# THE NLRB RECESS APPOINTMENTS: IMPLICATIONS FOR AMERICA'S WORKERS AND EMPLOYERS

## HEARING

BEFORE THE

## COMMITTEE ON EDUCATION AND THE WORKFORCE U.S. HOUSE OF REPRESENTATIVES

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# C O N T E N T S

# THE NLRB RECESS APPOINTMENTS: IMPLICATIONS FOR AMERICA'S WORKERS AND EMPLOYERS

**Tuesday, February 7, 2012**
**U.S. House of Representatives**
**Committee on Education and the Workforce**
**Washington, DC**

The committee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. John Kline [chairman of the committee] presiding.

Present: Representatives Kline, Petri, McKeon, Wilson, Foxx, Goodlatte, Roe, Walberg, DesJarlais, Hanna, Rokita, Gowdy, Barletta, Roby, Kelly, Miller, Kildee, Andrews, Scott, Woolsey, Hinojosa, McCarthy, Tierney, Kucinich, Holt, Davis, Grijalva, Bishop, and Altmire.

Staff present: Katherine Bathgate, Press Assistant/New Media Coordinator; Casey Buboltz, Coalitions and Member Services Coordinator; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Barrett Karr, Staff Director; Ryan Kearney, Legislative Assistant; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Kate Ahlgren, Minority Investigative Counsel; Aaron Albright, Minority Communications Director for Labor; Tylease Alli, Minority Clerk; Kelly Broughan, Minority Staff Assistant; Jody Calemine, Minority Staff Director; John D'Elia, Minority Staff Assistant; Brian Levin, Minority New Media Press Assistant; Celine McNicholas, Minority Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; and Megan O'Reilly, Minority General Counsel.

Chairman KLINE. A quorum being present, the committee will come to order.

Well, good morning, everybody. Welcome to our guests. We are fortunate to have a distinguished panel of witnesses today, and I want to thank all of you for your participation.

In January, President Obama shocked many across the country when he made three so-called "recess appointments" to the National Labor Relations Board, despite the Senate not being in recess. This action touches upon a number of constitutional powers.

The first is the president's authority to fill a vacancy through recess appointments, a power which no one questions.

The other constitutional power involved allowed for Congress to, "determine the rules of its proceedings." and prevent one body of the legislative branch from adjourning more than 3 days without the consent of the other. Senate Democrats understood the value of these constitutional principles in 2007, when they first established the practice of convening pro forma sessions every 3 days in order to "prevent recess appointments," and Democrat leader, Harry Reid, said at the time.

The procedural maneuvering crafted by Senate Democrats worked, that is until President Obama decided he can determine what counts as legitimate business of the Congress. According to the rationale of the administration, pro forma sessions are nothing more than a gimmick that do not interrupt a recess of Congress. Therefore, the president can fill these position without the Senate's consent.

Decisions based on shaky legal ground can often lead to embarrassing contradictions. Days before the president decided to become the arbiter of congressional rules and proceedings, Congress approved a bill to prevent a tax hike on millions of Americans. Later that day, the president signed that very same bill into law.

Either the payroll tax cut passed by the Senate during a pro forma session is the law of the land, and the recess appointments are invalid, or 170 million Americans are receiving tax relief unlawfully and the appointment should stand. No amount of legal manipulation can allow the president to have it both ways.

We have witnessed this administration take extraordinary action that stretches the limits of the office, and undermines our all-important system of checks and balances. I realize that in many ways the appointment process is broken. However, no president should endorse an unconstitutional scheme in order to address a political problem.

Not only has this action triggered a constitutional crisis, it has denied the public an opportunity to independently judge whether these individuals are qualified to serve. The Republican appointee was nominated a year ago, yet Democrats in control of the Senate refused to schedule a hearing on the nomination. Running roughshod over the appointment process, the president's appointees hadn't even completed the Senate's routine background check at the time of their "recess appointments."

Thanks to the president's action, three scarcely-known individuals are now empowered to dramatically transform our nation's workforce. The highly controversial nature of the appointments guarantees the rules and decisions the new boardmembers adopt will be constitutionally suspect and legally challenged.

Even the president's own justice department, in what I would characterize as an understatement of the gravity of the situation, noted the issues surrounding these appointments "create some litigation risk." Make no mistake. Every action taken by the board will be tainted, creating greater uncertainty for employers and additional costs for taxpayers.

The president has steered the country into uncharted waters. The question remains, why? At a time when millions of Americans

are out of work, why threaten the certainty and confidence our economy needs to grow and prosper? Is it so unions can have greater access to an employee's personal information and virtually unfettered access to an employer's property, or so workers have just 10 days to consider the consequences of joining a union before casting their ballot?

Perhaps a decision was made to deny employers their legal right to speak to employees during an organizing campaign. Maybe it was to give the NLRB new opportunities to weaken workers' right to a secret ballot. These are just some of the items on big labor's agenda designed to strengthen its power by weakening protections for workers and employers.

It is an agenda rejected by Congress, yet one that has made great progress in recent years, thanks to the activism of this labor board. The central issue before the committee today isn't the process that led to these appointments, although that will be part of the discussion.

Our primary concern is the fear and uncertainty this action has unleashed—the fear of the activist NLRB's future actions and the uncertainty of whether its mandates and decisions can stand under constitutional scrutiny. I look forward to discussing these matters further with our witnesses.

And I will now recognize my distinguished colleague, Mr. Miller, the senior Democratic member of the committee, for his opening remarks.

[The statement of Chairman Kline follows:]

**Prepared Statement of Hon. John Kline, Chairman, Committee on Education and the Workforce**

Good morning and welcome to our guests. We are fortunate to have a distinguished panel of witnesses with us today; thank you for your participation.

In January, President Obama shocked many across the country when he made three so-called recess appointments to the National Labor Relations Board (NLRB)—despite the Senate not being in recess.

This unprecedented action touches upon a number of constitutional powers. The first is the president's authority to fill vacancies through recess appointments, a power which no one questions. The other constitutional powers involved allow for Congress to "determine the Rules of its Proceedings" and prevent one body of the legislative branch from adjourning more than three days without the consent of the other.

Senate Democrats understood the value of these constitutional principles in 2007 when they first established the practice of convening pro forma sessions every three days in order to "prevent recess appointments," as Democrat Leader Harry Reid said at the time.

The procedural maneuvering crafted by Senate Democrats worked, that is until President Obama decided he can determine what counts as legitimate business of the Congress. According to the rationale of the administration, pro forma sessions are nothing more than a "gimmick" that do not interrupt a recess of Congress; therefore, the president can fill these positions without the Senate's consent.

Decisions based on shaky legal ground can often lead to embarrassing contradictions. Days before the president decided to become the arbiter of congressional rules and proceedings, Congress approved a bill to prevent a tax hike on millions of Americans. Later that day the president signed that very same bill into law. Either the payroll tax cut passed by the Senate during a pro forma session is the law of the land and the recess appointments are invalid, or 170 million Americans are receiving tax relief unlawfully and the appointments should stand. No amount of legal manipulation can allow the president to have it both ways.

We've witnessed this president take extraordinary action that stretches the limits of his office and undermines our all-important system of checks and balances. I realize that in many ways the appointment process is broken. However, no president should endorse an unconstitutional scheme in order to address a political problem.

Not only has this action triggered a constitutional crisis; it has denied the public an opportunity to independently judge whether these individuals are qualified to serve.

The Republican appointee was nominated a year ago, yet Democrats in control of the Senate refused to schedule a hearing on the nomination. Running roughshod over the appointment process, the president's Democrat appointees hadn't even completed the Senate's routine background check at the time of their "recess" appointments.

Thanks to the president's action, three scarcely known individuals are now empowered to dramatically transform our nation's workforce. The highly controversial nature of the appointments guarantees the rules and decisions the new board members adopt will be constitutionally suspect and legally challenged. Even the president's own Justice Department, in what I would characterize as an understatement of the gravity of the situation, noted the issues surrounding these appointments "create some litigation risk."

Make no mistake, every action taken by the board will be tainted, creating greater uncertainty for employers and additional costs for taxpayers.

The president has steered the country into uncharted waters. The question remains: Why? At a time when millions of Americans are out of work, why threaten the certainty and confidence our economy needs to grow and prosper?

Is it so unions can have even greater access to an employee's personal information and virtually unfettered access to an employer's property?

Or so workers have just 10 days to consider the consequences of joining a union before casting their ballot?

Perhaps the decision was made to deny employers their legal right to speak to employees during an organizing campaign?

Maybe it was to give the NLRB new opportunities to weaken workers' right to a secret ballot.

These are just some of the items on Big Labor's agenda designed to strengthen its power by weakening protections for workers and employers. It is an agenda rejected by Congress, yet one that has made great progress in recent years thanks to the activism of the Obama labor board. The president has provided his union allies a critical lifeline to wreak further havoc on America's workplaces.

The central issue before the committee today isn't the process that led to these appointments, although that will be part of the discussion. Our primary concern is the fear and uncertainty this action has unleashed—the fear of the activist NLRB's future actions and the uncertainty of whether its mandates and decisions can stand under constitutional scrutiny.

I look forward to discussing these matters further with our witnesses. I will now recognize my distinguished colleague George Miller, the senior Democratic member of the committee, for his opening remarks.

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Mr. MILLER. Thank you, Mr. Chairman. And good morning, and welcome to our witnesses this morning.

Last week, this committee held the rare hearing on creating job opportunities for the American people. The first panel consisted of two governors, one Democrat and one Republican. Despite party and regional differences, the governors delivered a positive message about cooperation and economic progress in their respective states.

They both unequivocally rejected the path of divisive politics. When it comes to seeking solutions to stronger, faster economic recovery, they did not recommend inaction. Instead, they both made a compelling case that past efforts here in Washington like the Recovery Act and the auto rescue saved this country from an even deeper crisis.

Michigan's Republican governor specifically highlighted legislation authored by Congressman Frank to help provide capital to small businesses. Governor Snyder said that in Michigan one piece of legislation allowed the state to use $30 million in public funds to leverage nearly $86 million in private capital for small businesses.

Those loan enhancements were spread across these programs and, together, they supported the creation of nearly 1,000 new jobs. In addition, despite calls of some to let the domestic auto industry fail, both governors agreed the federal rescue of the American auto industry was essential. Governor Snyder noted that inaction would have brought down the entire industry.

Because of the federal government's role in the American automobile—because of the federal government's role, the American auto industry is back on top of its game and creating thousands of jobs. The message to Congress is to work together, put aside divisive issues.

Our nation's future economic growth is dependent upon productive partnerships and shared responsibility between federal, state, and local governments and the private sector. And I couldn't agree more with the governors. Last week's hearing showed us what real opportunities there can be to work together to rebuild our economy and reignite the American dream.

This committee should be exploring ways we can assist governors to assist their states' infrastructure to modernize and repair our nation's schools. Targeting resources to fix crumbling schools not only helps student learning, but saves struggling small contractors from bankruptcy and creates private sector construction jobs.

We could be exploring ways we could work together to modernize our nation's job training programs to find bipartisan solutions to ESEA reauthorization. We could be helping local governments save jobs for teachers, police and firefighters. We could be exploring ways to help small businesses with the two most important challenges—getting access to credit, and creating more customer demand.

But that is not what this hearing is about. Today is just another legislative day to get dedicated to divisive issues. It is not about working together to find solutions to real problems. Today, the president's efforts to keep a vital governmental agency fully functioning will surely be criticized, the rights of workers will be attacked, labor unions will be attacked.

The agency's efforts to enforce the law or modernize the law will be intact. By now, we all know the drill, and so does the very frustrated American public. So instead of working together to find solutions to real problems, we will proceed with the majority's sixth hearing on the National Labor Relations Board.

I yield back my time.

[The statement of Mr. Miller follows:]

**Prepared Statement of Hon. George Miller, Senior Democratic Member, Committee on Education and the Workforce**

Good morning, Mr. Chairman.

Last week, this committee held a rare hearing on creating job opportunities for the American people.

The first panel consisted of two governors: One Democrat and one Republican. Despite party and regional differences, the governors delivered a positive message about cooperation and economic progress in their respective states.

They both unequivocally rejected the path of divisive politics. When it comes to seeking solutions for a stronger, faster economic recovery, they did not recommend inaction.

Instead, they both made a compelling case that past efforts here in Washington, like the Recovery Act and the auto rescue, saved this country from an even deeper crisis.

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Governor Snyder said that in Michigan, this one piece of legislation allowed the state to use $30 million in public funds to leverage nearly $86 million in private capital for small businesses. These loan enhancements were spread across three programs. All together, they supported the creation of nearly one thousand new jobs.

In addition, despite calls from some to let the domestic auto industry fail, both governors agreed that the federal rescue of the American auto industry was essential. Governor Snyder noted that inaction would have brought down the entire industry. Because of the federal government's role, the American auto industry is back on top of its game and creating thousands of jobs.

Their message to Congress was "work together." Put aside divisive issues.

Our nation's future economic growth is dependent on productive partnerships and shared responsibility between federal, state, and local governments and the private sector.

I couldn't agree more.

Last week's hearing showed us that there are real opportunities where we can work together to rebuild our economy and reignite the American Dream.

This committee should be exploring ways we can assist governors to improve their states' infrastructure and to modernize and repair our nation's schools. Targeting resources to fix crumbling schools not only helps student learning, but also saves struggling small contractors from bankruptcy and creates private-sector construction jobs.

We could be exploring ways we can work together to modernize our nation's job-training programs or find a bipartisan solution to ESEA reauthorization.

We could be helping local governments save the jobs of teachers, police, and firefighters.

We could be exploring ways to help small businesses with their two most important challenges: getting access to credit and creating more consumer demand.

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By now, we all know the drill. And so does a very frustrated American public.

So, instead of working together to find solutions to real problems, let's proceed with the majority's sixth hearing on the National Labor Relations Board.

I yield back.

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Chairman KLINE. I thank the gentleman.

Pursuant to committee rule 7-C, all committee members will be permitted to submit written statements to be included in the permanent hearing record. And so objection, the hearing record will remain open for 14 days to allow statements, questions for the record and other extraneous material referenced during the hearing to be submitted in the official hearing record.

As we turn to introducing our distinguished panel of witnesses, I will now recognize Mrs. Roby of Alabama to introduce our first witness. Mrs. Roby?

Mrs. ROBY. Thank you, Chairman Kline. It is my honor and privilege to introduce our first witness today, Mr. Charles Cooper, who is a fellow Alabamian with an impressive resume. Mr. Cooper is the founding member and current chairman of litigation for the firm Cooper & Kirk.

He previously clerked for Judge Paul Roney at the U.S. Fifth Circuit, now the 11th Circuit of Appeals, and to the Supreme Court justice, William Rehnquist—chief justice. In 1985, President Ronald Reagan appointed Mr. Cooper to the position of assistant attorney general for the Office of Legal Counsel.

Shortly after, Mr. Cooper reentered private practice, concentrating on constitutional, commercial and civil rights litigation, and has been named one of the 10 best civil litigators in Washington by the National Law Journal. Mr. Cooper received both his B.S. and his J.D. from the University of Alabama. And on this committee, I would be remiss not to say "Roll, Tide, Roll."

Thank you for being with us today, Mr. Cooper, and my colleagues and I look forward to hearing your testimony.

Chairman KLINE. I thank the gentlelady. I think we should consider, as a committee, that everybody just comes in wearing their school colors and we just get past this.

It is my pleasure to resume introducing our panel of witnesses. Dennis M. Devaney is a member of Devaney Jacob Wilson, PLLC. Mr. Devaney was a Democrat National Labor Relations Board member from November 1988 until December 1994. He was also commissioner of the U.S. International Trade Commission.

His labor and employment practice focuses on traditional labor law, including representation of clients with respect to matters arising under the National Labor Relations Act. He received his B.A. and M.A. from the University of Maryland and J.D. from Georgetown University Law Center.

Susan Davis is a partner at Cohen, Weiss and Simon, LLP. Ms. Davis specializes in the representation of national and local unions in all aspects of collective bargaining, organizing and strategic planning. Ms. Davis also serves on the AFL-CIO lawyers advisory panel. Before entering the private sector, Ms. Davis clerked for the U.S. District Court in southern New York, under the Honorable Constance Baker Motley. She graduated with her B.A. at the University of California at Berkeley, and received her J.D. from Rutgers University.

Stefan Marculewicz is a shareholder with Littler Mendelson, PC. He represents multinational and domestic corporations on issues involving international labor standards and labor management relations domestically. Prior to entering private practice he was a trial attorney for the National Labor Relations Board in its Baltimore and Fort Worth regional offices. Baltimore and Fort Worth. He received his B.A. from Lawrence University of Wisconsin, and J.D. from Catholic University America.

Welcome, all of you. A distinguished panel, indeed. Before I recognize each of you to provide your testimony, let me again briefly explain our lighting system. You will each have 5 minutes to present your testimony. When you begin, the light in front of you will turn green. When 1 minute is left, the light will turn yellow.

And when your time has expired the like will turn red. At that point, please try to wrap up your testimony. I won't be grabbing the gavel and smashing it down during your closing sentence or something, but please try to wrap it up. Your entire testimony will be included in the record. All right, I think we are ready to go.

We will start with Mr. Cooper. Sir, you are recognized for 5 minutes.

**STATEMENT OF CHARLES J. COOPER, FOUNDER AND CHAIRMAN, COOPER & KIRK, PLLC**

Mr. COOPER. Thank you very much, Mr. Chairman, and good morning. And good morning, Mr. Miller, and members of the committee. I appreciate very much the opportunity to be before you today to testify about these important questions, and I am especially grateful to the congresswoman from the second district of Alabama for that warm introduction.

I have been asked to testify concerning the constitutionality of President Obama's January 4 recess appointments of three new members to the NLRB, and of Richard Cordray to be the first director of the Consumer Financial Protection Bureau. The issue that is at the heart of this committee's constitutional inquiry is whether the Senate was continuously in recess from December 17 to January 23rd last.

The administration, in an opinion by the Office of Legal Counsel, takes the position that it was, despite the fact that the Senate repeatedly gaveled itself into pro forma sessions and, in one of those sessions, actually passed legislation. In my view, the Senate was not in continuous recess, and the January 4 recess appointments therefore exceeded the president's constitutional authority under the recess appointments clause.

OLC's legal argument rests entirely on the conclusion that the Senate is not in session at all during its pro forma sessions. For OLC, the Senate's pro forma sessions are a constitutional nullity, at least for purposes of the recess appointments clause. I believe that this view is unsustainable for three principle reasons.

The first, and threshold, reason that the Senate's pro forma sessions interrupted its holiday adjournment is that the Senate says so. The Constitution's rulemaking clause vests in each house of Congress the power to "determine the rules of its proceedings." And rules governing how and when the Senate meets, like when this body meets, and adjourns are quintessential rules of proceedings.

Because the rulemaking clause commits to the Senate judgments about the meaning of its own rules, the Senate's determination that it was repeatedly in session between December 17 and January 23 should end the matter. Second, even if the rulemaking clause did not give the Senate unilateral authority to decide when, and how, to recess, there is a firmly established practice of using pro forma sessions to satisfy the requirements of other constitutional provisions.

Since at least 1949, the Senate has repeatedly held pro forma sessions to comply with Article One, Section Five's requirement that it not adjourn for more than 3 days without the consent of this body. Congress has also used pro forma sessions to satisfy the 20th Amendment's requirement that it meet at noon on January 3rd to start a new session every year, unless a different time is specified by statute.

And it is very difficult to see how the Senate can be in session for purposes of one constitutional provision while in recess for purposes of another. OLC rejects these argument and, instead, relies on what it says is the purpose of the recess appointments clause, in its words, "to provide a method of appointment when the Senate is unavailable to provide advice and consent."

And throughout its opinion, OLC refers to this purpose about whether the Senate is available, and capable of providing its advice and consent responsibilities. And it bases this advice, again, on its view that the Senate was unavailable throughout the holiday adjournment because the days in which the Senate held a pro forma session were constitutionally indistinguishable from the days in which the Senate chamber was dark and empty.

