/2011
112	Terence Francis Flynn.	Nominated	1/5/2011	Referred	Withdrawn	6/7/2012
112	Terence Francis Flynn.	Recess appointment announced.	1/4/2012			
112	Terence Francis Flynn.	Nominated	2/13/2012	Referred	Withdrawn	6/7/2012
112	Lafe E. Solomon (d).	Nominated	1/5/2011	Referred	Returned to President.	1/3/2013
112	Richard F. Griffin, Jr.	Nominated	12/15/2011	Referred	Returned to President.	1/3/2013
112	Richard F. Griffin, Jr.	Recess appointment announced.	1/4/2012			
112	Richard F. Griffin, Jr.	Nominated	2/13/2012	Referred	Returned to President.	1/3/2013
113	Richard F. Griffin, Jr.	Nominated	2/13/2013	Referred.		
112	Sharon Block ..	Nominated	12/15/2011	Referred	Returned to President.	1/3/2013
112	Sharon Block ..	Recess appointment announced.	1/4/2012			
112	Sharon Block ..	Nominated	2/13/2012	Referred	Returned to President.	1/3/2013
113	Sharon Block ..	Nominated	2/13/2013	Referred.		

[45] Legislative Information System of the U.S. Congress (LIS), ''Nominations'' file. Recess appointment information from CRS Report R42329, ***Recess Appointments Made by President Barack Obama***, by Henry B. Hogue and Maureen Bearden.

Notes:

(a) Except as noted, all nominees were nominated as Members of the NLRB. See text of memorandum for explanation of overlapping nominations to the same term of the same position.

(b) For nominations that received floor action, the entry in this column appears in **boldface.**

(c) Becker was nominated simultaneously for a term ending December 16, 2009, and a term ending December 16, 2014.

(d) Solomon was nominated not as a Member of the NLRB, but as its General Counsel.

NOEL CANNING—OVERTURNING LONG-ESTABLISHED INTERPRETATION OF PRESIDENT'S CONSTITUTIONAL APPOINTMENT POWER

Legal challenges were quickly filed against President Obama's recess appointments to the Board (and the Consumer Financial Protection Bureau). In January 2013, a three-judge panel of the United States Court of Appeals for the D.C. Circuit held in the *Noel Canning* case that President Obama's recess appointments of NLRB Members Block and Griffin were invalid. The court's decision broke with long-established precedent and has implications far beyond the NLRB, calling into question hundreds of previous presidential appointments across the federal government and federal courts.

Noel Canning

Noel Canning was initially the subject of an unfair labor practice ("ULP") proceeding filed by the Teamsters before the NLRB. The case arose out of a dispute between the employer, *Noel Canning*, a soft drink bottler, and the International Brotherhood of Team-

sters Local 760, concerning whether there was an agreement on the terms of a collective bargaining agreement and whether *Noel Canning* committed an unfair labor practice in refusing to execute the collective bargaining agreement. In this case, the employer and the union were negotiating a new contract. While the union asserts the parties were able to reach an agreement, the employer refused to execute it and the union filed a ULP with the Board. The NLRB Administrative Law Judge ("ALJ") ruled in favor of the union and the Board affirmed the ALJ decision. Consequently, Noel Canning appealed that decision to the D.C. Circuit. The NLRB petitioned for enforcement of its decision and order.

D.C. Circuit Decision

In its appeal before the D.C. Circuit Court, Noel Canning challenged the validity of the Board's decision and argued the Board did not have a quorum to issue a decision in the case because the recess appointments were not valid. The D.C. Circuit ruled in favor of the Noel Canning Company, agreed with the employer and invalidated Obama's recess appointments on two grounds. It first held that the Recess Appointments Clause refers only to intersession recess (between two formal sessions of Congress) and does not include *intrasession* breaks or adjournments.[46] Under that reasoning, President Obama's appointment of Members Block and Griffin on January 4, 2012 constituted an *intrasession* appointment and was therefore invalid. The D.C. Circuit then considered when a vacancy must "happen" for purposes of the Recess Appointments Clause. They concluded that the clause covers only vacancies that arise during the recess, not vacancies that "happen to exist" when the recess begins (i.e., a seat vacant before recess begins cannot be filled during recess). This interpretation further restrains the president's recess appointment powers. The court held that President Obama's NLRB appointments were invalid on this basis as well, given that none of the vacancies themselves arose during an intersession recess. For these two reasons, the D.C. Circuit found the Board lacked a quorum and could not lawfully decide the underlying case, a basic unfair labor practice case.