But this assertion collapses, I would submit, under the weight of a single inconvenient truth. While holding a pro forma session on December 23, the Senate passed a bill, a two-month extension of the payroll tax cut, with the president promptly signed into law. In passing the payroll tax cut extension, the Senate acted by unanimous consent, the very same procedure by which the Senate confirms most presidential appointees.

If the Senate can pass legislation by unanimous consent during a pro forma session, then it can surely confirm presidents' nominees in the same manner. The OLC opinion answers this point that even if, in fact, the Senate is able to act during its pro forma sessions, the president, in OLC's words, "may properly rely on the public pronouncements of the Senate that it will not conduct business."

And there are several problems with this argument, and I will mention just two, in light of the time, Mr. Chairman. First, given the Senate actually passed a law during its pro forma session, on December 23rd prior to the January 4 recess appointments, the president plainly was not entitled to rely on the Senate's repudiated public pronouncement that no business would be conducted at such sessions.

Secondly, President Obama, in fact, has not relied on the Senate's no-business pronouncement. It was he who urged the Senate to pass the two-month extension of the payroll tax cut during the holiday adjournment, and he who then promptly signed the bill into with. The president surely isn't entitled both to rely on the Senate's no-business public pronouncement and to ignore it as it pleases him.

In short, Mr. Chairman and members of the committee, the president's January 4 recess appointments really had nothing to do with whether the Senate was available to act, and everything to do with the Senate's unwillingness to confirm the president's nominees. And as with every branch of our government, there is hydraulic pressure within the executive branch to exceed the outer limits of its own power.

But regardless of whether the president has sought to exceed his power in this instance for good or ill, it is Congress' constitutional responsibility to resist it.

Thank you again, Mr. Chairman, for inviting me to be here this morning.

[The statement of Mr. Cooper follows:]

**Prepared Statement of Charles J. Cooper, Partner, Cooper & Kirk, PLLC**

Good morning Mr. Chairman and Members of the Committee. My name is Charles J. Cooper, and I am a partner in the Washington, D.C., law firm of Cooper & Kirk, PLLC. I appreciate the Committee's invitation to present my views on the constitutionality of the President's January 4 recess appointments to the National Labor Relations Board and the Consumer Financial Protection Bureau. For reasons I will ex-

plain below, I believe that the President exceeded his constitutional authority by making these appointments during a three-day adjournment between pro forma Senate sessions. But first I would like to outline the professional experience that informs my thinking on this important subject.

I have spent the bulk of my career, both as a government lawyer and in private practice, litigating or otherwise studying a broad range of constitutional issues. From 1985 to 1988, I served as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, where I advised President Reagan and Attorney General Meese on numerous separation of powers and other constitutional issues. Perhaps most notable for present purposes, in early 1988 the President asked the Justice Department for its opinion as to whether the Constitution vests the President with an inherent power to exercise a line-item veto. After exhaustive study, the Office of Legal Counsel ("OLC") concluded that the proposition was not well-founded and that the President could not conscientiously attempt to exercise such a power. OLC's opinion is publicly available at 12 Op. O.L.C. 128 (1988).

Since leaving government service in 1988, I have been involved in a number of significant separation of powers cases in both the Supreme Court and the lower federal courts. E.g., Raines v. Byrd, 521 U.S. 811 (1997) (holding that individual congressmen lack standing to challenge Line Item Veto Act); Clinton v. New York, 524 U.S. 417 (1998) (holding that Line Item Veto Act violates Presentment Clause); FEC v. NRA, 513 U.S. 88 (1994) (dismissing case as improvidently granted because FEC lacked statutory authority to file cert petition); FEC v. NRA, 6 F.3d 821 (D.C. Cir. 1993) (holding that congressional appointment of ex officio FEC commissioners violates the Appointments Clause); Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990) (enjoining operations of the Office of Thrift Supervision because Directors' appointments were not authorized by Appointments Clause or Vacancies Act). Together, these experiences have made me a student of the system of checks and balances implicated by the recess appointments that are the subject of this hearing.

I

Between December 17, 2011, and January 23, 2012, the Senate held a series of so-called "pro forma" sessions designed to break the holiday period into three-day adjournments in order to comply with its constitutional obligation not to adjourn for more than three days during a congressional session without the consent of the House of Representatives. U.S. CONST. Art. I, § 5, cl. 4. The order that scheduled these pro forma sessions was entered by unanimous consent and provided that there was to be "no business conducted." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). At one of its pro forma sessions, however, the Senate passed by unanimous consent a two-month extension of the payroll tax cut, as requested by President Obama. Id. at S8789 (daily ed. Dec. 23, 2011). And on January 3, 2012, the Senate met in pro forma session to comply with the Twentieth Amendment's requirement that Congress meet on that date "in every year * * * unless they shall by law appoint a different date." The following day, on January 4, the President made four recess appointments, filling three vacant seats on the National Labor Relations Board ("NLRB") and appointing Richard Cordray to be the first Director of the Consumer Financial Protection Bureau ("CFPB"). The NLRB recess appointments are of great significance because without them the Board would have only two members, and thus would lack the quorum needed to take action. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). Two days after announcing the appointments, on January 6, the Administration released an OLC opinion that explains the legal rationale for the President's actions. Before addressing the merits of OLC's analysis, some background on the constitutional provisions at issue may be useful.

II

The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate" to "appoint * * * Officers of the United States." U.S. CONST. Art. II, § 2, cl. 2. This "general mode of appointing officers of the United States" is "confined to the President and Senate jointly," THE FEDERALIST NO. 67 (Alexander Hamilton), and it has always been the method by which the vast majority of officers receive their commissions. As a "supplement" to this usual procedure, id., the Recess Appointments Clause authorizes the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session," U.S. CONST. Art. II, § 2, cl. 3. The Framers gave the President this "auxiliary" power because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and yet "vacancies might happen in their recess, which it

might be necessary for the public service to fill without delay." THE FEDERALIST NO. 67.

Because the Recess Appointments Clause permits the President, under the specified circumstances, to bypass the Senate and make appointments unilaterally, it has been a rich source of conflict between Presidents and Congresses since the early days of the Republic. The earliest disputes concerned the questions whether a recently created office, which has never before been occupied, creates a "vacancy" and whether a vacancy that occurs when the Senate is in session "happen[s] during the recess of the Senate." See, e.g., Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976); 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); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350-53 (R. Worthington ed., 1884); 26 Annals of Cong. 652-58, 694-722, 742-60 (1814); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 188-89 (2001). Although there is substantial textual and historical support for a negative answer to both of these questions, see Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. REV. 1487 (2005); Stephens v. Evans, 387 F.3d 1220, 1228 (11th Cir. 2004) (Barkett, J., dissenting), in an 1823 opinion Attorney General William Wirt embraced the broader view that the Executive Branch has taken since.

Lengthy adjournments during sessions of Congress were rare in the early nineteenth century, but longer so-called "intrasession recesses" became more common in recent decades. With a single exception, see Rappaport, supra at 1572, the uniform practice of Presidents through World War I was to refrain from making recess appointments during intrasession adjournments, and in 1901 Attorney General Knox concluded that the President lacks constitutional authority to do so, 23 Op. Att'y Gen. 599 (1901). But in 1921, Attorney General Daugherty advised President Coolidge that he could break with prior precedent and constitutionally make recess appointments any time the Senate is unable to "receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 24 (1921). Although the Senate has intermittently objected to intrasession recess appointments in the years since, see, e.g., Brief for Senator Edward M. Kennedy as Amicus Curiae, Stephens v. Evans, 387 F.3d 1220 (11th Cir. 2004) (No. 02-16424), Attorney General Daugherty's opinion is the basis for what has become the Executive Branch's settled view, see, e.g., Intrasession Recess Appointments, 13 Op. O.L.C. 271, 272-73 (1989); Recess Appointments—Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314, 315-16 (1979); 41 Op. Att'y Gen. 463, 468 (1960). Although the Supreme Court has never addressed the meaning of the Recess Appointments Clause, a number of the Courts of Appeals have acquiesced, in whole or in part, in the Executive's longstanding view of this Clause. See, e.g., Stephens v. Evans, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding intrasession recess appointment to fill vacancy that occurred while the Senate was in session); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985 (en banc) (upholding recess appointment to fill vacancy that did not arise while the Senate was in recess); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962) (same).

Against this backdrop of interbranch disputes and shifting historical practices, the controversy that brings this Committee into session today is whether the Senate may use pro forma sessions to prevent the President from making recess appointments. More concretely, the question is whether the Senate was continuously in recess from December 17 to January 23 despite repeatedly gaveling itself into session and, in one instance, actually passing a bill. In my view, the Senate was not in "Recess" during its pro forma sessions, and the recess appointments at issue exceeded the President's constitutional authority.

III

Before discussing the Administration's legal rationale for the recent appointments, I will first frame the issue by noting two things that OLC's opinion does not say. First, the opinion does not suggest that the President can make recess appointments during a Senate adjournment of only three days—the length of the adjournment between the pro forma sessions at issue here. Instead, OLC's legal argument rests entirely on its conclusion that the Senate is not actually in session during its pro forma sessions, and so was in continuous recess between December 17 and January 23. For OLC, then, the Senate's pro forma sessions are a constitutional nullity, at least for purposes of the Recess Appointments Clause.

The Administration's reluctance to argue that the President can make recess appointments during a three-day Senate adjournment is hardly surprising given the

overwhelming weight of authority that suggests otherwise. Even Attorney General Daugherty, whose 1921 opinion extended the President's recess appointment power to intrasession adjournments, acknowledged that "an adjournment of 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. at 25. Since then, lawyers serving in numerous Administrations have advised Presidents to wait for a recess of some significant duration before making recess appointments. See, e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Re: Recess Appointments in the Current Recess of the Senate at 3 (Feb. 20, 2004); The Pocket Veto: Historical Practice and Judicial Precedent, 6 Op. O.L.C. 134, 149 (1982) (observing that OLC "has generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief"); Recess Appointments—Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314, 315-16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970). Indeed, the Department of Justice recently reached the same conclusion. See Letter to William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General at 3 (April 26, 2010), New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (No. 08-1457). And recent Presidents have accepted their lawyers' advice: from the start of the Reagan Administration until last month, the shortest recess during which a President made a recess appointment was 10 days. See Henry B. Hogue, Congressional Research Service, Recess Appointments: Frequently Asked Questions 10 (Jan. 9, 2012).

If, as I believe, the Administration is wrong when it claims that pro forma Senate sessions are a legal nullity, then the President's appointments are contrary to both the weight of legal authority and historical practice. Indeed, as far as I am aware, the present case would stand alone as the shortest intrasession recess during which any President has ever made a recess appointment. Presidents have made recess appointments during intersession recesses of less than three days on only two occasions, Hogue, supra, at 10, and in at least one of these cases the Senate vigorously protested, see S. Rep. No. 4389, 58th Cong., 3d Sess., reprinted in 39 Cong. Rec. 3823, 3824 (1905).

Second, the OLC opinion does not suggest that the Senate cannot constitutionally block recess appointments by remaining in session. To the contrary, OLC expressly acknowledges that "[t]he Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session." 2012 OLC Op. at 1. The only question, then, is whether the Senate's acknowledged power to thwart the President's recess appointment power was properly exercised through its use of pro forma sessions.

IV

A threshold reason to conclude that the Senate's pro forma sessions interrupted its holiday adjournnment is that the Senate says so. The Constitution vests in each House of Congress the power to "determine the Rules of its Proceedings," U.S. CONST. Article I, § 5, cl. 4, and rules governing how and when the Senate meets and adjourns are quintessential rules of proceedings. Because the Rulemaking Clause commits to the Senate judgments about the meaning of its own rules, the Senate's determination that it was repeatedly in session between December 17 and January 23 should end the matter.

The Framers understood that the Houses of Congress must have authority to make their own rules to function as a coequal branch of government. See Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), reprinted in 2 THE FOUNDERS' CONSTITUTION, Document 14 ("Each house of Congress possesses this natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by * * * the Constitution."). As Joseph Story explained in his authoritative constitutional treatise, "[t]he humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority."[1] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 835 (1833).

When Congress makes rules that govern its proceedings, the President should, like the courts, defer to the legislative branch. See Mester Mfg. v. INS, 879 F.2d at 571 (9th Cir. 1989) ("The Constitution * * * requires extreme deference to ac-

[1] See also, e.g., 2012 OLC Op. at 14 ("[B]rief pro forma sessions of this sort, at which the Senate is not capable of acting on nominations, may properly be viewed as insufficient to terminate an ongoing recess for purposes of the Clause."); id. at 15 ("[W]e believe the critical inquiry is the "practical' one identified above—to wit, whether the Senate is available to perform its advise and consent function.").

company any judicial inquiry into the internal governance of Congress."). Courts honor Congress' rules under the enrolled bill rule by treating the attestations of the two houses as "conclusive evidence that a bill was passed by Congress," even in the face of evidence that demonstrates otherwise. Pub. Citizen v. District of Columbia, 486 F.3d 1342 (D.C. Cir. 2007); see also One SimpleLoan v. U.S. Secretary of Educ., 496 F.3d 197 (2d Cir. 2007). This doctrine reflects "the respect due to a coordinate branch of government," Marshall Field & Co. v. Clark, 143 U.S. 649, 673 (1892), and underscores the very limited inquiry courts make where the Congress' rules of proceedings are at issue. For similar reasons, the D.C. Circuit has held that the meaning of ambiguous congressional rules is nonjusticiable; were it otherwise, "the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone." United States v. Rostenkowski, 59 F.3d 1291, 1306-07 (D.C. Cir. 1995). And although the OLC opinion is surely correct when it says that Congress "'May not by its rules ignore constitutional restraints or violate fundamental rights,'" 2012 OLC Op. at 20 (quoting United States v. Ballin, 144 U.S. 1, 5 (1892)), the Supreme Court has made clear that "within these limitations all matters of method are open to the [Senate's] determination," Ballin, 144 U.S. at 5.

The present case underscores the Framers' wisdom in giving each House of Congress exclusive authority to make its own rules. Here the President purports to tell the Senate what it must do to bring itself into session and retroactively declares a series of Senate sessions to be a constitutional nullity. The Rulemaking Clause does not permit such executive interference in the Senate's internal procedures any more than it would permit similar interference by the courts. Cf. Nixon v. United States, 506 U.S. 224 (1993). To hold otherwise would threaten Congress's ability to function as an independent branch of government, undermining the checks and balances that the Framers "built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

It is no answer to say that the Senate could use its rulemaking authority to prevent the President from making recess appointments "by declaring itself in session when, in practice, it is not available to provide advice and consent." 2012 OLC Op. at 20. As discussed in detail below, the Senate has not done this, for it is available to provide advice and consent during its pro forma sessions. In any event, the Constitution empowers the Senate to block recess appointments by refusing to recess, and the validity of the President's January 4 appointments depends on his judgment that the Senate unsuccessfully attempted to exercise this power. As Alexander Hamilton explained in Federalist 76, the Framers denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. The prospect of an intransigent Senate that refuses to confirm the President's nominees is an unavoidable corollary of the Framers' decision to "divid[e] the power to appoint the principal federal officers * * * between the Executive and Legislative branches." Freytag v. Commissioner, 501 U.S. 868, 869 (1991).

V

But even if the Rulemaking Clause did not give the Senate unilateral authority to decide when and how to recess, the better view would still be that the President cannot make recess appointments when the Senate is in pro forma session. Although the use of pro forma sessions to block recess appointments is a relatively new practice—first threatened during the Reagan Administration and first used against George W. Bush—there is a firmly established practice of using pro forma sessions to satisfy the requirements of other constitutional provisions.

Since at least 1949, the Senate has repeatedly held pro forma sessions to comply with Article I, Section 5's requirement that it not adjourn for more than three days without the House's permission. See, e.g., 95 Cong. Rec.12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 96 Cong. Rec. 7769 (May 26, 1950); 96 Cong. Rec. 7821 (May 29,1950); 96 Cong. Rec. 16,980 (Dec. 22,1950); 96 Cong. Rec. 17,020 (Dec. 26, 1950); 96 Cong. Rec. 17,022 (Dec. 29, 1950); 97 Cong. Rec. 2835 (Mar. 22, 1951); 97 Cong. Rec. 2898 (Mar. 26, 1951); 97 Cong. Rec. 10,956 (Aug. 31, 1951); 97 Cong. Rec. 10,956 (Sept. 4, 1951); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 101 Cong. Rec. 4293 (Apr 4, 1955); 103 Cong. Rec. 10,913 (July 5, 1957). Congress has also used pro forma sessions to satisfy the Twentieth Amendment's requirement that it meet at noon on January 3 to start a new session unless a different time is specified by statute. See H.R. Con. Res. 232, 96th Cong., 93 Stat 1438 (1979) (pro forma session to be held on January 3, 1980); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (pro forma session to be held on January 3, 1992); 151 Cong. Rec. S14,421

(daily ed. Dec. 21, 2005) (pro forma session to be held on January 3, 2006); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (pro forma session to be held on January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (pro forma session to be held on January 3, 2012). Pro forma sessions have long been widely accepted as a permissible method of fulfilling these constitutional mandates, and it is difficult to see how the Senate could be in session for purposes of one constitutional provision while in recess for purposes of another.

VI

Rejecting these arguments, OLC relies instead on what it says is the purpose of the Recess Appointments Clause: "to provide a method of appointment when the Senate [is] unavailable to provide advice and consent." 2012 OLC Op. at 15. Throughout its lengthy opinion, OLC repeatedly emphasizes the Executive Branch's "traditional view that the Recess Appointments Clause is to be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations * * * ." Id. at 4. In concluding that a pro forma session of the Senate is indistinguishable from a recess of the Senate, OLC argues that "the touchstone is [the pro forma sessions'] "practical effect, viz., whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations.'" Id. at 12 (quoting Recess Appointments, 41 Op. Att'y Gen. at 467).[2]

OLC is certainly correct that the Recess Appointments Clause was intended to provide "an auxiliary method of appointment," as Hamilton put in Federalist No. 67, for filling "vacancies that may happen during the recess of the Senate," when the Senate is unavailable to perform its advice and consent function. But even accepting at face value OLC's "practical construction" of the Recess Appointments Clause, the recess appointments made by the President on January 4 cannot reasonably be justified on the ground that the Senate was unavailable or otherwise unable to perform its advice and consent function. Rather, the Senate has simply been unwilling to provide its advice and consent to the President's nominees.

First, not only has the Senate been "available" in fact to consider these nominations, it has actually been considering some of them for many months. The President recess appointed Terence Flynn to a seat on the NLRB that had been vacant since August 27, 2010, when Peter Schaumber's statutory term expired. National Labor Relations Board, Members of the NLRB since 1935, *https://www.nlrb.gov/members-nlrb-1935* (last visited Feb. 5, 2012). This vacancy thus occurred by operation of law, not as a result of some unexpected event such as resignation or death. Yet the President waited over four months, until January 2011, to nominate Mr. Flynn to fill the seat. Far from being unavailable or otherwise unable to provide its advice and consent to Mr. Flynn's nomination, the Senate has simply been unwilling to do so, and the nomination has been stalled for over a year. In the case of Richard Griffin, the President waited until December 15, 2011—two days before the Senate's adjournment for the holiday—to nominate him to a seat that became vacant at the expiration of Wilma Liebman's statutory term months earlier, on August 27, 2011. Id. Again, this vacancy on the NLRB occurred by operation of law; it took no one by surprise. It is untenable for OLC to claim that the President acted to fill these vacancies because the Senate was not "capable of exercising its constitutional function of advising and consenting to executive nominations." Id. at 12.

Indeed, in publicly announcing his recess appointment of Mr. Cordray to the CFPB, President Obama abandoned any pretense that he was acting because the Senate was unavailable to consider the nomination. To the contrary, the President declared that he was making the recess appointment despite the fact that the Senate had been considering the nomination for over six months. This is what he said: "Now, I nominated Richard for this job last summer * * * For almost half a year, Republicans in the Senate have blocked Richard's confirmation. They refused to even give Richard an up or down vote * * * ." President Barak Obama, Remarks by the President on the Economy, available at *http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy* (Jan. 4, 2012). The President was not complaining that the Senate was unavailable or unable to confirm Mr. Cordray. He was complaining that the Senate refused to confirm Mr. Cordray. And, as he candidly proclaimed: "I refuse to take no for an answer." Id.

Thus, the President himself has openly acknowledged that his purpose in recess appointing Mr. Cordray to the CFPB had nothing to do with the only purpose of-

[2] Op. Att'y Gen. 631 (1823). Attorney General Wirt's opinion reads the phrase "may happen during the recess of the Senate" to mean "may happen to exist during the recess of the Senate," and so concludes that the President may fill any seat that is open during a recess regardless of when it became open or whether it has been previously occupied. Id. at 631-32.

fered by his lawyers at OLC as providing a constitutional justification for the exercise of his power to do so. The President's January 4 recess appointments were driven not by any concern that the Senate was unavailable to perform its constitutional role in the appointment of government officers, but rather by the President's determination, openly avowed, to circumvent the Senate's role.

VII

For OLC, however, the Senate's availability to perform its advice and consent function is not determined by whether the Senate is in fact available to consider a nomination, or even by whether it has in fact been considering a nomination for many months. Rather, OLC focuses solely on whether the Senate's availability to consider a nomination is interrupted by a recess of sufficient duration to justify exercise of the President's recess appointment power. And, as previously noted, it has opined that the Senate was unavailable throughout its holiday adjournment—from December 17 to January 23—because the days in which the Senate held a pro forma session were constitutionally indistinguishable from the days in which the Senate chamber was dark and empty.

But this assertion collapses under the weight of a single inconvenient truth: while holding a pro forma session on December 23, the Senate passed a bill—a two month extension of the payroll tax cut—which the President promptly signed into law. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). This was not the first time that the Senate had passed legislation during a pro forma session. See id. at S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act during pro forma session). In passing the payroll tax cut extension, the Senate acted by unanimous consent, the same procedure by which the Senate confirms most presidential nominees. MICHAEL L. KOEMPEL & JUDY SCHNEIDER, CONGRESSIONAL DESKBOOK § 10.80 (5th ed. 2007); see, e.g., 157 Cong. Rec. S7874-75 (daily ed. Nov. 18, 2011); 157 Cong. Rec. S4303 (daily ed. June 30, 2011); 156 Cong. Rec. S587 (daily ed. Feb. 11, 2010). In fact, the Senate confirmed numerous nominees by unanimous consent the very day it agreed to hold the pro forma sessions at issue here. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011). If the Senate can pass legislation by unanimous consent during a pro forma session, then it can surely confirm the President's nominees in the same manner, especially if there is an immediate and indisputable need for it to do so. Further, Senate committees often consider presidential appointees when the Senate is in intrasession recesses. During the intrasession recess from January 7 to January 20, 1993, for example, Senate committees "considered nearly every one of President-elect Clinton's cabinet nominations." Michael A. Carrier, Note, When Is the Senate in Recess for Purposes of the Recess Appointments Clause?, 92 MICH. L. REV. 2204, 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)). Had some national emergency over the holiday break made the filling of a vacant office imperative, there is no doubt that the Senate would have been able to confirm a nominee at one of its pro forma sessions. Nor is there any doubt that the President could have called the Senate into session for the purpose of performing its advice and consent function, if he determined that the national interest required him to do so. U.S. CONST., ART. II, § 3, cl. 2.

The OLC opinion answers that, even if in fact the Senate is able to act during its pro forma sessions, the President "may properly rely on the public pronouncements of the Senate that it will not conduct business." 2012 OLC Op. at 21. There are several problems with this argument.

First, the Senate's scheduling order directing that no business be conducted during pro forma sessions was entered by unanimous consent, and there can be no doubt that the Senate was perfectly free to overrule it, and to conduct business, by unanimous consent. Surely, under a "practical construction" of the Recess Appointments Clause "focusing on the Senate's ability to provide advice and consent to nominations," 2012 OLC Op. at 4, the indisputable practical reality that the Senate is able to provide advice and consent to nominations during a pro forma session trumps a non-binding public pronouncement to the contrary. Second, given that the Senate passed a law during its pro forma session on December 23, prior to the January 4 recess appointments, the President plainly was not entitled to rely on the Senate's repudiated public pronouncement that no business would be conducted at such sessions. If a Senate recess is defined as any period during which the Senate is not available to conduct business, then surely the Senate cannot be in recess when it passes legislation. Finally, President Obama in fact has not relied on the Senate's no-business pronouncement. It was he who urged the Senate to pass the two-month extension of the payroll tax cut during the holiday adjournment, and who promptly signed the bill into law notwithstanding that it was passed by the Senate in plain violation of the order scheduling the December 23 pro forma session. The President

surely is not entitled both to rely on the Senate's public pronouncement that it will not conduct business and to ignore it, as he pleases.

Rather than furthering the purpose of the President's recess appointment power, the OLC opinion would allow that power to swallow the Senate's authority to withhold its consent when it believes a nominee should not be confirmed. In this way, the Administration's legal position is a vivid illustration of what Justice Cardozo called "the tendency of a principle to expand itself to the limit of its logic." BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921). The Framers intended the President's recess appointment power to serve as an "auxiliary method" that would "supplement" the usual requirement that the President and the Senate act "jointly" in making appointments. THE FEDERALIST NO. 67 (Alexander Hamilton). Yet under the Administration's approach, a President could circumvent the Senate's opposition to a nominee by making seriatim recess appointments to the same office. That is precisely what the President has done in the case of his recess appointment to the NLRB of Sharon Block, where he replaced one recess appointee with another.

The President's January 4 recess appointments had nothing to do with whether the Senate was available to act and everything to do with the Senate's unwillingness to confirm the President's nominees. As with every branch of our government, there is a "hydraulic pressure" within the Executive "to exceed the outer limits of its power." INS v. Chadha, 462 U.S. 919, 951 (1983). Regardless of whether the President has sought to exceed his power for good or ill, it is Congress' constitutional responsibility to resist him.

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Chairman KLINE. Thank you, sir.

Mr. Devaney, you are recognized for 5 minutes.

**STATEMENT OF DENNIS M. DEVANEY, MEMBER, DEVANEY JACOB WILSON, PLLC**

Mr. DEVANEY. Thank you, Mr. Chairman, Ranking Member Miller, members of the committee. It is a privilege for me to be here this morning to comment on the public policy implications for the NLRB of President Obama's January 4th so-called "recess appointment" of three members.

As you all know, those three members actually are a quorum of the board since the 1947 Taft-Hartley Act amendments. And I think it is particularly significant in the wake of the Supreme Court's decision, in New Process Steel, that the majority of the board is now purportedly appointed via this recess appointment mechanism.

As I said in the Washington Times interview that I gave, my problem with it is I think it is going to put a cloud over every action that this board takes. And the object lesson and relevant precedent that underscores this unfortunate public policy consequence for the board, employees, unions and employers is best illustrated by what happened to the board in December of 2007.

As many of you will remember, finding itself with only four members and expecting two more vacancies when the recess appointments of two members expired at the adjournment of the first session of the 110 Congress, the four boardmembers purportedly delegated all of the board's powers to the remaining two members.

And they did this at a time, and in the face of, the clear language in the statute since 1947, which says that three members of the board shall at all times constitute quorum of the board. On behalf of one of my clients, I appealed an adverse two-member decision to the U.S. Court of Appeals for the District of Columbia Circuit and then, on the client's behalf, participated as amicus curiae on the winning side in the U.S. Supreme Court New Process Steel case.

And I note for the record that Justice Stevens, in one of his last opinions, writing for the majority, said, "If Congress wishes to allow the board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the board's full power be delegated to more fewer than three members, and to provide for a board quorum of three, must be given practical effect."

Section 3-B, as it currently exists, does not authorize the board to create a tail that would not only wag the dog, but would continue to wag the dog after the dog died.

The lesson with respect to the president's recess appointments the day after the U.S. Senate met in pro forma session on Tuesday, January 3rd to commence the second session of this Congress, and was scheduled to meet in another pro forma session on Friday, can be found in the background Office of Legal Counsel memorandum which was done in 2003 that said to the board that it could, indeed, delegate all of its powers to a three-member board which then could decide, too.

OLC was wrong then, and the Supreme Court said they were wrong. OLC is going to be wrong now, and I believe that that will be the final result if litigation comes forward. The problem for the parties and for the board, for employees, and for employers is that it is likely that that issue cannot be raised until there is an adverse decision by this NLRB, appeal to a circuit court, and then perhaps reviewed by the Supreme Court of the United States.

At a minimum, we are looking at 2 to 3 years of litigation. As I said in the brief I wrote in New Process Steel, the questions of the board's delegation and quorum requirements is an institutional and legal process issue, not an employee, not a union, not a management question.

I think many of you know I primarily represent management in my private practice. But I want you to know that in the New Process Steel case the amicus curiae brief that I filed was on behalf of the Michigan Region Council of Carpenters.

So this is not a union or management issue. This is a process issue. And it is just bad public policy for the president to have taken this action. I also want to note particularly the sort of dance that the Office of Legal Council has done. I was present at the oral argument in New Process Steel, and Deputy Solicitor General Katyal argued for the government, a very effective advocate.

But Chief Justice Roberts, on March 23rd—and this is before President Obama recess-appointed Member Becker and Member Pearce asked him, "Well, why doesn't the president just use the recess appointment authority?" Katyal's answer was, "Well, yes, the recess appointment authority would be available, but in my office it is opined that there has to be a minimum recess of 3 days."

Now, not a year-and-a-half later—and frankly, unfortunately, I think for political expediency reasons—OLC now has changed their mind. I notice my time is up. Let me just briefly close, Mr. Chairman.

For the parties who use the board' processes, and for reasoned development of national labor policy, the uncertainty that is going to be created by questions about the legality and the authority of

these appointments will further contribute to doubts about the agency and it's mission.

For many years, the board, by tradition, has decided that cases which of major significance or important precedent should only be decided when there is a five-member board and with a majority of three. Because of this cloud that is over this board, I think that the parties and the employees and the unions and the employers who deal with the board, unfortunately, are going to face a very uncertain prospect for the next several years.

And that is bad public policy. Thank you, Mr. Chairman.

[The statement of Mr. Devaney follows:]

**Prepared Statement of Dennis M. Devaney, Member, Devaney Jacob Wilson, PLLC**

Mr. Chairman, Members of the Committee. It is a privilege for me to be here this morning to comment on the public policy implications for the National Labor Relations Board of President Obama's January 4, 2012 so-called recess appointment of three members to the NLRB (a quorum of the Board since the 1947 enactment of the Taft Hartley Act and of its potential legal significance in light of the U.S. Supreme Court's New Process Steel decision). As I said in my interview with the Washington Times that the Committee partially quoted in its release announcing today's hearing "My problem with it is I think there is going to be a cloud over whatever they do * * * Anything they do is going to be subject to being undone, because they did not have the authority to act."

The object lesson and relevant precedent that underscores the unfortunate public policy consequences for the Board, employees, unions, and employers by such brinksmanship appointment and delegation practices is best illustrated by the Board's actions in December, 2007. Finding itself with only four members and expecting two more vacancies when the recess appointments of two members expired at the adjournment of the 1st Session of the 110th Congress, the four Board members, delegated all of the Board's powers to the remaining two members in the face of the statute's clear language, since 1947, that "[T]hree members of the Board shall, at all times, constitute a quorum of the Board."

On behalf of one of my clients, I appealed an adverse two member decision to the U.S. Court of Appeals for the District of Columbia Circuit and then on the client's behalf participated as amicus curiae on the winning side at the U.S. Supreme Court in New Process Steel, L.P. v. NLRB, where Justice Stevens writing for the Court majority said "If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three must be given practical effect * * * Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

The lesson with respect to the President's recess appointments the day after the U.S. Senate met in pro forma session on Tuesday, January 3, 2012 to commence the second session of the 112th Congress and was scheduled to meet in another pro forma session on Friday, January 6, 2012 can be found in the background Office of Legal Counsel, U.S. Department of Justice memorandum provided to the NLRB in 2003 which had incorrectly opined that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained" which was rejected by the Supreme Court's in New Process, in Deputy Solicitor General Neal Katyal's answer on behalf of the Obama Justice Department to Chief Justice Robert's question at oral argument in New Process on March 23, 2010: CHIEF JUSTICE ROBERTS: "And the recess appointment power doesn't work why?" MR. KATYAL: "The—the recess appointment power can work in—in a recess. I think our office has opined the recess has to be longer than 3 days", (see Exhibit 1) and in the effort to distinguish the Justice Department's three day legal position put before the Court in New Process in the January 6, 2012 Office of Legal Counsel Memorandum Opinion for the Counsel to the President which argues that former Solicitor General Kagan's April 26, 2010 response to the Supreme Court's April 16, 2010 Order was addressing mootness. The problem with that argument is that on March 23, 2010 when Chief Justice Roberts asked his question, President Obama had not made his recess appointments of former Member Craig Becker and of then Member and now Chairman

Mark Pearce which did not take place until March 27, 2010. Thus, Katyal's answer was not given in the context of a question with respect to mootness, but rather as the Obama Justice Department's policy advice that to make a constitutionally sound recess appointment, the recess should be of at least three days in duration. Not even two years later, the Obama Justice Department rendered an opinion in which they opined that "pro forma sessions do not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause of the Constitution."

For the parties who use the Board's processes and for reasoned development of national labor policy, uncertainty created by questions about the legality and authority of these appointments will further contribute to doubts about the agency and its mission. For many years, serving members of the Board have adhered to a policy by which members have agreed not to change major or significant precedent without the presence of a full five member Board. For both institutional and personal reasons, many appointees serving in recess appointments, even when the Board has been composed of five members, have been reluctant to take positions on controversial cases. This has frequently resulted in additional delay in adjudication of cases and in implementation of non-adjudicative policies by the Board. Importantly, since Board procedures allow notational voting and provide that panel decisions are circulated to all serving members who may opt onto the case or designate the case as one that should be decided by the full Board, if these recess appointments are at some point in the future held constitutionally deficient, the Board will again be faced with redoing or revisiting decisions. Such a development will once again undercut confidence in the fairness and due process of Board decision making.

Parties who receive an adverse decision from the Board will have the right to appeal those decisions. Unlike typical Board decisions, the constitutional issue will not be subject to Chevron deference. In the meantime, the regional staff will apply the most recent decisions of the Board. Thus, the effect of the decisions will not be limited to the aggrieved party. In fact, the decisions will extend to all parties covered by the NLRA. It takes on average more than one year for the Board to decide a case. Normally, there would be some closure once the Board decides, but under the current scenario there will most likely be legal issues for an extended period of time which will add costs for the parties and taxpayers.

Should the current Board, which includes a majority of purported recess appointees, attempt to delegate powers to the Acting General Counsel or Regional Directors it will raise additional legal questions. In the New Process decision the Supreme Court did not reach the issue of potential unlawful delegations, but a Writ of Certiorari Petition raising that direct issue is currently pending before the Supreme Court. It is almost certain that similar challenges will be mounted because of the cloud over the current Board as a result of the recent appointments. See HTH Corporation, KOA Management LLC DBA Pacific Beach Hotel and Pacific Beach Corporation v. National Labor Relations Board.

Thank you for the opportunity to provide my comments. I will be happy to answer any questions you or the Committee members may have.

EXHIBIT 1

[Laughter.]

JUSTICE SCALIA: When—when—when is one of the two's term over?

MR. KATYAL: In the absence of any further confirmations or other appointments, one of the members, Member Schaumber, will leave on August 27th of this year.

JUSTICE SCALIA: Of this year. At which point there will be some pressure on Congress, I guess, right?

MR. KATYAL: There will.

JUSTICE GINSBURG: There are—there are two nominees, are there not?

MR. KATYAL: There are three nominees pending right now.

JUSTICE GINSBURG: Three?

MR. KATYAL: Yes. And they have been pending. They were named in July of last year. They were voted out of committee in October. One of them had a hold and had to be renominated. That renomination took place. There was a failed quorum—a failed cloture vote in February. And so all three nominations are pending. And I think that underscores the general contentious nature of the appointment process with respect to this set of issues.

CHIEF JUSTICE ROBERTS: And the recess appointment power doesn't work why?

MR. KATYAL: The—the recess appointment power can work in—in a recess. I think our office has opined the recess has to be longer than 3 days. And—and so,

it is potentially available to avert the future crisis that—that could—that could take place with respect to the board. If there are no other questions——

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Richie, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF SHELDON E. RICHIE ON BEHALF OF THE PETITIONER

MR. RICHIE: First, let me address the the issue of what happens if we prevail, how will the problem be fixed. There are two types of cases. There are representation cases, and then there are cases dealing with unfair labor practices. The unfair labor practices, Mr. Chief Justice, have a limitations period to them. The—the issues—the issues with respect to representation have no limitations. So in response to Justice Ginsburg's comment—I believe it was Justice Ginsburg—there's a—when a successor comes on board, these issues, if these—if we prevail and our decision is vacated, those are—can be reheard by the board when a successor is in place. The D.C. Circuit——

JUSTICE SCALIA: Excuse me. Just the—just the representation cases, not the unfair labor 6 practice cases?

MR. RICHIE: That's correct.

JUSTICE SCALIA: Wouldn't the——

MR. RICHIE: Well, except to the extent, Justice Scalia, that the statute of limitations has not run on those unfair labor——

JUSTICE SCALIA: Yes, I understand.

MR. RICHIE [continuing]. Cases.

CHIEF JUSTICE ROBERTS: Wouldn't—wouldn't the statute of limitations at least be told during the period when they can't do anything? I suppose that's a different case.

MR. RICHIE: That's an argument. That's a different case. I don't know the answer. And I'm sure the litigants would argue that. With respect to the issue of the—whether it's three members that are required on both the board and the group, the D.C. Circuit didn't deal with that, but they did deal with the exception issue. And they said—I'm reading from the appendix page of our * * *

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Chairman KLINE. Thank you, sir.

Ms. Davis, you are recognized.

**STATEMENT OF SUSAN DAVIS, PARTNER, COHEN, WEISS AND SIMON, LLP**

Ms. DAVIS. Thank you very much, Chairman Kline, Ranking Member Miller, members of the committee, Congresswoman Susan Davis—we are not related to each other. It is very nice to be here. Thank you very much for allowing me to testify about the needs for a fully-functional National Labor Relations Board. And I do agree with Mr. Devaney. This is more about process any sort of partisan agenda.

I am a partner in the law firm of Cohen, Weiss and Simon in New York City. And if I may have a hats off to the New York-New Jersey Giants, as we start.

For the past 31 years, I have represented nurses and airline pilots, auto workers and steel workers, musicians, actors, truck drivers alike. I have sat at countless bargaining tables across the aisle from employers, and we have negotiated collective bargaining agreements, some of which have been in effect for decades.

They have provided wages for workers to support their families, to buy a home, for their kids to go to college, to have decent health insurance and a decent retirement package. In short, these collective bargaining agreements, and our process, has allowed workers in this country to attain the American dream.

I have represented workers during the Reagan board, during the Clinton board, during both Bush boards and during the Obama boards. Makes me feel old. [Laughter.]

There have been decisions from the boards that I have decried, and there have been other decisions that I have lauded. However, one constant during this period has remained. Through Democratic administrations, through Republican administrations, other than for a few days at the time the labor board has been allowed to function.

Every year, it has addressed more than 20,000 unfair labor practice charges of employer illegal conduct. It has awarded an average of $93 million a year in workers to back pay. It has conducted about 1,900 secret ballot elections every year. And, as this committee has discussed in the past, secret ballot elections are very important.

Under our system of labor relations, like it or not neither the federal courts nor the states have any jurisdiction whatsoever to administer our national laws. The NLRB is the sole entity that can administer the rule of law in labor relations in this country. In a very real sense, the rule of law is a substitute for the rule of the jungle.