The opinion contradicts federal appellate precedent in three circuits. In 2004, the Eleventh Circuit upheld President Bush's *intrasession* recess appointment of Judge Pryor. *Evans v. Stephens*, 387 F.3d 1220 (2004) (en banc). The Second and Ninth Circuits both refused to limit the President's appointment powers to vacancies that arise during a recess. *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1982); *United States v. Allocco*, 305 F.2d 704 (2nd Cir. 1962).

Implications of Noel Canning

The recess appointment power is provided for under Article II of the Constitution, which states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the

[46] *Noel Canning v. NLRB*, No. 12–1153 Consolidated with 12–1153, slip op. at 30 (Jan. 25, 2013). *Available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/D13E4C2A7B33B57A85257AFE00556B29/$file/12-1115-1417096.pdf.

End of their next Session."[47] Using this power, Presidents have appointed hundreds of individuals to positions at various agencies and the federal courts. Reagan made 232 such appointments over the course of his presidency. Clinton made 139, and George W. Bush made 171. George H.W. Bush used the power 74 times in his single term—more than double the 32 times it was used during the first term of the Obama administration.[48] There have been 29 total recess appointments to the NLRB, and every president since Carter has exercised this power for Board appointments.[49]

The D.C. Circuit's decision in *Noel Canning* extends far beyond the current challenges to the President's Board recess appointments. Under the Court's holding in the case hundreds of recess appointments would be invalidated if they were subject to the decision, including as many as 25 recess appointments to the NLRB.[50] The Congressional Research Service (CRS) has recently estimated that since January 20, 1981, presidents have made a total of 329 *intrasession* recess appointments, each of which would be invalid under *Noel Canning*. Reagan made 72 such appointments, George H.W. Bush made 37, and Clinton made 53. Ironically, the most active president in making *intrasession* recess appointments was Republican George W. Bush, who made 141 during his presidency, while President Obama has made only 26—the fewest of any president since Reagan.[51] Data is not readily available on the exact number of recess appointments that would have been invalidated under the alternative grounds specified in *Noel Canning*—i.e., those intersession recess appointments in which the vacancy did not "arise" during a recess—however CRS concluded that there are a "substantial number" of these appointments as well.[52]

The appointments potentially invalidated by *Noel Canning* would disrupt the work of many federal agencies, ranging from the Department of the Treasury to the Office of Management and Budget—and include appointments to critical positions. For example, President Reagan's *intrasession* recess appointment of Donald P. Hodel to serve as Secretary of Energy on November 5, 1982 would have been invalidated by *Noel Canning*, as would President George W. Bush's nomination of John R. Bolton to serve as U.S. Representative to the United Nations Appointee on August 1, 2005. Ambassador Bolton served out his recess appointment without ever receiving Senate approval. The federal courts themselves would also be impacted by the D.C. Circuit Court's decision in *Noel Canning*. For example, President George W. Bush *intrasession* appointed William H. Pryor on February 20, 2004 to serve on the U.S. Court of Appeals for the Eleventh Circuit. His nomination and all the cases in which he participated could be invalidated until his confirmation on June 9, 2005.

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[47] U.S. Constitution Article II, Section 2, Clause 3.

[48] See Congressional Research Service, "The *Noel Canning* Decision and Recess Appointments Made from 1981–2013", Table 1. (Feb. 4, 2013).

[49] See Congressional Research Service, "The *Noel Canning* Decision and Recess Appointments Made from 1981–2013", Tables 2–11. (Feb. 4, 2013).

[50] Id.

[51] Henry B. Hogue, Maeve P. Carey, Michael W. Greene and Maureen Bearden, *The Noel Canning Decision and Recess Appointments Made from 1981–2013, Feb. 4, 2013, CRS Memorandum, available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf.

[52] Id. at 3.

House Republicans did not raise concerns about the constitutionality of these prior *intrasession* appointments by Presidents who were not Barack Obama.

NUMBER OF DOCUMENTED INTRASESSION AND INTERSESSION RECESS APPOINTMENTS SINCE JANUARY 20, 1981, BY PRESIDENT

Administration	Intrasession recess appointments (estimate)	Intersession recess appointments (estimate)	Total documented recess appointments
Ronald W. Reagan	72	160	232
George H. W. Bush	37	41	78
William J. Clinton	53	86	139
George W. Bush	141	30	171
Barack H. Obama	26	6	32
Total	329	323	652

H.R. 1120 DENIES WORKERS & EMPLOYERS ANY EFFECTIVE REMEDY WHEN THEIR NLRA RIGHTS ARE VIOLATED

H.R. 1120 requires the NLRB to cease all activity that requires a quorum of Board members. The bill is nothing more than an attempt to shut down the only agency with the authority to ensure workers have the right to organize and bargain collectively. Nothing in this legislation protects workers or employers or provides greater certainty in labor-management relations. At nearly every Committee hearing on Board matters, witnesses have testified that the politicized exercises Committee Republicans continue to engage in against the Board does nothing to harmonize labor-management relations.