This is true in our economy, it is true in our society, and it is particularly true in the often heated and agitated realm of labor relations. A central feature of the rule of law is that there is a place to go for decisions. Again, this is a systematic truth, but is essentially true in the context of labor management disputes.

Since 1935, the basic rule in this country in labor management relations has been the National Labor Relations Act. And the place to go for decisions, the only place to go, has been the National Labor Relations Board. Those who want to change that reality can try to change it, try to change the law, try to abolish the labor board.

But as long as the NLRA and the NLRB stand, they must be permitted to function. That is simply the way our system works. Had President Obama not made the three recess appointments to the board on January 3 there would have been, we all agree, a two-person quorum-less board that would have shut down.

The Office of Legal Counsel, like the head of that same office under President George W. Bush and like a number of constitutional scholars, determined that the pro forma sessions, where no business was conducted, did not constitute constitutional sessions that were sufficient to block the president's recess appointment power because he could not obtain the advice and consent of the Senate in a very real sense.

For those of us who live outside the Beltway, I must say that the idea that you could post one person in the chamber for a few seconds every couple days when the Senators were in their home states, when, under Senate order, there was not ability to conduct any business, for those of use who don't live in this town, that it is to exalt the minutest of form over the weightiest of substance.

The constitutional debate is fascinating. Haven't spent this much time reading about it in many, many years. But it obscures the real issue that is before this committee. What will happen to workers, what will happen to our system of collective bargaining if the labor board is shut down. I think that is the question, with all due respect to all of us, that you need to focus on today.

Workers who are fired—and that is one out of every four in an organizing campaign—will have their cases investigated, but will have no final back pay award, will have no final reinstatement award, if there is no labor board. Workers may file election petitions, there may even be elections. But there will be no election order and no election finality, and thus no requirement of collective bargain, even for those workers who want to select a union.

Last month, in New York City, a strike of 20,000 nurses that I represent was averted because the National Labor Relations Board enforced the obligation of the union and of the four major hospitals in New York City to bargain with each other in good faith. It was painful, but we did it.

Ultimately, we reached a contract that protected the nurses. It protected the patients. It protected the hospitals. And it protected those of us who live and work in New York City who will have to go to a hospital one day. The rule of law enforced by the labor board, not the rule of the jungle that was in effect in the 1930s, saved the day.

If the labor board is not able to function it will affect all of us, but most of all it affect workers in this country who have the least. They will pay the highest price. You must measure that price not only in lost jobs and in lost back pay, but in lost opportunities to move into the middle class. That is the American dream.

That price the president determined, on January 3rd, in light of the view of the Office of Legal Counsel which had been supported by its predecessor, was simply too high.

Thank you very much. I look forward to the opportunity to answer your questions.

[The statement of Ms. Davis follows:]

**TESTIMONY**
**BEFORE THE COMMITTEE ON EDUCATION AND THE WORKFORCE**
**UNITED STATES HOUSE OF REPRESENTATIVES**

February 7, 2012

Hearing on

**"The NLRB Recess Appointments: Implications for America's Workers and Employers"**

Susan Davis
Cohen, Weiss and Simon LLP
New York, New York

Chairman Kline, Ranking Member Miller and Members of the Committee, thank you for this opportunity to testify about the necessity for a fully functioning National Labor Relations Board, and the impact of a quorumless Board on the workers in this country.

I am a partner in the law firm of Cohen, Weiss and Simon LLP in New York City, a firm that has served the interests of working people and their unions for more than 60 years. I have been with the firm for more than 30 years representing unions of nurses, musicians, truck drivers, laborers, airline pilots, steelworkers, letter carriers, autoworkers, actors, broadcasters, recording artists and a myriad of other workers across the country. Together with Cohen, Weiss and Simon, I have served as general counsel to the International Brotherhood of Teamsters and the United American Nurses, a national union of 100,000 registered nurses. Currently, as a member of the firm, I am chief national counsel for the American Federation of Television and Radio Artists, general counsel of the New York State Nurses Association and counsel to a number of local labor unions in New York City. During the past 30 years, I have practiced extensively before the National Labor Relations Board. I am here today to discuss my concern that the NLRB, without a full complement of Board members, would be incapable, not only of protecting workers' rights, but of administering the federal labor laws that protect workers, employers, and the public interest.

The National Labor Relations Act protects the rights of workers, whether they are in a union or not, to join together in order to have a voice in their workplace. The Act protects workers against employer discrimination or retaliation if they opt to exercise these and other rights protected by the Act, and it also guarantees workers the right to refrain from engaging in union activities. In the Act's preamble, Congress recognized that it was in our country's best interests to avoid industrial strife by allowing workers' designated representatives to sit across the table from employers, as equals, and bargain about the workers' terms and conditions of employment. Although far from perfect, the Act has protected millions of workers over the past 75 years, under both Republican and Democratic administrations.

The rights enshrined in the NLRA have allowed the nurses we represent to address perpetual mandatory overtime requirements and last-minute schedule changes without fear of losing their jobs. A truck driver in a union we represent who was fired because he ran for union office and filed grievances on behalf of members was recently reinstated with full back pay. Other workers, as a result of filing unfair labor practice charges, have been able to stop their supervisors from interrogating them about their lawful activities and prevent their employers from unlawfully discharging them merely because they sought union representation. Last month, a strike of 20,000 Registered Nurses in New York City was averted in large part because the Labor Board enforced the hospitals' and the union's obligations to bargain in good faith with each other. In that situation, like so many others, the requirement to bargain in good faith allowed the workers to maintain good-quality health insurance, wages sufficient to support their families and an adequate retirement income. In short, it allowed them to overcome the stark income inequality that is destroying the middle class in our country.

In protecting workers' rights, the NLRA provides a framework for collective bargaining; it does not dictate any specific results. This framework has facilitated the type of union-management cooperation and bargaining successes that the auto industry recently achieved. Following contract settlements last fall, General Motors is back as the world's Number 1 automaker, Chrysler is profitable for the first time since 1997, and Ford Motor Company continues to make large investments in its U.S. plants.[1] All three domestic automakers are bringing jobs back to the United States from other countries; indeed, in the last several years, they have added nearly 160,000 jobs.[2]

This is only a small part of what the National Labor Relations Act has helped our nation to achieve over the past several years. However, the rights the Act protects and the framework it guarantees are only as real as the Board's ability to enforce them. If the NLRB does not have a full complement of Board members sufficient for a quorum, workers will lose, companies will lose and, ultimately, our economy and our country will lose.

Every year, the Board addresses approximately 23,000 charges alleging illegal employer or union conduct. In the last five years, workers have received an average of $93 million a year in back pay for unlawful employment actions taken against them. And, every year, the NLRB conducts between 1,700 and 2,200 representation elections.[3] By continuing to function so

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[1] http://www.gazettenet.com/2011/10/13/chrysler-uaw-finally-agree-on-new-contract; http://www.businessweek.com/news/2011-09-20/uaw-says-gm-to-invest-2-5-billion-in-new-four-year-contract.html; http://www.thedetroitbureau.com/2011/10/breaking-news-ford-and-uaw-reach-settlement.

[2] http://www.freep.com/article/20120126/BUSINESS01/201260458/Auto-industry-would-gain-from-Obama-s-manufacturing-support.

[3] NLRB Annual Reports: http://nlrb.gov/annual-reports.

effectively throughout both Democratic and Republican administrations, the Board has protected the interests of hundreds of thousands of workers.

When the Senate adjourned *sine die* in early January, the Board's membership, as a result of the expiration of an earlier recess appointment, fell to two Members. Under a 2010 Supreme Court decision,[4] the Board cannot exercise its authority unless it has a quorum of at least three Members. Thus, the President's inability to make additional Board appointments in January would have prevented the Board from enforcing the Act and ensuring the worker protections it has guaranteed for more than 75 years.

Only the NLRB can guarantee these protections for workers. As the Supreme Court noted almost 40 years ago,[5] Congress entrusted the Board, an administrative agency, rather than the courts, with the exclusive jurisdiction to enforce the Act. It did so in order to ensure that the agency would be free to adapt the broad legal standards set forth in the Act to the ever-evolving workplace. As a result of this administrative structure, there is no other forum in which workers can seek redress when their rights under the Act—to have a say in their workplace and be free from unlawful employer retaliation or discrimination—are violated. And there is no other forum in which the public interest in sound and stable labor relations can be vindicated. Charges can only be filed with the NLRB, and only the NLRB can conduct an investigation, prosecute a case and issue a decision and order. States cannot step in and legislate remedies for violations of these rights, as the doctrine of federal preemption does not permit them to do so.[6] The only way that rights guaranteed by the NLRA can be protected is by action of the NLRB.

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[4] *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

[5] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[6] "It is by now a commonplace that, in passing the NLRA, Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's

To deny the Board the ability to function by disabling the President's ability to appoint Board members would eviscerate workers' rights under the National Labor Relations Act and the public interest in the administration of our nation's laws. Not only would workers lose rights and protections they desperately need, but both workers and employers would lose the guidance and decision-making finality that a Board decision brings. A majority of workers who voted for union representation in a secret ballot election, for example, would not be able to enjoy the benefits of collective bargaining because there would be no election finality. Workers who sought to decertify a certified representative would face the same lack of finality. Unions and employers would both lack the ability to secure rulings that protect their rights, and the public interest, in being free from unfair labor practices in their relationships. Administrative law judge decisions finding that an employer committed an unfair labor practice by discharging a worker for engaging in union activity, something that occurs in one out of four organizing campaigns, would have no finality. Decisions finding that a union engaged in an unfair labor practice would face the same fate. In short, the institutional paralysis that would result from a quorumless Board—something that has not lasted for more than a few days in the 75-year history of the Board[7]—would irreparably harm workers and employers alike.

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preemptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' *Garner v. Teamsters*, 346 U.S. 485, 346 U. S. 498-499 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. *See* 359 U.S. at 359 U. S. 247." *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986).

[7] Although Chairman Liebman and Member Schaumber operated as a two-Member Board for twenty-seven months, it was not until after this two-Member Board's tenure, when the Supreme Court issued its decision in *New Process Steel*, that the Board was held to have operated without

I will now review the status and circumstances of the recent appointments to the NLRB, and then describe in more detail the impact of a non-functioning NLRB.

On January 4, 2012, President Obama appointed three Members of the National Labor Relations Board: Democrats Sharon Block and Richard Griffin, and Republican Terence Flynn. With these three appointments, the NLRB is now at its full five-Member strength for the first time since August 2010.

In making these appointments, President Obama relied on the legal opinion of the Office of Legal Counsel (OLC) of the U.S. Department of Justice, which concluded that the Senate was not in session under the U.S. Constitution when the appointments were made. The opinion concluded that so-called *pro forma* sessions of the U.S. Senate, some of which lasted only a few seconds and during which no business was conducted, did not constitute sessions within the U.S. Constitution that would preclude the President from determining that the Senate remained unavailable "to receive communications from the President or participate as a body in making appointments."[8] Nevertheless, immediately after the recess appointments were announced, some observers denounced the appointments and challenged their constitutionality.[9]

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a quorum. The four-Member Board that was appointed prior to the *New Process Steel* decision promptly reconsidered the hundreds of cases that had been decided by the two-Member Board.

[8] *Intrasession Recess Appointments*, 13 Op. OLC at 272 (quoting Daugherty Opinion, 33 Op. Att'y Gen. at 24).

[9] *See, e.g.*, Motion to Dismiss filed by respondents in *Paulsen v. Renaissance Equity Holdings, LLC* (Civil Action No. 12-CV-350) (EDNY) (arguing that 10(j) injunction action brought by the NLRB against respondents should be dismissed because the NLRB lacks the statutorily-required three members to bring the action); Charging Party's Motion to Disqualify Members Block, Griffin and Flynn from Ruling on this Case (Case Nos. 13-CB-18961, 18962) (NLRB) (arguing that NLRB Members Block, Griffin and Flynn should be disqualified from hearing the case because their recess appointments to the NLRB are unconstitutional). Some critics have suggested that the recess appointments were improper because two of the nominations had only been pending in the Senate for a short amount of time prior to the Senate's recess. This criticism is unfounded and ignores the fact that Presidents have the authority to, and

In my view, as in the view of a number of leading constitutional scholars, OLC and the President were correct in their conclusion that the Senate was in recess and unavailable to provide "advice and consent" on the President's nominations to the NLRB.[10] Significantly, senior officials in the Justice Department under President George W. Bush, including Steven Bradbury, who headed the Office of Legal Counsel at the Justice Department from 2005-2009, agree.[11]

When the Senate recessed on December 17, 2011, it agreed to "adjourn and convene for *pro forma* sessions only, with no business conducted," every Tuesday and Friday between December 17, 2011 and January 23, 2012.[12] The OLC determined that the Senate was forced to conduct these so-called *pro forma* sessions every three days because the House of Representatives had refused to consent to the Senate recessing[13] and, under Article I, §5 of the Constitution, "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." The House attempted to prevent the Senate from recessing with the express purpose of blocking the President's exercise of his constitutional

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indeed have, made recess appointments of individuals who were not previously nominated at all to the positions to which they were recess appointed. For example, in 2002, President George W. Bush recess appointed William Cowan and Michael Bartlett to the NLRB, and in the 1990s, President Clinton recessed appointed John Higgins and John Truesdale. None of these appointees was nominated to the NLRB before, during or after their service on the Board.

[10] *See* "Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions," 36 Opinions of the Office of Legal Counsel 1 (Jan. 6, 2012); *see also* Testimony of Professor Michael Gerhardt before the House Committee on Oversight and Government Reform (February 1, 2012); Laurence Tribe, "Games and Gimmicks in the Senate," New York Times (Jan. 5, 2012).

[11] http://www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html.

[12] OLC memo, at 1.

[13] *Id.* at 2.

power to make appointments without Senate confirmation while the Senate was not available for consultation.[14]

In the so-called *pro forma* sessions that occurred during the 20-day recess between the beginning of the second session of Congress on January 3, 2012 and the reconvening of the Senate on January 23, the Senate conducted no business and was not available to act on the President's nominations. The Office of Legal Counsel correctly concluded that the brief *pro forma* sessions, involving at most a single Senator and lasting only a few seconds each, did not fundamentally change what was, in reality, a 20-day recess. According to the OLC, Congress could "prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations," but "it cannot do so by conducting *pro forma* sessions during a recess."[15] Such sessions are not that at all; they are a mere pretext designed to interfere with the President's responsibility to ensure that the laws of our Nation be enforced.

Critics of the President's appointments argue that the Senate was not actually in recess for more than three days at a time, and that the President does not have the authority to make appointments without Senate confirmation during the short three-day breaks between these events. As OLC concluded, however, because the Senate conducted no business whatsoever for 20 days—the so-called *pro forma* sessions were convened by a single Senator and lasted only a few seconds—the Senate was indeed in recess.[16] Moreover, as one federal court of appeals has found, no three-day time limit for the exercise of the recess appointment power appears in

[14] *Id.* at 2-3.

[15] *Id.* at 4.

[16] *Id.* at 13-16.

Article II, §2, the provision of the Constitution giving the President the recess appointment power.[17]

It is also important to bear in mind the context in which these appointments were made. Clearly, the House was attempting to block the President's exercise of his constitutional power to staff executive branch agencies by controlling the Senate's ability to recess. Several politicians candidly admitted that the *pro forma* sessions were called solely to nullify the President's Constitutional recess authority.[18] Under these circumstances the President was highly justified in making these appointments, particularly because the NLRB would have ceased functioning, thereby injuring the workers, unions and employers who rely on it to adjudicate disputes and enforce our nation's system of labor-management relations.

These attacks on the President's recess appointments must also be viewed in the context of the unprecedented assaults on the NLRB over the past year. The NLRB was the focus of eight Congressional hearings last year, including five held by this Committee. There have been countless requests for information, numerous document subpoenas and unparalleled personal attacks on NLRB staff. There have been legislative efforts to eviscerate the Board's remedies and to raise insurmountable barriers for workers seeking to form a union, and attempts to defund and even abolish the Board. (H.R. 2926) These actions are the prelude to current attempts to nullify the President's recess appointment power.

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[17] *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004); *see also* Gerhardt testimony at 3.

[18] Following a Republican filibuster of Craig Becker's nomination to the NLRB in August 2009, several Senators vowed to block any other nominees to the NLRB. http://www.politico.com/news/stories/0511/54385.html; http://www.rollcall.com/news/senators_ask_boehner_block_adjournment_recess_appointment-205971-1.html. As a result, the President rightly concluded that the so-called *pro forma* sessions were a pretext for interfering with his constitutional duty to enforce our nation's laws.

The attacks on the NLRB—and it is difficult to characterize these activities in any other way—were clearly designed to punish the Board for issuing particular decisions and engaging in administrative rule-making. This is, however, exactly what the NLRB is charged by law with doing. The attempt to paralyze the Board by nullifying the President's appointment power not only runs afoul of the Act's intent, but constitutes an attack on workers and the process of collective bargaining itself. The consequences of this attack will be to block workers' path to the middle class, destabilize our labor relations, undermine the rule of law and, as a result, harm not only our economy but our country.

An examination of what this Board has actually done over the past two years reveals a complete lack of congruity between the Board's actions, which have been meaningful but modest, and the reaction of certain observers, which have been overwrought, to say the least. In late 2010, for example, the Board issued a Notice of Proposed Rule-making and, on August 30, 2011, a final rule requiring NLRA-covered employers to post a Notice of Employee Rights in workplaces.[19] This Notice is virtually identical to the notice required by the Department of Labor for federal contractors, except that the NLRB Notice adds, in the introductory sentence describing workers' rights, the right to "refrain from engaging in any of the above activity." The Notice describes workers' rights under the NLRA, gives examples of violations of the law by both employers and unions and lists NLRB contact information. In does not, in any manner, instruct workers how to form a union.

The NLRB has also examined its representation procedures through the rule-making process. The Board's election procedures have been roundly criticized as antiquated, delay-

[19] https://www.federalregister.gov/articles/2011/08/30/2011-21724/notification-of-employee-rights-under-the-national-labor-relations-act.

ridden and easily susceptible to manipulation.[20] On December 22, 2011, after an unprecedented two-day public hearing and after receiving more than 65,000 public comments, the Board adopted a Final Rule that makes modest changes to its election procedures. The new election rules, which are consistent with many other administrative and judicial procedures, will modernize and streamline a process that made more sense in 1935 than it does now. The new rules will ensure that when workers are seeking an election to decide whether or not to form a union, they will have an election, not a cost-prohibitive litigation marathon.

In its decisions, the NLRB has embraced policies that are embedded in well-established Board law and that effectuate the purposes of the Act. The Board's decisions have been well within the bounds of the Board's authority and the statutory goals. Many Board decisions, such as the ruling that NLRB back pay awards, like damages awards in other areas of the law,[21] should include daily compounded interest, have been unanimous.

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[20] *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951 – 2007*, John Schmitt and Ben Zipperer, Center for Economic and Policy Research, March 2009: http://www.cepr.net/documents/publications/dropping-the-ax-2009-03.pdf; *No Holds Barred: the Intensification of Employer Opposition to Organizing*, Kate Bronfenbrenner, Economic Policy Institute and American Rights at Work Education Fund, 2009; http://www.epi.org/publications/entry/bp235; *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Human Rights Watch, 2000: http://lcc.aflcio.org/WhatsNewDocuments/EFCA/UnfairAdvantage.pdf; *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections*, Gordon Lafer (American Rights at Work, July 2007): http://www.americanrightsatwork.org/publications/general/neither-free-nor-fair.html; *Consultants, Lawyers and the 'Union Free' Movement in the USA Since the 1970s*, John Logan, Industrial Relations Department, London School of Economics, 2002: http://www.americanrightsatwork.org/dmdocuments/OtherResources/Logan-Consultants.pdf; *The Union Way Up: America, and Its Faltering Economy, Need Unions to Restore Prosperity to the Middle Class*, Robert B. Reich, LA Times, January 26, 2009: http://www.latimes.com/news/opinion/la-oe-reich26-2009jan26,0,1124419.story.

[21] *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

While this Board, like every Board before it, has from time to time overturned precedent, it has often returned to deep-rooted, venerable Board law. For example, the Board reinstated the well-established doctrine that an employer's voluntary recognition of a union that is supported by a majority of workers bars a subsequent challenge to representation by a minority of employees;[22] this doctrine, which was in effect for forty years, had been uniformly upheld by the federal courts, prior to a Bush-era Board's decision to overturn it.[23]

In a decision protecting workers' free speech rights to convey their message through the peaceful display of a stationary banner, the Board acted consistently with several federal district courts and the only federal appeals court that had considered the issue.[24] The Board also upheld the rights of a contractor's employees to communicate with each other on another employer's property, [25] and struck down a mandatory arbitration agreement that prohibited class or collective actions in violation of Section 7 of the Act.[26] These cases, and others decided by the Board, affirm the NLRA's fundamental guarantee that workers may engage in concerted activity and join together for their mutual aid and protection.[27]

The NLRB has historically been charged with clarifying prior law and providing guidance, consistency and predictability for workers and employers. Consistent with this charge, the Board recently explained the circumstances in which the Board must hold a re-run election

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[22] *Lamons Gasket Co.*, 357 NLRB No. 72 (2011).

[23] *Dana Corp.*, 351 NLRB 434 (2007).

[24] *Carpenters Local 1506 (Eliason and Kanuth of Arizona, Inc.),* 355 NLRB No. 159 (2010).

[25] *New York, New York Hotel & Casino*, 356 NLRB No. 119 (2011).

[26] *D.R. Horton, Inc.*, 357 NLRB No. 184 (2011).

[27] Section 7 of the Labor Management Relations Act, 28, U.S.C. §157, specifically protects workers' rights to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

away from the employer's premises because of significant employer election interference.[28] The Board also clarified the standard for determining appropriate bargaining units in non-acute healthcare facilities by applying the same traditional community-of-interest standard that it has applied in other industries.[29] In applying the community-of-interest standard, the Board utilized an analytical framework that had been endorsed by the D.C. Circuit Court of Appeals in an earlier decision.[30]

There are also a number of decisions in which the Board has ruled against workers and unions. For example, the Board held that certain union policies regarding dues obligations are unlawful;[31] that a union interfered with an election when it financed a lawsuit that was filed against the employer during the pre-election period;[32] and that back pay may not be awarded to unlawfully fired undocumented immigrants, even where the employer knew that the workers lacked work authorization.[33]

There are, additionally, a number of significant cases pending at the Board that will provide important guidance to employers, workers and unions. These cases involve the proper standard for determining whether individuals are independent contractors or "employees" covered by the NLRA;[34] whether and in what circumstances charter schools come under the

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[28] *2 Sisters Food Group, Inc.*, 257 NLRB No. 168 (2011).

[29] *Specialty Healthcare*, 357 NLRB No. 83 (2011).

[30] *Blue Man Vegas v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

[31] *Machinists Local Lodge* 2777, 355 NLRB No. 174 (2010); *IBEW Local 34*, 357 NLRB No. 45 (2011).

[32] *Stericycle*, 357 NLRB No. 61 (2010).

[33] *Mezonos Maven Bakery*, 357 NLRB No. 47 (2011).

[34] *BWI Taxi Management, Inc.*, Case No. 5-RC-16489; *Supershuttle DFW, Inc.*, Case No. 16-RC-10963.

jurisdiction of the NLRA;[35] the employee status of graduate teaching assistants and other similarly situated workers;[36] and the standard to be applied when an employer discriminates in providing access to non-employees.[37] Other key issues awaiting Board guidance involve the application of the Act's protections to workers who use social media to engage in concerted activities, and the proper standard to be applied in determining whether nurses and other employees should be considered "supervisors" under the Act.[38]

If the Board were prevented from acting because it lacked a three-Member quorum, these and other significant issues would not be resolved. The parties covered by the NLRA, including workers, employers and unions, would be deprived of the guidance they need in order to exercise their rights and act in compliance with the Act. Workers who are illegally fired would not be reinstated, a company unlawfully refusing to bargain would be able to act with impunity and workers would be denied the voice in their workplace that the NLRA guarantees. If the NLRB lacked a quorum, there would be no final election certifications issued. At the very least, if appointments to the Board could not be made, justice would be interminably delayed. And, as commentators have repeatedly noted, "delay has an insidious effect of weakening the NLRA's election machinery and unfair labor practice remedies, such that delay generally helps employers and harms unions and wrongfully discharged employees."[39]

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[35] *Chicago Mathematics & Science Academy Charter School,* Case No. 13-RM-1768.

[36] *New York University*, Case No. 2-RC-23481; *Brown University*, 342 NLRB 483 (2004); *New York University*, 332 NLRB 1205 (2000).

[37] *Roundy's Inc.,* Case No. 30-CA-17185.

[38] Memorandum OM 12-31, "Report of the Acting General Counsel Concerning Social Media Cases, January 24, 2012; Memorandum OM 11-74, "Report of the Acting General Counsel Concerning Social Media Cases, August 18, 2011.

[39] Catherine Fisk, *The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, But*

Worse than delay, however, would be the flat failure to administer our nation's laws. If the Board were deprived of its ability to function under the NLRA, unfair labor practice charges would continue to be filed and investigated, but no final decisions would be issued. As a result, no back pay or reinstatements would be ordered, and no other remedies for unlawful conduct would be made final. Undoubtedly, workers, who would suffer and lose the most, would bear the brunt of this paralysis. Employers and unions, however, that are later found to have violated the law would also be harmed. They would continue to accrue back pay obligations for their unlawful conduct and, at some future time, when the Board were able to act, the bill would become due. The prospect of mounting liabilities that grow as time passes would serve no public or private interests.

On the representation side, election petitions would still be processed and, in many circumstances, elections might be conducted. But, in many instances, where exceptions to elections were filed, ballots might not be counted and election results would not be finalized. Representation cases would become truly interminable. Even if a majority of workers in a particular company voted in a secret ballot election to form a union because they wanted to engage in collective bargaining with their employer, the bargaining process would be blocked. Again, workers would be the primary victims of the Board's inability to act.

Employers, however, should also be concerned about a non-functional Board. An employer that makes unilateral changes, such as withholding wage increases or reducing benefits, improperly disciplines employees, or refuses to engage in good faith bargaining, acts unlawfully. Every such act risks creating liability and the employer, whether now or in the future, will be held accountable. Additionally, the certainty that comes with Board decisions,

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*Didn't, Address in New Process Steel LLC v. NLRB*, Legal Studies Research Paper Services No. 2010-22, p. 17, School of Law, University of California, Irvine (October 13, 2010).

regardless of which side the decision seems to favor, serves the best interests of the great majority of companies that genuinely want to conform their behavior to the requirements of the law.

**Conclusion:**

The consequences of a non-functional Board are not exaggerated. They are what workers, unions and companies would face if the Board were reduced to fewer than three Members, the statutory quorum required for Board action. While all parties, and the public itself, would be victims, workers, who have the fewest resources, will pay the highest price. The price of paralysis must be measured not only in lost wages and lost jobs, however, but in lost opportunities to bargain for a contract that will help move workers into the middle class and attain the American Dream. The President, in making the recent appointments to the National Labor Relations Board, consistent with the Justice Department's legal advice, correctly determined that this price was too high.

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Chairman KLINE. Thank you.
Mr. Marculewicz?

**STATEMENT OF STEFAN J. MARCULEWICZ, SHAREHOLDER, LITTLER MENDELSON**

Mr. MARCULEWICZ. Thank you, Chairman Kline, and Ranking Member Miller, and members of this committee for inviting me to testify before you on this important topic.

My testimony today is going to focus on the practical implications of President Barack Obama's January 4th, 2012 appointments of NLRB members Richard Griffin, Sharon Block and Terence Flynn; should those appointments be deemed invalid because of the manner in which the president has made them. I am not here to comment on the process followed by the president in making those appointments or its constitutionality.

I will leave that to others who have already testified. However, as a labor lawyer who spends much of his day advising companies on the ins and outs of compliance with the intricacies of the National Labor Relations Act and the decisions of the National Labor Relations Board, I do feel I have a certain understanding of the confusion and uncertainty that will result from decisions of this new board, particularly given that the quorum may ultimately be determined invalid by the courts.

That uncertainty will be seen far and wide. Moreover, I believe it will have a particularly disparate impact on small business, which often lacks the resources in both time and money to pursue rights they might otherwise legitimately have. Only a few years ago, the United States Supreme Court issued its decision in New Process Steel. In that case, the court concluded that Congress had not conferred authority to allow a two-member panel to decide cases at the NLRB.

During the period of time that New Process Steel was making its way through the courts, the two-member NLRB decided nearly 600 cases. For the most part, those cases consisted of routine determinations by the board on which the two members—one a Democrat, the other a Republican—could agree on applicable law. Controversial matters were left for another day.

Once the Supreme Court issued its decision in New Process Steel, each of those decisions was rendered invalid. Each one had to be revisited by the board once it had a proper quorum. Suffice it to say this created a significant amount of uncertainty within the ranks of those whose cases had been decided by the two-member panel.

For the period of time, that uncertainty remains. Then, eventually, the National Labor Relations Board established a process to revisit each of those decisions and work through the cases. Because the cases decided by the two-member panel were generally noncontroversial, and ones on which they could agree on the law, the NLRB was able to revisit and resolve them without lasting effects.

In the current situation, however, with a full complement of five boardmembers, the NLRB is likely to rule on many substantive points of law. Some of those points of law are highly controversial. Not only will such decisions impact the parties involved and the cases themselves, but because the NLRB decisions become the law of the land they will also directly impact other employers, labor unions and even individuals.

If President Obama's recent nominations are determined to be invalid, the lasting effects could be substantial. Every decision issued by this board will be accompanied by the very real possibility that it might be sustained. Companies trying to comply with the law will face a dilemma on whether to comply with the 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 by the courts it will be very difficult to undo that process.

An overwhelming majority of NLRB cases are settled or resolved at the regional office level. They never reach the full NLRB. Yet regional office action is premised upon the current state of the law as defined by the NLRB. If this practice holds true, even in light of the current composition of the board, then the same portion of cases are, hopefully, to be resolved.

Only now they will be resolved pursuant to precedent that is unstable. When a party resolves a matter at the regional office level, typically that party commits to taking action in furtherance of that resolution. That action is relied upon, and followed by, those it affects. Such action could include the agreement upon the scope of a bargaining unit that may exclude certain employees.

It could include creation and dissemination of a new company policy on social media or e-mail usage that affects the entire workforce. Or it could include permitting non-union employee access to an employer's property, whether it is the employer's premises or its e-mail system. The reality is that the NLRB doctrine becomes the fabric of labor relations in our economy quickly, as employers seek to comply with the law.

If such doctrine is annulled in its entirety, as is possible here, its effects will be difficult and costly to remove. One might argue that any decision by an NLRB panel, even one in which members have confirmed by the Senate, is subject to being overturned by the courts. That is true, but such situations are addressed on an individual and case-by-case basis.

What distinguishes the current scenario we are facing is that a determination by the courts that the current NLRB does not have the authority to issue any decisions will potentially render every single decision made by the panel null and void. Each year, the board decides hundreds of cases, and the impact of those decisions is widespread.

A decision that nullifies all of those cases will have a real impact on employers, unions and workers. One of the hallmarks of our legal system is the fact that it provides a certain degree of predictability to those parties who are subject to its laws.

Given the fact that the current board's composition may be determined invalid, there is a risk that we will lose that predictability and certainty in our labor relations law for what could be an extensive period of time. That loss will have a direct impact on the many people who are subject to the nation's labor laws administered by the NLRB. I ask that you take this into consideration as you consider this issue.

Thank you very much for giving me the opportunity to present my views.

[The statement of Mr. Marculewicz follows:]

**Prepared Statement of Stefan J. Marculewicz, Esq., Littler Mendelson, P.C.**

I wish to thank you Chairman Kline, Ranking Member Miller, and Members of this Committee for inviting me to testify before you on this important topic.

My name is Stefan Marculewicz, and I am a Shareholder in the Washington, DC office of the law firm of Littler Mendelson, P.C. With nearly 900 attorneys, Littler is the largest law firm in the world dedicated exclusively to the practice of labor and employment law. The views I express to you here today in this testimony are my own. I am not appearing here today on behalf of any client or other organization.

My testimony today will focus on the practical implications of President Barak Obama's January 4, 2012 appointments of NLRB Members Richard Griffin, Sharon Block, and Terrence Flynn should those appointments be deemed invalid because of the manner in which the President made them. I am not here to comment on the process followed by the President making these appointments, or its constitutionality. I will leave that to others. However, as a labor lawyer who spends much of his day advising companies on the in's and out's of compliance with the intricacies of the National Labor Relations Act, and the decisions of National Labor Relations Board, I do feel I have a certain understanding of the confusion and uncertainty that will result from decisions of this new Board, particularly given that the quorum may ultimately be determined invalid by the courts. That uncertainty will be seen far and wide. Moreover, I believe it will have a particularly disparate impact on small businesses which often lack the resources in both time and money to pursue rights they might otherwise legitimately have.

Only a few years ago, the United States Supreme Court issued its decision in New Process Steel, L.P. v. NLRB.[1] In that case, the Court concluded that Congress had not conferred authority to allow a two member Board to decide cases. During the period of time that New Process Steel was making its way through the courts, the two member NLRB decided nearly 600 cases. For the most part, those cases consisted of routine determinations by the Board on which the two members, one a Democrat and the other a Republican, could agree on the applicable law. Controversial matters were left for another day. Once the Supreme Court issued its decision in New Process Steel, each of those decisions were rendered invalid. Each one had to be revisited by the Board once it had a proper quorum. Suffice it to say this created a significant amount of uncertainty within the ranks of those whose cases had been decided by the two member panel. For a period of time, that uncertainty remained. Then eventually, the NLRB established a process to revisit each of those decisions and worked through the cases. Because the cases decided by the two member panel were generally non-controversial and ones on which they could agree, the NLRB was able to revisit and resolve them without lasting effects.

In the current situation, however, with a full complement of five members, the NLRB is likely to rule on many substantive points of law. Some of these points of law are highly controversial. Not only will such decisions impact the parties involved in the cases themselves, but because NLRB decisions become the law of the land, they will also directly impact other employers, labor unions and even individuals. If President Obama's recent nominations are determined to be invalid, the lasting effects could be substantial. Every decision issued by this Board will be accompanied by the very real possibility that it might not be sustained. 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.

An overwhelming majority of NLRB cases are settled or resolved at the Regional Office level. They never reach the full NLRB. Yet Regional Office action is premised upon the current state of the law as defined by the NLRB. If this practice holds true even in light of the current composition of the Board, then that same portion of cases are likely to be resolved. Only now they will be resolved pursuant to precedent that is unstable. When a party resolves a matter at the Regional Office level, typically that party commits to taking action in furtherance of that resolution. That action is relied upon and followed by those it affects. Such action could include the agreement upon the scope of a bargaining unit that may exclude certain employees, it could include creation and dissemination of a new company policy on social media or email usage that affects an entire workforce, or it could include permitting non-employee access to an employer's property whether it is the employer's premises or is email system. The reality is that NLRB doctrine becomes part of the fabric of labor relations in our economy quickly as employers seek to comply with the law. Moreover, it impacts employers of all types, large and small. If such doctrine is annulled in its entirety, as is possible here, its effects will be difficult and costly to remove.

[1] 130 S.Ct. 2635 (2010).

One might argue that any decision by an NLRB panel, even one where each member has been confirmed by the Senate, is subject to being overturned by the courts. That is true, but such situations are addressed on an individual and case-by-case basis. What distinguishes the current scenario we are facing, is that a determination by the courts that the current NLRB does not have the authority to issue any decisions will potentially render every single decision made by the panel null and void. Each year, the Board decides hundreds of cases, and the impact of those decisions is widespread. A decision that nullifies all of those cases will have real impact on employers, unions and workers.

One of the hallmarks of our legal system is the fact that it provides a certain degree of predictability to those parties who are subject to its laws. Given the fact that the current Board's composition, may be determined invalid, there is a risk that we will lose that predictability and certainty in our labor relations law for what could be an extensive period of time. That loss will have a direct impact on the many people who are subject to the nation's labor laws administered by the NLRB. I ask that the members of this Committee take these practical effects into consideration in your deliberations.

Thank you for giving me this opportunity to present my views.

*Examples*

There are some significant legal issues currently being considered by the NLRB that will have a direct impact on employers, unions and employees. The following are a few examples:

*1. Social Media*

Social media is the latest means by which much of the population communicates, and as evidenced by the recent news involving Facebook's announced initial public offering, will continue to grow into the fabric of our society and economy. The NLRB has become very active with respect to the interplay between communications through social media and the Section 7 rights of employees to engage in protected concerted activity. The NLRB's activities will impact both the union and non-union workplace. While the NLRB's Office of the General Counsel has been very active in its efforts to mold policy in this area,[2] there has been little in the way of guidance from the Board itself on how it will ultimately settle on what constitutes a proper social media policy as a matter of law. It is possible that within the coming months, the Board, which currently has three cases pending before it on this subject, will make new law.[3] Those decisions, when they come, will be very far reaching and have a significant impact on a large percentage of employers and workers in the United States. Not only will such decisions impact the parties to each of those cases, but employers and workers will be required to reassess their approach to social media with respect to the workplace. Employers will issue new or revised policies, and employees will be subjected to them. If the Board's decisions on this point are later overturned, then all of the work done to comply with the nullified precedent will have been wasted.

*2. Property Rights and Email Access*

Another key issue pending before the Board relates to access to private property by non-employees. The case currently pending before the Board on this issue is Roundy's, Inc.[4] This case has generated a significant amount of interest among the employer community. In late 2010, the Board requested briefing on certain issues in that case. In particular, the Board sought positions pertaining to the core issue of non-employee access to private property. However, the Board also sought positions related to the law governing the ability of employers to restrict employees from using a company email system for organizing activities.[5] A decision by the NLRB on this topic will have an immediate impact on the daily workplace. Not only will it have a direct effect on an employer's ability to manage access to its property, but there are also indications that it will impact the ability of the employer to manage its internal email systems. A decision by this Board in the Roundy's case will present employers with an immediate dilemma regarding their policies and how they should enforce them. Those employers who are unwilling or unable to challenge the viability of such a decision through the expensive litigation process before the

[2] See, NLRB Memorandum OM 12-31 (January 24, 2012) and NLRB Memorandum OM 11-74 (August 18, 2011).

[3] See, NLRB Press Release Acting General Counsel issues second social media report, (January 24, 2012), *https://www.nlrb.gov/news/acting-general-counsel-isses-second-social-media-report* (last visited February 3, 2012).

[4] 30-CA-17185. See also, Roundy's Inc., 356 NLRB No. 27 (November 12, 2010).

[5] Register Guard, 351 NLRB 1110 (2007).

Board, will simply comply and that compliance will have ramifications throughout the workplace and beyond.

*3. Bargaining Units*

In August of 2011, the Board issued a decision in the case Specialty Healthcare. In that case, the Board articulated a new standard for determining the appropriateness of bargaining units of employees. Specifically, the Board stated that groups of employees who were "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" will be found appropriate, assuming they share a community of interest as determined using the traditional criteria.[6] Under the new standard, such a group can only be placed in a larger unit with which it shares a community of interest if the party seeking such placement can demonstrate that the employees in the smaller group share "an overwhelming community of interest" with the rest.[7] Although there have been a few cases that address certain aspects of this case, the full extent and scope of this decision is still not clear. It is therefore likely that this current Board will be called upon to decide cases where issues arising out of Specialty Healthcare must be addressed. Such clarification by the current Board will lend further uncertainty to the process. Elections and unit determinations serve to identify those who are eligible to vote and be represented by a labor union, and those who are not. The law, which is well-developed in the area of defining what constitutes an appropriate unit, is careful to avoid disenfranchising employees. Indeed, it is unlawful for the Board to find a unit appropriate merely because it is coextensive with the extent to which the employees have been organized.[8] Once a unit is established, a majority of that unit has selected an exclusive bargaining representative, and the parties have secured a collective bargaining agreement, it is very difficult to reverse that process. Not only have parties invested time and resources to reach that end, but undoing such a situation can create unstable employee relations that can have a far reaching impact on an employer's operations.