H.R. 1120 requires the Board to cease all activity that requires a quorum of members until (1) a quorum of Board members are confirmed by the Senate, (2) the Supreme Court issues a decision on the constitutionality of the recess appointments, (3) the adjournment *sine die* of the first session of the 113th Congress. In the event that a quorum of members is confirmed by the Senate or the 113th Congress adjourns *sine die,* no decision, rule, vote, or other action taken by the Board on or after January 4, 2012 will be enforceable. This means that all decisions issued by the Board during that time (approximately 569 decisions) will remain unenforceable. In addition, the bill would prevent the Board from enforcing decisions issued prior to January 4, 2012, where parties are in contempt.

Specifically, the bill affects the Board's ability to act in the following areas:

Decisions & Orders—Under this bill, the Board will be prevented from issuing decisions.

- After an ALJ in a ULP proceeding or a Regional Director in an election case issues a decision, a party may appeal to the Board. Under H.R. 1120, parties could appeal, but the Board would be prevented from deciding the issue, creating uncertainty for employees, employers, and unions alike. For example, a worker unlawfully fired from her job may be awarded an order of reinstatement by an ALJ. If that decision is appealed, the Board cannot hear the appeal, and the injured worker will

remain out of her job, with her family enduring the associated consequences, while H.R. 1120 is in effect.

Petition for Enforcement of an Order

- Board orders are not self-enforcing. Only a U.S. Circuit Court of Appeals can enforce Board orders, and the Board must petition for such enforcement.[53] Under H.R. 1120, there would be no way to enforce Board orders in ULP charges, whether the order was the product of the current Board or a prior Board.

Pursuing Injunctive Relief

- In some cases where a ULP is filed, the alleged violation is so severe that immediate steps are necessary to prevent further harm to workers whose rights have been violated. Under the NLRA, only the Board can grant the General Counsel permission to petition a Federal District Court for 10(j) injunctive relief. Under H.R. 1120, there will be no way for the NLRB to enjoin or restrain plainly unlawful acts pending resolution of a charge. In other words, H.R. 1120 creates an open season on pro-union workers, who might be fired en masse for attempting to organize, removing them from the workforce while H.R. 1120 is in effect.

Elections

- Under the NLRA, prior to an election being held, a party may challenge a Regional Director's determination of the bargaining unit, by filing a "petition for review" with the Board. Under the Board's internal rules (Section 11274 of the Casehandling Manual), "[t]he filing of a request for review shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the Regional Director, including the direction or conduct of an election, except that the Regional Director, in the absence of a waiver, may not open and count any ballots that may be challenged until the Board has ruled on any request for review that may be filed. Nor will the granting of review stay the Regional Director's decision or the directed election unless ordered by the Board." Under H.R. 1120, the Board would not be able to "rule on any request for review." Therefore, by simply filing this petition for review, a party can stop ballots from being opened and counted under H.R. 1120.
- If neither party files a petition for review and the ballots are opened and counted, a party can ignore the election results under H.R. 1120. In the case of a certification election, for example, if the Regional Director determines that the union has won the election and orders the parties to begin collective bargaining, the employer may simply refuse to collectively bargain. The union may file an unfair labor practice charge. It may prevail before an ALJ. The employer can then appeal the decision to the full Board, where no further action may be taken under H.R. 1120.

[53] *See,* 29 U.S.C. § 160(e).

Appointment of Regional Directors

- The Board must approve the appointment, transfer, or discharge of any Regional Director.[54] The current Board has appointed or transferred 10 Regional Directors and additional vacancies are likely to occur. Under H.R. 1120, one-third of the Agency's regional offices would be without a Director. Workers and employers in those regions would be unable to have election petitions addressed, elections held or certified, or ULP complaints issued. Regions in which the NLRA will be effectively repealed while H.R. 1120 is in effect include Atlanta, covering the southeast; Tampa, covering most of Florida; Brooklyn; Manhattan; Los Angeles, covering southern California; Detroit, covering most of Michigan; Philadelphia, covering eastern Pennsylvania and southern New Jersey; Seattle, covering the northwest; Puerto Rico; and Milwaukee covering most of Wisconsin and the Michigan upper peninsula. Moreover, it is not at all clear what comes of decisions already made by these appointed Regional Directors, including whether certified elections become uncertified under this bill.