*4. Other Important Topics*

There are several other items that have been identified by the NLRB as important topics that may well result in significant substantive changes to the law.[9] Examples include, but are not limited to, the following:

Cessation of dues check-off. Currently the law permits an employer to cease dues check-off upon the expiration of a collective bargaining agreement.

Information Requests for Financial Records. Current Board law permits unions to seek financial records of employers in bargaining if the employer pleas poverty or asserts that it cannot afford demands made by the union.

Supervisory Authority to Assign and Direct. Current Board law regarding the authority of supervisors to assign and direct arises out of the Oakwood Trilogy of cases.[10]

An employer's right to withhold witness statements from a union. Current Board law permits an employer to object to producing witness statements obtained during an internal investigation to a union pursuant to an information request.

Decisions by the Board on any one of these cases will be very significant and could have immediate and far reaching implications. That such decisions may be clouded with the risk that they will be nullified, should be avoided.

*5. Regulatory Agenda*

The NLRB recently published final rules with respect to a notice posting requirement, and amendments to the rules governing representation elections. Earlier this year, NLRB Chairman Pierce indicated that he intended to engage in further rulemaking in the area of representation election procedure.[11] The Chairman's expression of intent is not a surprise given his statements at the November 30, 2011 meeting of the Board in which they adopted NLRB Resolution No. 2011-1. Such regulations, will have a substantial impact on employers, unions and workers, and are likely to be followed immediately upon their implementation.

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[6] Specialty Healthcare, 357 NLRB No. 83 (2011).

[7] Id.

[8] NLRA §9(c)(5). 29 U.S.C. § 159(c)(5).

[9] See, NLRB MEMORANDUM OM 12-17 (December 7, 2011); NLRB MEMORANDUM GC 11-11 (April 12, 2011)

[10] Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).

[11] Labor Board Chief to Push Organizing Rules, Sam Hananel (January 26, 2012 Associated Press).

Chairman KLINE. Thank you, sir. Thank you, all. I am just looking at the panel, four attorneys, all very distinguished, some agreement and some disagreement. But I know that Mr. Andrews was probably extremely excited to walk in and see a panel of nothing but lawyers. Is that not true?

Mr. ANDREWS. It is a vast improvement over what the committee usually does, Mr. Chairman. [Laughter.]

Chairman KLINE. I thank the gentleman. And did you come in wearing your school colors, as well, Mr. Andrews? You went—I forget which law school you—here is your opportunity.

Mr. ANDREWS. I went to Cornell.

Chairman KLINE. There you go. Okay. I like to get that out early because I knew that it was coming.

All right, seriously, we have the concerns that many of us here on the panel have—probably on this side of the aisle—have been addressed by some of you. And that is that there is a great deal of uncertainty about the legality and the certainty of decisions that are made by this NLRB with these new members appointed.

And so there will be challenges to decisions made. Starting first with you, Mr. Marculewicz, how will employers challenge the constitutionality of these recess appointments? What will they do? What are the practical steps? What is going to happen?

Mr. MARCULEWICZ. Well, the practical steps would be that if the National Labor Relations Board issued an order—first of all they wouldn't issue an order. But if there was a certification of a representative, a labor union for example, that would be a—well, if there would have been a certification by the NLRB of a labor union as the exclusive representative of a group of employees or a bargaining unit of employees, the NLRB would issue that certification.

And then the employer would refuse to bargain; called a technical refusal to bargain, technical 8-A-5. In that situation, with the current board panel, if that would then be, they would file a motion for summary judgment or the NLRB would file a complaint. There would be a motion for summary judgment, and the case would then be—an order would be issued by the National Labor Relations Board to compel the employer to bargain with that group of employees, with that labor union.

If that were to take place, at that point then the employer would be able to appeal that to the court of appeals, and then bring the matter into court. That would be one way it would happen. If the NLRB also issued a decision, or an order, in a unfair labor practice case, then you would have a situation where that order would then be entered by the National Labor Relations Board. And then it would be appealed by the employer.

So virtually every case, and substantive determination by the NLRB, which comes in the form of an order, would likely, potentially make its way into the circuit courts.

Chairman KLINE. So the employer—one of the options would be for the employer just to refuse to bargain. Would that be good for employees?

Mr. MARCULEWICZ. Uh, no.

Chairman KLINE. Nor employers.

Mr. MARCULEWICZ. Nobody.

Chairman KLINE. You would have a real problem. It is interesting to look at your testimony, talking about the decisions following the New Process Steel case, where you had some 600 decisions rendered invalid, and then some 90 appeals or something like that to federal court. Expensive?

Mr. MARCULEWICZ. Extremely.

Chairman KLINE. And again, disruptive. And so if you are an employer now, and you are looking at this situation, you are going to have to make a decision about actions that you take and not knowing if the board's decision is going to be upheld.

Mr. Devaney, in 2008, the Senate used pro forma sessions to stop then-President Bush from making recess appointments to the NLRB. Why did they do that?

Mr. DEVANEY. Well, unfortunately, Mr. Chairman, I think that was——

Chairman KLINE. Yes, thank you.

Mr. DEVANEY. Unfortunately, I think that was about public policy. It was about partisan politics. And here is the reason I say that. You were kind enough to share with me the CRS studies of the recess appointment process. And Majority Leader Reid was quoted in 2007 as the reason that they instituted the pro forma sessions was to prevent President Bush from recess-appointing members of the NLRB.

And so the complaints that were raised about the failure of the board to function in 2008 were because of the pro forma sessions instituted by the Democrat-controlled Senate, at this point by Majority Leader Reid. It is amazing to me. Now, you know, not 5 years later, Majority Leader Reid was asked about, well, what did he think about the president's purported recess appointments on January 4th.

And he said, well, you know, it is a great thing. I don't know how you can consistently take those positions in light of the history of this. And as I say, for the board it is a particularly unfortunate development. The other thing I would like to comment, to follow up, the case that I took after New Process Steel we had an adverse board decision in 2006.

My client then appealed to the D.C. Circuit. We were participants in the amicus curiae process in the Supreme Court. The Supreme Court ruled favorably to our position. I eventually, in 2011, was able to settle that case with the regional office of the NLRB. But my client, in that instance the Michigan Regional Council of Carpenters, expended a tremendous amount of money and resources to vindicate the rights that it was trying to vindicate.

And it was because the two-member board didn't have the authority. If we face the same thing, the parties who want to challenge us are looking two or 3 years out before we get resolution.

Chairman KLINE. Thank you. My time has expired.

Mr. Miller?

Mr. MILLER. Thank you. Thank you very much, all of you, for your testimony.

Ms. Davis, you make the point in your testimony that, absent the functioning board, there really is no other place for the employer or the employee to seek a remedy, where—in whatever instance, how that is presented in the workplace, is that——

Ms. DAVIS. Yes. There is no place judicially for them to seek remedy. They could resort to what we lived through in the early 1930s, which is this massive strikes and massive lockouts. And we are actually seeing a lot of those lockouts now. There was an article a couple of weeks ago in The Times about employers resorting to that as a tactic.

But there will be no orderly place where disputes can be resolved. That is essentially leaving it to the law of the jungle. If I may just address this uncertainty question for one moment?

Mr. MILLER. Yes.

Ms. DAVIS. I think it is wrong for three reasons. Substantively it is wrong, process-wise it is wrong. And it misses the point. It misses what is at stake. With respect to the substance, the 11th Circuit, which looked at this, said there is a presumption of constitutionality in the president's recess appointments. Happened back since George Washington.

President Obama has appointed a fraction of the people that the other administrations have appointed. So I think the constitutional argument which, if you look at the OLC opinion, goes back to a 1921 decision by the attorney general, is sound. As a process matter—and I want to specifically address New Process, which several of the witnesses addressed—I think that is a terrific example of what we would have here.

Because we had a two-member board functioning, not knowing they were legally quorum-less, for 27 months. And they issued about 600 decisions before the Supreme Court said that they were quorum-less. So what happened at this point? That is really the comparative that we have here.

What happened was that 400 of the cases, two-thirds of the cases, the party said, "We are fine with that two-person decision," and they went away. They needed someone to resolve their disputes, and they were resolved. The other third of the cases, the vast majority of them—I think 98 percent of them—were resolved within a six-month period.

So this notion of this paralysis of the board—if somehow, at some future time, the president, who is presumed to have acted lawfully, is determined to have not acted lawfully—I think is overblown. But more importantly, what is going to happen to workers in this country who are fired, who are threatened, who are surveilled. What is going to happen to union's employers that really want to work with each other to help a company, to help workers? All that will be put on hold.

And I think that harm far outweighs any speculative uncertainty of the board's not functioning.

Mr. MILLER. Thank you very much. What really concerns me in your testimony, and this has been a concern of mine, of my service on this committee—that over the years this practice continues, where workers are fired or they lose their overtime or they lose an advantageous shift or whatever penalty can be imposed upon them for discussing collective bargaining, discussing the desire to have a union, telling their employer they would like to talk to others about doing this.

However they manifest their interest in a union, they lose their job. And it is a very difficult process to get back to that point and

secure the wages that they lost. It is simply a securing of the wages they lost, offset by, I guess, whatever employment they find in the meantime.

Meanwhile, their families undergo a huge amount of economic stress. You make the point that year in and year out about an average of $93 million in back wages is restored to these individuals. And I assume, in some instances, plus their employment restored.

Ms. DAVIS. Right.

Mr. MILLER. I don't know many middle class families that can go through that. But that, obviously, is the people who are being punished here. As you point out, two-thirds of the argument says we know most of the things that come here are worked out in front of the board one way or the other and because a very experienced panel of people seek to have these things resolved.

But now we create this kind of impasse that really just pounds workers with employers. And unfortunately, too many employers are willing to fire them or punish them in some other way because they broached the subject. And that, to me, is the real concern here.

The notion of whether this was politics in 2008 or is politics today, the fact is it has been politics all along. I think the president was right to breach, I think George Bush was probably right to breach, if he believed in those appointments. The fact of the matter is, you know, we had members of the House, and the speaker, make a decision not to recess. So the Senate couldn't recess for the specific purpose that they couldn't consider recess appointments.

So you know, this is all interesting back and forth. But the fact of the matter is, I guess this will be resolved in the court. But you know, this board has been under assault by members of this committee who have sought to tamper with the work and intimidate the general counsel of this board.

We see the governor of South Carolina asking that only Republican members resign. We see a major law firm with business before the board conducting conversations with the Republican member of the board, saying, "Well, you know, if you ever decide to leave we would be interested in you."

Hello. This board has been under assault, as have workers' rights, all across the country at every level of government. And maybe it is about time the court stepped in and decide what can be done and can't be done.

Chairman KLINE. The gentleman's time has expired.

Dr. Roe?

Mr. ROE. Well, as an obstetrician, I get a little sweaty palm and my heart rate goes up when I am in front of four lawyers, just to put that disclaimer out here. [Laughter.]

But I think I want to go back to this little document I am holding in my hand right here, called a Constitution. And this is messy, and it makes it hard to do. And it was specifically done for that reason. And I want to start with Mr. Cooper.

And I have read this, and certainly read in Article One, Section Five, Clause Four. And it is very clear to me your description just a moment ago was very clear to me what was done is unconstitutional. Now, the courts will decide that—not me, and not anybody in this room.

But I have looked up every NLRB appointee since 1936. I did a research on every single one of them, including Mr. Devaney sitting right there. He was a recess appointment, but he was then vetted by the Senate.

And Mr. Cooper, why is that process important to have these people go in front of the Senate for a hearing, for background checks and so forth, if you could enlighten us there.

Mr. COOPER. I will be happy to, Mr. Congressman. And I can't provide a explanation for its importance better than the one that Alexander Hamilton did in the Federalist Papers, in Federalist No. 67 and again in Federalist No. 76. Alexander Hamilton recognized, on behalf of the framers essentially, that the regular appointment process was divided between the president and the Senate, a majority of the Senate, in order to ensure that a president did not have absolute power over the appointment of federal officers.

There was a big debate, in fact, prior to the time they settled upon that joint responsibility whether or not the Congress should have the exclusive power to make appointments to vacant positions.

And so the compromise was this shared joint responsibility so that the Senate would provide a check, in our vast system of checks and balances between the branches of government, particularly the political branches, to ensure that. And I think the formulation is that unfit characters, or nominees who were there as a product of regional prejudice or favoritism of some kind or another, would not be appointed and made part of the federal core of officers.

I think the history of the clause, and the recess appointment clause, makes clear that this was a fundamental check on executive power.

Mr. ROE. I totally agree with that. And then to follow that up, why would any president make anything but a recess appointment if they can do that? If they can just bypass—that clearly was put in there for that reason. To prevent a president from having authoritarian power.

So if you take the current ruling that they have, that the Justice Department brought down in this case, why would a president not just do that any time with any appointment, and just bypass the Senate?

Mr. COOPER. Congressman, it is a fair question. Because I do believe that under the theory of the Office of Legal Counsel for the constitutionality of these particular January 4 recess appointments I think I would be hard pressed to see any genuine constitutional restraint on the president's ability to use the recess appointment power.

There would be continuing political restraints, certainly. And I am quite certain that a president who made a regular practice of this, because the founders' original understanding what the genuine purpose of the clause, the recess appointment clause, contemplated had been essentially eliminated and those restraints had been abandoned.

I still have no doubt that the Senate would react, and this body would react, negatively to a regular process of this kind of use of the recess appointment power. But the only restraint would be a

political one. And the only tools left would be political tools in the hands of this body and in the Senate.

Mr. ROE. Just one other quick question because my time is about up. What happens, Mr. Marculewicz, with the regional offices, when they make a decision, if this is ultimately overturned?

Mr. MARCULEWICZ. Well, I think it——

Chairman KLINE. The gentleman's time has expired.

Mr. ROE. Let me say, let me finish, with one thing. At the conclusion of the Constitutional Convention, Benjamin Franklin asked, "What have you wrought?" He answered, "Republic, if you can keep it." I say we have to follow this book or we can't keep it.

Chairman KLINE. Thank you. Then gentleman's time has expired.

Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman. At a time when we should be considering the president's job proposal, we are having an exquisitely interesting constitutional law seminar. So I wish we weren't doing this, but I thank the four panelists for their preparation and the wisdom of their testimony.

Mr. Cooper, your answer to the question as to who gets to decide whether the Senate's really in session or in recess is the Senate; because the Senate says so. And you testified that the Senate's determination should end the matter. Let me ask you this. If the Senate went into session, and by unanimous consent deemed that it would be considered to be in session forever, the Senate is a continuous body.

The Senate, by UC, says, "We hereby declare we are always in session." And then you had a sufficient number of senators refuse to vote for cloture and refuse to take up presidential nominees. So presidential nominees never get a vote. Does that withstand constitutional muster?

Mr. COOPER. I think that would be a much, much more difficult question, Mr. Andrews.

Mr. ANDREWS. That is why I ask it. Does it withstand constitutional muster? What do you think?

Mr. COOPER. I beg your pardon?

Mr. ANDREWS. Does it withstand constitutional muster?

Mr. COOPER. I have serious doubts that it would. But I do believe that——

Mr. ANDREWS. Okay, what is defective about it? What is is wrong with it that it might not pass constitutional muster?

Mr. COOPER. Well, Mr. Andrews, it is not within the Senate's authority, I would concede, to say that something exists that does not exist.

Mr. ANDREWS. We think they do that all the time, but that is——

[Laughter.]

Mr. COOPER. And if, in fact, the reality was that the Senate was in recess as a matter of fact——

Mr. ANDREWS. Well, but don't they have the power, according to your testimony, to define what recess means? I mean, there is an existential meaning, I guess, to the term "recess." But according to you, the Senate is in recess if the Senate says it is in recess; it is in session if it says it is. Is there some limitation to that principle?

What is defective about my hypothetical?

Mr. COOPER. I would say this, Mr. Andrews. The Senate can say it is in session if, in fact, it is in session. And the pro forma sessions are, in fact, sessions of the Senate.

Mr. ANDREWS. But the interesting phrase here is "in fact," and who gets to define that. And you say exclusively the Senate gets to define that. Exclusively.

Mr. COOPER. Within constitutional limitations.

Mr. ANDREWS. Okay, let us say that somebody thinks that they haven't defined it within constitutional limitations. And so they get standing somehow. And they file suit, and argue that the Senate exceeded its constitutional limitations, which you acknowledge.

On page four of your testimony—excuse me, page five of your testimony—you approvingly quote a D.C. Circuit opinion that says the meaning of ambiguous constitutional rules is non-justiciable. So wouldn't that mean that the court couldn't even consider the argument that the Senate had exceeded its constitutional authority?

Mr. COOPER. I do not think that would apply in this context, Mr. Andrews.

Mr. ANDREWS. What is different about it? Why would it be—you said, or at least you approvingly cited, a case that said that interpretation of the constitutionality of Senate rules is not justiciable. Why would it be justiciable under my hypothetical?

Mr. COOPER. It is not justiciable in any case in which it is ambiguous. And at a minimum here, the Senate's own interpretation of its rules is ambiguous. And so this court must defer to the Senate itself about its rules and about the Senate's interpretation of its rules, which here——

Mr. ANDREWS. So is it——

Mr. COOPER [continuing]. Makes clear it is in pro forma session.

Mr. ANDREWS. Should the court—if you were clerking, as you so distinctively did, for Chief Justice Rehnquist—if this case came before the court, and you were writing—the justice asked you for your opinion—is the case justiciable, or not, that I stated? Would the court hear it, or not?

Mr. COOPER. I believe that the court could hear this case as being justiciable.

Mr. ANDREWS. But what is the difference between my hypothetical—or the Senate simply deems itself to be in session, and the court interpreting the facts before us here? Because I think you think that these facts are not justiciable. Because you said the Senate's determination should end the matter.

Shouldn't the court have the chance to review this?

Mr. COOPER. The court would, in my opinion——

Mr. ANDREWS. Well, that makes it justiciable, doesn't it?

Mr. COOPER [continuing]. Defer to the Senate's interpretation of its rules.

Mr. ANDREWS. But if it is, that would mean it is justiciable, though, wouldn't it?

Mr. COOPER. It would mean that the courts, like the Congress and the president, should defer to the individual body's view with respect to its rules, and whether or not——

Mr. ANDREWS. But I thought you said——

Chairman KLINE. The gentleman's justiciable time has expired.

Mr. ANDREWS. Thank you. Thank you, Mr. Cooper.

Chairman KLINE. Dr. DesJarlais?

Mr. DESJARLAIS. Thank you, Mr. Chairman.

Mr. Cooper, I think we are just kind of in the middle of this. When these recess appointments are challenged in federal court, in your opinion will the court give deference to the Senate, or the White House, and why?

Mr. COOPER. This is a good follow-on question, Mr. Congressman, because I think it is clear from the court decisions in this area that the Senate's view of its own rules—under its rulemaking power, just as would be true of this body's rulemaking power and its interpretation of its own rules—should be deferred to by the other branches of the government.

The president isn't empowered to effectively interpret the Senate's rules and to decide for himself in contradiction to the Senate's own view that the Senate is or is not in session, at least insofar as there is a factual basis to ground the Senate's judgment on that point.

And certainly there is a factual basis in the pro forma sessions which, again, have been used by both bodies of a congress to comply with other constitutional requirements for many years now, and was used by both bodies of this Congress on December 23, 2011 to actually enact legislation. That, it seems to me, would make it very nearly impossible for a court to say the president was right in interpreting the Senate's action as being a constitutional nullity.

Mr. DESJARLAIS. Okay, best case scenario. When do you think a final decision as to the constitutionality of recess appointments would be made?

Mr. COOPER. In the Supreme Court.

Mr. DESJARLAIS. Yes.