Issuing Rules and Regulations

- Under H.R. 1120, the Board would be prevented from issuing rules and regulations. While Republicans have criticized the Board's attempts to issue regulations that would have required the posting of an employee rights' notice and improved the election process, this legislation also prevents the Board from taking basic administrative steps to improve Agency efficiency. For example, the Board's effort to streamline its regional offices requires changes to the Agency's rules and would, therefore, be prohibited under H.R. 1120.

Unfair Labor Practice Strikes

- In labor law, two different tools are available to parties: legal remedies and economic weapons. Under H.R. 1120, if an employer refuses to comply with an Administrative Law Judge decision, with no effective appeals process in place to enforce that decision, or a complaint process is rendered unavailable in a region of the country, the only recourse available to workers is the economic weapon—specifically, an unfair labor practice strike. In this way, H.R. 1120 encourages workers to engage in work stoppages if they need to remedy various violations of the NLRA, such as an unlawful firing or bad faith bargaining. The bill not only increases uncertainty, it increases instability and unrest in workplaces and in the national economy. This result should be unsurprising, as the NLRB was established, not just to protect the rights of workers and employers, but "to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other." By shutting down the NLRB, H.R. 1120 invites chaos in labor relations.

[54] 77 Fed. Reg. 45696.

UNIONS AND THE MIDDLE CLASS

The consequences of H.R. 1120 cannot be understated. H.R. 1120 is an assault on workers and their right to organize and collectively bargain. By shutting down the only agency with the authority to enforce the right to organize and collectively bargain, Republicans continue to attempt to frustrate workers' attempts to organize and have a voice in the workplace. These attacks are especially damaging as our nation emerges from the Great Recession. Unions helped build the American middle class. At a time when wages are stagnant and wealth is increasingly concentrated, it is critical that workers have a meaningful voice in our economic recovery. In fact, wage depreciation, egregious inequality, and excessive corporate power that undermined the ability of the average worker to make a living wage spurred the passage of the NLRA in 1935.

U.S. Senator Robert F. Wagner, the author of the NLRA, reviewed economic conditions leading up to the Great Depression in a May 15, 1935 speech to the Senate, stating that

> *By 1929, 200 huge corporations owned one-half of our total corporate wealth. Two years later, 100 general industrial corporations out of a total of 300,000 controlled one third of the general industrial wealth of the Nation. As a natural corollary, the wage earners' share in the product created by manufacturing has declined steadily for nearly a century. . . . Sixteen million families, or 60 percent of the people, had annual incomes below the $2,000 per year necessary for the basic requirements of health and decency. And nearly 20,000,000 families, constituting 71 percent of all America, received less than $2,500 a year. At the same time, in the highest income bracket, one-tenth of 1 percent of the families in the United States were earning as much as the 42 percent at the bottom.*[55]

The economic conditions that contributed to the Great Depression mirror many of the same conditions that led to the Great Recession. Now is not the time to impede workers' rights under the NLRA, which for decades helped reverse wage stagnation and income inequality. As unions came under increasing assault in recent decades, wage growth has declined, and income disparities have increased. A recent study from Northeastern University found that, between 2009 when the economic recovery began and the end of 2010, national income rose by $528 billion with $464 billion of that growth going to corporate profits and $7 billion to wages and salaries.[56] Better wages mean workers have money to spend on their families, which is good for local businesses and good for job creation.

Current data overwhelmingly shows that employees in unionized workplaces earn significantly more than non-union workers. According to the Bureau of Labor Statistics, the median weekly earn-

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[55] Leon H. Keyserling. *The Wagner Act: Its Origin and Current Significance*, 29 George Washington Law Review 199 (1960–1961).