Mr. COOPER. I tend to agree with Mr. Devaney. I think that would be a 2-year process at least. And it cannot get underway, but it will surely get underway as soon as either the NLRB or Mr. Cordray and the Financial Protection Bureau begin making decisions and rulings that adversely affect individual companies, individuals in unions and banks and others.

When that starts happening, I am sure that litigation will proceed. And I think there is some litigation even now proceeding.

Mr. DESJARLAIS. Okay, thank you. That is all I have.

I yield back.

Chairman KLINE. The gentleman yields back.

Mr. Grijalva?

Mr. GRIJALVA. Thank you, Mr. Chairman. I won't venture into all the legal stuff, but——

[Laughter.]

Mr. GRIJALVA [continuing]. Although I am tempted, but I can't even pretend.

Do your—Mr. Devaney, do your clients—as you mentioned, you represent primarily employers. Do they benefit from the National Labor Relations Board when it cannot function, it cannot do its business with two members only?

And these three appointments were meant not only to fill the board, but also to increase its functional ability to deal with the things before it, even the most mundane and routine. So do your

clients gain, do they have a benefit, by the fact that board cannot act?

Mr. DEVANEY. I don't think it depends on the facts of the case. For example, I actually disagree with Ms. Davis with respect to the impact of delay. I mean, there were 100 cases that were appealed to the U.S. Court of Appeals out of the some 600 cases that were decided by the unlawfully-constituted two-member board.

Now, for every one of those 100 people they had expenditure for lawyers, they had expenditures for their clients. Those were unions, those were employees, those were management. As I said earlier, I think it is an institutional process. It is true that unfair labor practice charges are—the number of charges filed against employers are much higher than the number of charges that would be filed by unions.

So to that extent, I guess you could make an argument that, well, if the board can't function it delays the decision-making on those kind of matters. I raise another concern.

Mr. GRIJALVA. Well, the testimony, you know, as far as I can see, employers—not to mention the workers and their families—I don't think they benefit from a dysfunctional board that cannot make decisions. That, to me, is—even routine, mundane decisions can't be made during this period.

And that, to me, seems to be really bad public policy, in the sense that people are suspended without a decision. And no doubt in my mind there is a benefit derived from some employers of no decision being made and allowing this process to just be strangled with no decision.

Ms. Davis, can you give me a couple of examples of those mundane, non-controversial decisions that the board might be expected to decide at any time? And these basic decisions that I have been asking about, what happens if they are not made or cannot be made?

Ms. DAVIS. Yes, I think that is a good question. I would divide the universe of what is out there into several categories. There are the little decisions that you mentioned that matter to one employer and one union or one group of workers. And I just went through one in New York City with the musicians on Broadway who were campaigning against recorded music. They wanted to keep pit music live.

And they decided they weren't going to shut down Broadway like they did a couple years ago. They were going to engage in a campaign to let people know what it meant to have live music on Broadway. The employers came out, the Broadway League, and said we are going to sue you if you do that.

So we filed a charge with the board. It went up, it got resolved. Broadway stayed live, we were happy. They probably weren't as happy, but it is a little case. Doesn't matter to anybody but those two parties.

Then there are the significant decisions that are precedent-setting that are out there. The definition of who is an employee and who is an independent contractor, that is going to matter for a lot of different people. That is pending. Whether graduate students, graduate teaching assistants, are able to organize.

My son is at NYU right now. He doesn't, quite frankly, care. But a lot of people care about whether or not they can form a union. Whether or not nurses, simple charge nurses or supervisors—there are a lot of big-ticket items out there that, quite frankly, I think those of us who advise clients for a living, all of us, would like the certainty of a discontinuation.

I don't think it serves anybody's interest not to have certainty. And finally, as the ranking member mentioned, the impact on this economy of a essential gutting the ability to go to the labor board is going to hurt unions. When it hurts unions, it is going to hurt workers. When it hurts workers they don't have money, they can't buy things.

As I think the former secretary of labor said it is a righteous cycle. When you have good jobs you have a paycheck, you can buy things, there are more jobs. If the board becomes dysfunctional, if the labor movement is hurt and the workers are hurt, ultimately the middle class in this country is going to hurt. And that is going to hurt all of us.

Mr. GRIJALVA. Thank you.

And my last question, if I may, Mr. Cooper. As an expert—and the motivation behind those appointments, I think, has to be looked at, as well—as a constitutional expert, can you tell the members of this committee what we need to do to address the gridlock of executive appointments that now it seems that the Senate holds up even the most mundane appointments?

These are critical to employers and employees in the country, the one we are talking about today. But how do you address that gridlock, given the fact that nothing seems to move if it is recommended by this president.

Chairman KLINE. I am sorry, but the gentleman's time has expired.

Mr. Gowdy?

Mr. GOWDY. Thank you, Mr. Chairman. And I want to thank the ranking member for mentioning South Carolina, although I am not positive it was in a complimentary way. We appreciate the acknowledgment.

Some of us like the law because it provides order and consistency and predictability, which is why we have this concept called stare decisis, which we tend to like when we like the underlying ruling, we tend to ignore when we don't. So let me ask you this, Ms. Davis. Up until a month or so ago, the administration's position was the recess had to last longer than 3 days for it to be a recess.

The president's own deputy solicitor general argued that in front of the Supreme Court. What is the new definition of "recess"?

Ms. DAVIS. I think if you read the very lengthy opinion of the Office of Legal Counsel you will see that dating back—essentially the founding fathers and dating back to earlier decisions—that there should be a functional analysis of what constitutes a recess. Is the Senate actually there to advise and consent. And here——

Mr. GOWDY. Well——

Ms. DAVIS. I am sorry. If I just say here, under their own order and under the reality, they were not there.

Mr. GOWDY. So the executive branch determines when there is a recess? Because whatever we decide to today is going to be applicable whether it is a Republican president or a Democrat president.

Ms. DAVIS. Ultimately, and happily, the courts are going to decide. And I am very glad that I am on this side of the aisle and not subject to the constitutional cross-examination by Congressman Andrews. Because I think he makes the right point. Ultimately, we are not going to decide that in this room. A court is going to decide it.

But I think what we need to look at is what is the import of the paralysis that could be caused by a congressional squabble that essentially would render this agency headless.

Mr. GOWDY. Well, do you agree Congress can defund this agency?

Ms. DAVIS. Do I agree Congress has——

Mr. GOWDY. Sure.

Ms. DAVIS [continuing]. Has attempted to manipulate the decisions of the agency——

Mr. GOWDY. It is a simple——

Ms. DAVIS [continuing]. Through the appropriations process.

Mr. GOWDY. It is actually a simple question. Can Congress defund the NLRB?

Ms. DAVIS. I know Congress has attempted to defund the NLRB. Whether or not it can properly defund it is, I think, the question you should be looking at.

Mr. GOWDY. But you don't think we have the authority to disband the NLRB and move the jurisdiction to another agency.

Ms. DAVIS. I certainly think that you could try to change the law.

Mr. GOWDY. Right, that is what I am saying

Ms. DAVIS. But as long as the law—but that is a legislative matter. As long as that law applies——

Mr. GOWDY. Yes, but if Congress has the power to defund it, but Congress doesn't have the power to define whether they are in recess and when they are not.

Ms. DAVIS. You do not ultimately have the power to decide a recess. A court is going to decide what is a recess. The question is——

Mr. GOWDY. So the judicial branch——

Ms. DAVIS [continuing]. What is going on in the interim. And I think, quite frankly——

Mr. GOWDY. The judicial branch trumps the Senate and the House in defining when there is a recess.

Ms. DAVIS. With all due respect to all of our opinions—yours, and those of ours at this table—the constitutional analysis right now is turning a bit on whose ox is being gored. I think that we have to look at this soberly. The president made a judgment, it was a read judgment. The opinion of his Office of Legal Counsel was sound.

That is the same opinion that the head of that office under George W. Bush gave. I think the question now is, now that that is done what is going to be the impact of this. I think that is the issue that everyone here should be focused on.

Mr. GOWDY. Well, let me ask you about the practical impact. When did the president submit the names to the Senate, the NLRB putative appointees? What is the date?

Ms. DAVIS. I believe in December, perhaps December 15.

Mr. GOWDY. Do you know whether the proper paperwork was turned in contemporaneous with those——

Ms. DAVIS. I have no idea. My understanding is, though, that those people have been vetted, just fully vetted. They have been looked at by the FBI. It is exactly what happened when President Bush recessed recess-appointed two people, when President Clinton recessed-appointed John Higgins and Johns Truesdale. There was no process of review here.

Mr. GOWDY. And, well, let me go back to my—what is the new definition of "recessed"? Can the president do it over a lunch break?

Ms. DAVIS. No, I think——

Mr. GOWDY. And if not, why not?

Ms. DAVIS. I think the question is, is the Senate actually available to advise and consent.

Mr. GOWDY. Well——

Ms. DAVIS. Now, if the Senate—I am going to just try to answer your question. On a lunch break? I think that is a different question, when they are conceitedly, by Senate order, not able to do any business as opposed to coming back after a 30-minute lunch break. The Senate could call up these nominees now. They could——

Mr. GOWDY. Which leads to my final point——

Ms. DAVIS [continuing]. Call up these nominees now.

Mr. GOWDY [continuing]. Because I am almost out of time. Who controls the calendar of the Senate?

Ms. DAVIS. I am sorry?

Mr. GOWDY. Who controls the calendar? Because the Democrats control the calendar in the Senate. So what we have now are three names being sent to the Senate. Reid has yet to schedule a hearing on any of them. So if you want to game the system you just put your names up, you have a member of your own party never schedule a hearing, don't do background checks, wait until the Senate decides to take a nap, and then make the recess appointments.

Ms. DAVIS. I understand your frustration with the system. But I have to tell you, those of who don't live in this town are even more frustrated to see that the kind of games that are going on is able to essentially paralyze an agency. I understand your frustration.

Mr. GOWDY. Well, you know——

Chairman KLINE. The gentleman's time has expired.

Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman. And Mr. Chairman, I thank you for calling the hearing. Obviously we have a problem here, but what I have not heard from the witnesses is what the House of Representatives can do about it. Isn't it true, I will ask any of the witnesses, that the House cannot confirm these appointments?

The House can't confirm these appointments. That is right.

Mr. DEVANEY. [Off mike.] The Senate—advise and consent.

Mr. SCOTT. Okay. And the House can't rule. We have heard a lot constitutionality of these issues. There is nothing the House can do that can resolve the constitutional issue before us about the recess appointments. Is that right?

Mr. DEVANEY. Well, I think that is right. But on the other hand, I think it is certainly legitimate for the Congress to be concerned about the functioning and the proper functioning of the National Labor Relations Board.

Mr. SCOTT. Okay, we are concerned. But there is nothing that we can do about resolving——

Mr. COOPER. One thing, if I could just add. The president's view of the pro forma sessions—and the OLC's view now, apparently adopted by the president—those sessions are a constitutional nullity would apply no less to this body, which engages in pro forma sessions itself. And, in fact, enacted the two-month payroll tax cut extension itself by a pro forma session just as the Senate did.

And that view would extend no less to this body, I should think, than it does to the Senate.

Mr. SCOTT. Well, the issue of the NLRB functioning is not going to be resolved by this body.

Mr. DEVANEY. Well, Congressman, let me say this, just throw this out as an idea. When I served as a commissioner of the ITC, the Congress, in that statute, made the agency bipartisan. If one of the concerns is the partisan rancor at the five-member NLRB—which, by the way, in the statute it doesn't say that there should be three of the president's supporters and two others—since 1935, many of the statutes that Congress has enacted make a different evaluation.

I mean, maybe that is something that might be considered.

Mr. SCOTT. Well, we are not going to resolve the constitutionality.

Mr. Marculewicz, you indicated that the problem with the lack of a quorum is on rulings. Can the NLRA work, to some extent, without rulings?

Mr. MARCULEWICZ. The National Labor Relations Board, at the regional office level, operates on a daily basis. Charges are filed on a regular basis, election petitions, representation case petitions are filed on a daily basis. They conduct investigations, they issue complaints, they prosecute those complaints, they conduct hearings.

Administrative law judges decide cases. And throughout that entire process, they work very hard to resolve a lot of those disputes. And so a very large number of cases are resolved at the regional office level long before they get to the NLRB, whether it is a two-member board panel or a five-member board panel that has a situation. Where we are, we are looking at potential constitutional issues with that, the three members' appointments.

And the issue with the regional office, when the regional office works a case, they work that case under the authority and under the precedent established by the National Labor Relations Board. So, for example, when you had the two-member panel the regional offices were investigating and prosecuting cases consistent with the law that existed at the time.

And cases get resolved consistent with that law. The problem here is that when you have a five-member panel that issues a decision and, as Ms. Davis indicated, there are number of very significant issues pending before the National Labor Relations Board that apply to both union and non-union workplaces—look at the Facebook or social media issues, look at the e-mail access issues.

Mr. SCOTT. But you can't—I think the point we are trying to make, and I just have a short period of time, is that there can be some function of the committee.

Mr. DEVANEY. Congressman, could I follow up on that? There is another uncertainty concern, though, that is raised. If, for example, these appointments are found to be unlawful, if there are any delegations done by this board to the general counsel, the regional officers, or others there is another constitutional problem.

And I will just point out, in my testimony——

Mr. SCOTT. Well, we know the constitutional problems.

Mr. DEVANEY. Well, I——

Mr. SCOTT. My question—and I just have a short period of time left—I just want to point out that isn't it true that every president since President Reagan has made recess appointments to this board?

Ms. Davis?

Ms. DAVIS. That is absolutely correct. And with respect to your question, just to clarify, while certain things can be investigated at the region, ultimately, if you have an employer who does not want to bargain with the union, who does not want to reinstate an employee who was unlawfully fired, and the board is not functioning, we are out of luck.

Mr. SCOTT. Thank you. And just for the record, Mr. Chairman, President Reagan made 240 recess appointments, President George H.W. Bush 75, President Clinton 139, President George W. Bush 171. And thus far, President Obama 32.

Ms. DAVIS. If I may just add, Teddy Roosevelt made 160 recess appointment in the blink of an eye. So I think we are standing on firm ground here.

Mr. COOPER. Perhaps I could just add a——

Chairman KLINE. The gentleman's time, I am sorry, has expired.

Mr. Wilson?

Mr. WILSON. Thank you, Mr. Chairman. And thank you very much for holding this hearing. We in South Carolina have found out the hard way how significant NLRB is.

We were all very proud, in our state—and I was there for the groundbreaking for the new Boeing facility, a million square foot facility—they proceeded to hire 1,000 employees. We have suppliers who are locating in South Carolina, ultimately in the district I represent—Zeus of Orangeburg, Prysmian of Lexington, Spirax of Blythewood.

We have nearly 10,000 people who were really looking forward to producing 787 jetliners. And then out of the blue the NLRB intervened and announced that Boeing could not produce 787 jetliners. Fortunately, with the leadership of persons such as Congressman Gowdy and Congressman Tim Scott from Charleston, we were able to push back.

But the NLRB, out of control, is truly destroying jobs and threatening families in my state. And so that is why we are concerned. And so, Mr. Chairman, your leadership of bringing this issue is just crucially important.

Mr. Marculewicz, I wanted to ask you several questions. The NLRB regional staff investigates violations of the National Labor Relations Act and runs union representation elections. What prece-

dent does NLRB regional staff follow, and how will this infect employers and employees?

Mr. MARCULEWICZ. Thank you. I think the National Labor Relations Board regional office staff, and I was one of them, follows the precedent as set by the National Labor Relations Board, the existing case law. When a new case comes out or is issued by the National Labor Relations Board, then the Office of General Counsel typically issues a memo and gives some directive, particularly if it is a significant case.

So, for example, if you had a situation where there was a new decision on social media policies there might be some direction that would be given by the general counsel's office that then would be investigated by the regional office.

If you have a situation where, as we could potentially have with this five-member panel, decisions that are made on major substantive areas of law have potential constitutional problems associated with them—meaning that they could all be overturned—the regional office is still going to pursue and prosecute and investigate cases consistent with that law.

So what that is going to mean is, it is going to mean that, first of all, employers, unions and workers are going to be held accountable to that new law, number one. And those who may not even be subject to cases are going to conform their behavior to that new law.

Which means, for example, if you use a social media—a company comes out with a new policy that defines social media and how social media can be regulated in the workplace or outside of the workplace—the National Labor Relations Board issues a decision modifying what the parameters of that could be.

Then companies are going to be calling. And and this is what I do on a regular basis. I get clients, and we will just use a hypothetical example of Dan the pool guy who runs a small business and says, "I have, you know, 100 employees and social media is a major means of communications. How do I operate?"

Well, I say, "Well, Dan, unfortunately this is the situation. They have changed the law, there are constitutional ramifications. If the National Labor Relations Board, there were to be a complaint or a charge filed against you by the by some party with the NLRB, they are going to expect you to be held accountable to this type of policy, even though there are constitutional problems with it."

And he says, "Well, what am I supposed to do? How am I supposed to deal with this? I am not going to fight these guys. I don't have the money, I don't have the resources, I don't have the time. I just want to run my business." So the reality is that the implications and the ramifications, when you take it from the—you know, they are going to implement these policies and these new laws.

And when you have to try to put that toothpaste back in the tube, if the U.S. Supreme Court decides, as Mr. Cooper has indicated may happen, that there is a constitutional question related to the appointment of these individuals, these boardmembers, that is turning things over significantly.

It is a lot different when you have a two-member panel that is just making noncontroversial sort of agreed-upon decisions. Here, you are going to be having a situation where they are going to be

changing major substantive areas of law that are going to have major impacts on everybody.

Mr. WILSON. Well, as we have seen in our state, an intrusive government, sadly, is going to convince companies to locate overseas. And that is a great concern I have, and so I appreciate your efforts of raising these issues to the American people.

And again, Mr. Chairman, thank you. This is real-world information the American people need to know. I yield the balance of my time.

Chairman KLINE. I thank the gentleman.

Mr. Kucinich?

Mr. KUCINICH. Thank you very much, Mr. Chairman. I ask unanimous consent to insert into the record an article from the New York Times dated January 22nd, 2012, "More Lockouts As Companies Battle Unions."

[The information follows:]

[From the *New York Times,* January 22, 2012]

**More Lockouts as Companies Battle Unions**

By STEVEN GREENHOUSE

America's unionized workers, buffeted by layoffs and stagnating wages, face another phenomenon that is increasingly throwing them on the defensive: lockouts.

From the Cooper Tire factory in Findlay, Ohio, to a country club in Southern California and sugar beet processing plants in North Dakota, employers are turning to lockouts to press their unionized workers to grant concessions after contract negotiations deadlock. Even the New York City Opera locked out its orchestra and singers for more than a week before settling the dispute last Wednesday.

Many Americans know about the highly publicized lockouts in professional sports—like last year's 130-day lockout by the National Football League and the 161-day lockout by the National Basketball Association—but lockouts, once a rarity, have been used in less visible industries as well.

"This is a sign of increased employer militancy," said Gary Chaison, a professor of industrial relations at Clark University. "Lockouts were once so rare they were almost unheard of. Now, not only are employers increasingly on the offensive and trying to call the shots in bargaining, but they're backing that up with action—in the form of lockouts."

The number of strikes has declined to just one-sixth the annual level of two decades ago. That is largely because labor unions' ranks have declined and because many workers worry that if they strike they will lose pay and might also lose their jobs to permanent replacement workers.

Lockouts, on the other hand, have grown to represent a record percentage of the nation's work stoppages, according to Bloomberg BNA, a Bloomberg subsidiary that provides information to lawyers and labor relations experts. Last year, at least 17 employers imposed lockouts, telling their workers not to show up until they were willing to accept management's contract offer.

Perhaps nowhere is the battle more pitched than at American Crystal Sugar, the nation's largest sugar beet processor.

Last summer, contract negotiations bogged down, with the company insisting that its workers agree to higher payments for health coverage, more outsourcing and many other concessions. Shortly after the 1,300 unionized workers—spread among five plants in North Dakota, Minnesota and Iowa—voted overwhelmingly to reject those demands, the company locked them out and hired replacement workers.