[56] Andrew Sum, et al., *The "Jobless and Wageless" Recovery from the Great Recession of 2007–2009: The Magnitude and Sources of Economic Growth Through 2011 I and Their Impacts on Workers, Profits, and Stock Values*, Northeastern University (2011). *Available at* http://www.clms.neu.edu/publication/documents/RevisedlCorporatelReportlMayl27th.pdf.

ings of full-time union workers in 2012 were $943 compared with $742 for nonunion workers—or $10,400 more per year per worker.[57] In addition, unionization also raises the wages of the typical low-wage worker by 20.6%.[58] And unionized high school graduates earned 17% more than non-unionized high school graduates in 2011.[59]

In addition, union workplaces are more likely to provide employees with critical benefits, including health insurance and retirement benefits. Union workers are 28.2% more likely than their nonunion counterparts to have employer-sponsored healthcare plans.[60] Furthermore, 71.9% of union workers are offered employer-provided pensions, compared with only 43.8% of nonunion workers. When this difference is adjusted for other factors, union members are 53.9% more likely to have pension coverage.[61] In addition, union workers are 285%—nearly three times—more likely than nonunion workers to have defined-benefit pensions.[62]

Participation in unions is important to improving the lives of women and minorities. Unions raise the wages of women workers, who have traditionally earned less than their male counterparts.[63] In 2012, the median wage for women union workers was 32.3% greater than the median wage for their nonunion counterparts.[64] Unions also raise the wages of minorities, helping close racial and ethnic wage gaps.[65] In 2012, the median wage for African American union workers was 30.9% greater than the median wage for their nonunion counterparts.[66] In 2012, the median wage for Hispanic union workers was 58.5% greater than the median wage for their nonunion counterparts.[67]

Finally, unions reduce wage inequality. According to the Economic Policy Institute:

> *Collective bargaining reduces wage inequality for three reasons. The first is that wage setting in collective bargaining focuses on establishing "standard rates" for comparable work across business establishments and for particular occupations within establishments. The outcome is less differentiation of wages among workers and, correspondingly, less discrimination against women and minorities. A second reason is that wage gaps between occupations tend to be lower where there is collective bargaining, and so the wages in occupations that are typically low-paid tend to be higher under collective bargaining. A third reason is that collective bargaining has been most prevalent*

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[57] Bureau of Labor Statistics. "Union Members—2012" (January 23, 2013) *Available at* http://www.bls.gov/news.release/pdf/union2.pdf.

[58] Schmitt, John. "The Union Wage Advantage for Low-Wage Workers" Center for Economic and Policy Research (May 2008).

[59] Lawrence Mishel. "Unions, Inequality, and Faltering Middle-Class Wages" Economic Policy Institute (Aug. 29, 2012). *Available at* http://www.epi.org/files/2012/ib342–unions-inequality-middle-class-wages.pdf.

[60] *Id.*

[61] *Id.*

[62] AFL-CIO. "The Union Difference: Union Advantage by the Numbers" (January 2009) *Available at* http://www.cirseiu.org/files/2012/01/Union-advantage-by-the-numbers.pdf.

[63] Schmitt, John. "Unions and Upward Mobility for Women Workers" Center for Economic and Policy Research (February 23, 2009).

[64] Bureau of Labor Statistics. "Union Members—2012."

[65] Lawrence Mishel. "Unions, Inequality, and Faltering Middle-Class Wages."

[66] Bureau of Labor Statistics. "Union Members—2012."

[67] *Id.*

among middle-class workers, so it reduces the wage gaps between middle-class workers and high earners (who have tended not to benefit from collective bargaining).[68]

In H.R. 1120, Committee Republicans have introduced a bill that does nothing to create jobs, improve the economy, or provide certainty in labor-management relations. Instead, they have again decided to spend Committee time and resources on a bill attacking the right of workers to organize and bargain collectively. If enacted, this legislation would leave workers and employers without a legal process and remedies when their NLRA rights are violated. This bill sends a clear message to workers and employers—in the 113th Congress, their rights and concerns will again take a backseat to partisan politics.

GEORGE MILLER, *Senior Democratic Member.*
BOBBY SCOTT.
CAROLYN MCCARTHY.
RUSH HOLT.
RAÚL M. GRIJALVA.
DAVE LOEBSACK.
MARCIA L. FUDGE.
GREGORIO KILILI CAMACHO SABLAN.
FREDERICA S. WILSON.
ROBERT E. ANDREWS.
RUBÉN HINOJOSA.
JOHN F. TIERNEY.
SUSAN A. DAVIS.
TIM BISHOP.
JOE COURTNEY.
JARED POLIS.
JOHN YARMUTH.
SUZANNE BONAMICI.

○

[68] Lawrence Mishel, *The decline of collective bargaining and the erosion of middle-class incomes in Michigan,* EPI Briefing Paper #347, p. 2, September 25, 2012. *Available at* http://www.epi.org/files/2012/bp347-collective-bargaining.pdf.