That was on Aug. 1, more than five months ago, and since then the workers and their families have been scrounging to make ends meet. Some face foreclosure and utility disconnection notices.

American Crystal has hired more than 900 replacement workers to keep its plants running. Federal law allows employers to hire such workers during a lockout, although they cannot permanently replace regular employees. Employers can pay the replacements lower wages, although as is the case with American Crystal, the companies sometimes need to offer higher wages and help pay for housing to attract replacements.

With many private-sector labor unions growing smaller and weaker, and with public-sector unions under attack in numerous states, some employers think the time is ideal to use lockouts, a forceful approach they were once reluctant to use.

Many employers, though, say they have little choice.

Robert Batterman, a labor lawyer who represents employers, said whether it was the N.F.L. or Sotheby's, which locked out 43 art handlers in Manhattan last July, "the pendulum has swung too far toward the employees, and the employers are looking in these tight economic times to get givebacks."

"Employers," he continued, "are using lockouts because unions are reluctant to do what the employers consider reasonable in terms of compromising. Employers are looking to reset their collective bargaining relations."

After being out of work since Aug. 1, Paul Woinarowicz, a warehouse foreman employed at American Crystal Sugar for 34 years, sees another rationale for lockouts.

"It's just another way of trying to break the union," said Mr. Woinarowicz, a member of the bakery and confectionery workers union. "People here in the Red River Valley are really mad at American Crystal. It was just like a knife stuck in your heart."

With American Crystal earning record profits before the lockout, the workers strongly opposed its push for concessions. Mr. Woinarowicz noted that the company's most recent quarterly report showed a sharp decline in production and profits—a development the workers said showed the lockout was taking a toll. American Crystal said the drop was due to a smaller sugar beet crop and higher operating costs.

American Crystal accuses union negotiators of being inflexible and denies that it is seeking to break the union. For many employers, lockouts have proved highly successful. Last July 17, Armstrong World Industries locked out 260 workers at its ceiling tile plant in Marietta, Pa., after they rejected the company's offer as stingy on pensions and health coverage.

After being locked out for five months, the workers accepted a contract only slightly different from the one they had originally voted down. Union officials said the workers knew Armstrong had the upper hand.

There have been several recent lockouts at hospitals, often after nurses engaged in a one-day walkout. To hire replacement nurses from a staffing company, hospitals often have to commit to hiring them for at least a week, so a one-day nurses' strike is often followed by a four-day lockout. But at some health care facilities, like West River nursing home in Milford, Conn., where management locked out 100 workers on Dec. 13, companies see lockouts as a way to wrest concessions and set an example for workers at their other facilities.

DeMaurice Smith, executive director of the National Football League Players Association, said the football, hockey and basketball leagues ordered lockouts in recent years for a clear reason: to gain leverage in negotiations.

"The lockout is designed to put you at a distinct disadvantage," he said, saying it places huge pressures on players who typically have short professional careers. The National Hockey League's lockout of 2004-5 canceled an entire season.

Mr. Smith said, "A lot of players have careers of two or three years, and you might get a player who asks, 'At what point is this fight worth one-third of my career?'"

For Jeannie Madsen, a lab technician at American Crystal, the lockout has meant strains for her and her fiance, also a worker there. With her former husband also locked out and suspending child support payments, she said she could not afford new school clothes and shoes for her children and had to stop paying her daughter's orthodontist bills. She said Wells Fargo would soon foreclose on her home.

"What's most upsetting is that it's affecting the lives of many innocent children," she said.

The sides are holding occasional negotiations but remain deadlocked.

Ms. Madsen said the company was continually putting up barriers to a settlement, essentially pressing the workers to surrender. Company officials did not return phone messages, but Brian Ingulsrud, the company's vice president for administration, wrote in an editorial for a Fargo newspaper that "American Crystal Sugar remains committed to good-faith negotiations."

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Chairman KLINE. Without objection.

Mr. KUCINICH. Thank you. I have had the opportunity to visit two locked-out groups of workers in the last few days. One in Findlay, Ohio at Cooper Tire, where the United Steelworkers have been locked out since around Thanksgiving. And another one in San-

dusky, Ohio at Sabanci, where members of the IAM have been locked out since January of 2011.

Now, Ms. Davis, as you testified, lockouts have been more frequent. Are unions striking more?

Ms. DAVIS. Unions are actually striking much, much less. They are sitting down at the table now. They understand the reality that this country is facing, and they are sitting down at the table, and I have done it countless times, with employers trying to save the employer's business in order to save their jobs.

We just went through it at the New York City Opera. The car companies are a terrific example, where the union sat down with the car companies and they reached an agreement. And as a result of that agreement, the car companies are back in business. We have 160,000 jobs that have come back to this country.

Mr. KUCINICH. But let us——

Ms. DAVIS. That is what the unions are trying to do.

Mr. KUCINICH. But let us look at what is happening in Findlay and Sandusky, and also in Minnesota, where American Crystal Sugar has locked out its employees. In every case, they are looking for concessions beyond which workers can't sustain. In every case, they are using lockouts as a bludgeon to drive down workers benefits and wages and to literally try to break unions. Is that not true?

Ms. DAVIS. I think that is exactly right. And quite frankly, it is one thing when it happens in football and hockey and basketball. But it is another thing when it really happens to the 99 percent who, as a result of that lockout, cannot pay their medical bills.

Mr. KUCINICH. So, okay. And I have read not only not pay medical bills. Not even be able to have the money to buy their kids shoes. So here is the question. What is the penalty for lockouts? Is there anything punitive that is in the law right now that would really come down very hard on an employer who locks out his employees who are just trying to exercise their rights to collective bargaining?

Ms. DAVIS. There are legal and illegal lockouts. In a legal lockout, there is nothing that anybody can do. In an illegal lockout, which is often the case—we have seen that a lot—the only remedy is to ultimately file a charge, and go to the NLRB. And that is one of the reasons that the paralysis in the NLRB will be hurting workers even more.

Mr. KUCINICH. So with the paralysis in the NLRB, would it be helpful if there was additional legislation to protect workers who are locked out? And if, in fact, it was found to be an unfair labor practice, for punitive measures be taken against the employer. Would that be helpful, if there were additional laws?

Ms. DAVIS. We welcome any worker-friendly legislation because, ultimately, we think it will help this country.

Mr. KUCINICH. Mr. Chairman, members of the committee, I just want to suggest that, you know, yes, there are union disputes with management. But at times, there is egregious violations of workers rights; the right to organize, the right to collective bargaining, the right to strike.

And we need to protect the workers rights. And what I am going to be proposing—and I would ask members to consider this—is that any company that is found to have illegally locked out their em-

ployees that they be debarred from any federal contracts whatsoever. I think this is the only way that we can have an effective stop against this growing practice of trying to lick workers out.

We are in a whole new area. And I want to ask one more question if I have time. Is there a constitutional issue here? Is the worker's right to association here actually under attack?

Ms. DAVIS. There is no question that it is under attack. It is protected by the statute, and it is under attack by every employer that wants to keep its workers down and keep a union out. I have to just mention one thing about the Boeing issue that was raised by the congressman earlier.

Boeing, ultimately, at the end of the day, is a success story. What happened is, a union sat down with a company, they worked out an arrangement, they saved jobs in South Carolina, they saved jobs in Washington. That is how the system is supposed to work.

Mr. KUCINICH. So the system can work if the law is followed, but if corporations go ahead and try to smash a union using lockouts as a device they are breaking down the system, violating the constitutional rights of workers. And there ought to be recourse for workers against these corporations.

That is my point. What is the punishment? You throw a whole group of people, 1,000 people, out of work you are condemning their families to poverty. We have to have some recourse if it is an illegal action. And often it is, and that is why I think we cannot be silent or neutral on this question.

When workers are locked out, they have to have recourse of their rights. If the NLRB isn't functioning, workers are not able to gain their rights. And the balance has already been tilted viciously against workers. And I think it is time that we reset the balance in their favor.

Thank you very much. I yield back.

Chairman KLINE. The gentleman's time has expired.

Mr. ROKITA. Thank you, Mr. Chairman. I yield to a statesman, Dr. Phil Roe, for the purpose of a quick follow-up to his questioning.

Mr. ROE. Just a couple of quick follow ups. I, again, have looked at every NLRB appointee since 1936. And the first one that was appointed by recess was President Carter. And after that, President Reagan, but not during a recess. It was during a recess. It was during a recess where the Senate was not in pro forma session.

So this is the first time I could find, through research, since 1936, that that happened. And I think it is a very serious constitutional issue between the balance of powers. And I agree with you, Ms. Davis. We need a functioning NLRB, no question about it.

And this will be a disaster if these folks layer a rule by the Supreme Court 2 years from now that everything they ruled on doesn't stand. You have got to go back to 2012, and then go through all of that again.

Mr. Cooper, am I correct, or am in wrong in that?

Mr. COOPER. Congressman, I believe you are correct. I would only add to your point that it is true that presidents throughout history have exercised their power under the recess appointment clause. That is an important power. It was contemplated by the

framers as a necessary adjunct to the joint appointment authority between the president and the Senate.

But no president until January 4th had ever exercised the recess appointment power on the day after the Senate met in session and 2 days before it met in session again.

Chairman KLINE. Congressman?

Mr. COOPER. That has not happened.

Mr. ROE. I will yield back.

Mr. COOPER. And that is what is unique, and that is what extends now the concept of this power to a place where it is never gone and where it has uniformly been said not to exist.

Mr. ROE. Okay, I yield back to Mr. Rokita.

Mr. ROKITA. Thank you, Dr. Roe. And thank you, Mr. Cooper, for that clarification.

Real quickly, Mr. Devaney, do you have something to add to that?

Mr. DEVANEY. Well, I just wanted to say that, you know, I had the distinction of being recess appointed by President Reagan, and then I was confirmed by the Senate. I mean, that is the way the system is supposed to work. It was an inter-session.

Mr. ROKITA. And there was not confirmation here, bottom line.

Mr. DEVANEY. Exactly. And then I was confirmed.

Mr. ROKITA. Thank you.

Mr. Chairman, listening to the discussion here I am very concerned that some people on this committee don't feel the need to have this constitutional discussion, don't feel the need to maintain this Constitution. I simply, for the record, want to remind everyone of the oath that we took.

"I do solemnly swear that I will support and defend the Constitute of the United States against all enemies, foreign and domestic. That I will bear true faith and allegiance to the same. That I take this obligation freely, without any mental reservation or purpose of evasion."

It doesn't talk about Mr. Obama's, President Obama's——

Mr. MILLER. The gentleman—will the gentleman yield?

Mr. ROKITA. No. One second.

Mr. MILLER. To apologize?

Mr. ROKITA. Okay, never——

Mr. MILLER. Trying to figure out what your point is.

Mr. ROKITA. The point is, we can——

Mr. MILLER. You are challenging other——

Mr. ROKITA. This is the most important thing we could be doing.

Mr. MILLER [continuing]. [Off mike.].

Mr. ROKITA. A great way to——

Mr. MILLER [continuing]. Resolution——

Mr. ROKITA [continuing]. This country is to let the free market work.

Mr. MILLER. And in the political this would go to the Supreme Court.

Mr. ROKITA. So to describe this hearing as a waste of time——

Mr. MILLER. It is a waste of time.

Mr. ROKITA [CONTINUING]. AS I HAVE HEARD SEVERAL TIMES——

Mr. MILLER. You have—no, you have no impact——

Mr. ROKITA [continuing]. Is, we do have an impact. As the witness has stated, it is demeaning to the process, it is demeaning to the Constitution, it is demeaning to the oath that we took.

Mr. MILLER. No, it is not.

Mr. ROKITA. And Chairman——

Ms. DAVIS. Actually, not all the witnesses stated that, sir.

Mr. MILLER. That is how——

Mr. ROKITA. And, Chairman, because we don't have order here——

Chairman KLINE. The gentlemen, plural, will suspend.

Mr. MILLER. And it will go to the Supreme Court, and they will make a determination.

Mr. ROKITA. Mr. Chairman, because——

Chairman KLINE. The gentleman's not recognized.

Mr. ROKITA. But this committee——

Chairman KLINE. The gentleman has a minute and 7 seconds left.

Mr. ROKITA. Mr. Chairman, I ask for some additional time, since we didn't have regular order.

Chairman KLINE. The gentleman has 59 seconds left.

Mr. ROKITA. Ms. Davis, we talked about the rule of the jungle. And it reminds me of what, I believe, John Adams said. We are a country of laws, not a country of men. From your testimony, I want to clarify something. Are you saying that the NLRA, or the NLRB for that matter, trumps the Constitution?

Ms. DAVIS. Obviously not. What I was saying is, that as long as there is an NLRA and also there is an NLRB that it is incumbent upon everyone to allow that agency to function. And constitutional niceties will be decided later, so——

Mr. ROKITA. Constitutional, I see. Let me——

Ms. DAVIS. I am sorry. I was just in the middle of my sentence.

Mr. ROKITA. Constitutional niceties. I know you said that this is the longest time that you have studied the Constitution in awhile. And I appreciate that, but this is important. This is more than a constitutional nicety. I want you to assume something.

Assume that what was done with these "recess appointments" was found by a court, or whoever the decider is, to be unconstitutional. Do you agree that the Constitution holds supreme?

Ms. DAVIS. Well, first of all, of course the Constitution holds supreme. And I think the issue that we have been debating is who decides. Does this chamber decide or does a court decide?

Mr. ROKITA. If——

Ms. DAVIS. But I think the question—I am sorry, you just have to let me answer your question.

Chairman KLINE. The gentleman's time has expired.

Mr. ROKITA. I was trying to save your time.

Chairman KLINE. Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman.

Ms. Davis, you may complete your thought.

Ms. DAVIS. Thank you very much. What I was saying is, the question of what is the balance of horribles here, in the event we do not know how a court is going to decide? On the one hand, if a court were ultimately to rule that the recess appointments were unconstitutional—which I think, for the reasons outlined in the

OLT report, that is unlikely, but let us assume that that is a possibility—we would be exactly in the situation we were after New Process Steel.

You would have scores of parties who are happy with the decision, and they will go away. And you will have some cases that will have to be revisited. And that was done in a couple of months. On the other hand, if the agency is essentially rendered impotent now, which is what is being urged on the other side of the aisle, the consequences for unions, for the collective bargaining processes, and for workers are enormous.

And I think that is the issue of what is at stake here.

Ms. WOOLSEY. Thank you very much. Which leads me right in to asking the question what is more uncertain? Being paralyzed by process, or moving forward to make sure that we can make decisions and decisions are made related to, in particular, the most difficult disputes that are going on.

Okay, so I am going to ask each one of you what would you have done to unlock this process?

Mr. DEVANEY. You want to go this way, Congresswoman?

Ms. WOOLSEY. No, I will start down there. We get you either way.

Mr. COOPER. I would have advised the president to remain carefully and strictly within the bounds of his constitutional authority. And that at least in this instance, would have meant that the Senate had indeed found a way to prevent him from making recess appointments and——

Ms. WOOLSEY. Okay, but what would you have done if you were president, Mr. Devaney?

Mr. DEVANEY. I would not have made these recess appointments, and here is why. When I served on the board in 1993 and 1994, we went down to two members. At that point, the solicitor of the NLRB gave advice to us that said, "You know, you really oughtn't to decide cases with only two members 'cause the statute says a quorum is three."

Now, you know, years later the board made a different decision and they lost in New Process Steel. I think because of the institutional importance of fair decision-making being looked at by the parties that this was a very bad idea and a very bad precedent by the president.

Ms. WOOLSEY. What would you have done, Ms. Davis?

Ms. DAVIS. I would actually also have advised the president to remain strictly within the constitutional authority. But we would have reached a different conclusion. And after reaching that conclusion, which is laid out in the OLC opinion, I would have lauded him for looking at the real world consequences of, on the one hand, the Senate gaveling in and out for a couple seconds, and on the other hand the fact that a statute and an agency would be dysfunctional in the years that a marathon litigation was occurring.

Ms. WOOLSEY. Okay. Mr. Marculewicz?

Mr. MARCULEWICZ. Well, thank you for the opportunity to put myself in this position. I think——

Ms. WOOLSEY. You are welcome.

Mr. MARCULEWICZ [continuing]. By virtue of the example that has already been set, there are two confirmed members of the Na-

tional Labor Relations Board, Chairman Pearce and Member Hayes. They were confirmed by the Senate. There is nothing to prevent the Senate and—or prevent me, as president, from nominating candidates to the National Labor Relations Board who could be confirmed by the Senate.

Ms. WOOLSEY. Well, all right.

I would like to ask Mr. Devaney, what do you consider "in session?" What was accomplished during those seconds that the Senate was in session?

Mr. DEVANEY. Congresswoman, I am not going to be a defender of the Senate's position, which is——

Ms. WOOLSEY. Yes, but you kind of were. You were saying they were in session——

Mr. DEVANEY. Well, I—the reason that I think the president made a mistake in public policy decision is I think that even as the Justice Department admits there is no certainty here.

Ms. WOOLSEY. No.

Mr. DEVANEY. So it does put a cloud over all the decisions that the NLRB is going to make. I mean, in a near-term thing, if I was advising the board, I would say that when they decide by panels they ought to make sure that the two confirmed members are a majority of the three sub-panels——

Ms. WOOLSEY. Okay. I am going to let Ms. Davis——

Mr. DEVANEY [continuing]. Because that at least might give them a shot.

Ms. WOOLSEY [continuing]. Do the cleanup batter on this panel for me. What is worse? Uncertainty, or at least going forward? What is worse?

Paralysis? Via uncertainty, or action?

Ms. DAVIS. I think, in the broadest sense, what is worse is that this country going to to be hurt, the economy is going to be hurt, and workers are going to be hurt. If the only agency we have that is capable of enforcing the labor laws is rendered incapable of doing anything.

If you look at the economy back in 1955, when we had a third of the workers in this country in unions and we had jobs and we had purchasing power and we had a middle class, and you look at the economy now, where we have less than 8 percent of the workers in unions and we have an economy that is barely sputtering, I think it is very clear that at the end of the day the day we have to look at this from the ground up and see what is in the best interests of this country.

And I think that is pretty clear.

Chairman KLINE. Gentleladies, time has expired.

Mr. Walberg?

Mr. WALBERG. Thank you, Mr. Chairman. And I detect I have missed some very interesting testimony and questioning while I was over dealing with issues related to veterans affairs and contracting and problems that go on there.

But one of the most beautiful parts of democracy is its messiness. Messiness that speaks of freedom and choice and opportunity, and disagreement that go on. And frankly, when I see what is going on here with the president and his non-recess recess appointments, I am willing to accept the messiness of democracy.

It causes me great concern. And, of course, this is first and most important function. Whether it is an education workforce committee or judiciary committee or whatever, to uphold the Constitution. So I appreciate the discussion today.

Mr. Marculewicz, over the last few months the board has been delegating its authority to the general counsel in preparation for a loss of quorum. What authority has been delegated?

Mr. MARCULEWICZ. Actually, it is the board that delegated certain authorities related to issues that could have become impediments to processing representation case elections and unfair labor practice charges through to litigation.

So for example, the board delegated to the chief administrative law judge the authority to rule on dipositive motions, such as motions to dismiss, motions for summary judgment and other things of that matter. And that would enable an initial ruling to take place on that subject.

If the ruling—if it were denied, then the case could proceed to litigate, fully be developed. And then, ultimately, once the board is fully constituted, they would then be able to rule both on the motion of the decision by the chief administrative law judge as well as the substance of the case.

And that is really, I think, the way I see that. It was designed to keep the process going during this interim period.

Mr. WALBERG. What functions cannot be delegated?

Mr. MARCULEWICZ. You know, the ultimate decision-making on cases, the ultimate orders. They can't delegate that to anybody. That is their exclusive authority.

Mr. WALBERG. What is, then, the practical effect of a broken board?

Mr. MARCULEWICZ. The practical effect of a broken board is—I wouldn't call it—I mean, the practical effect of a broken board, as you call it, is such that it would still operate. I mean, so much of working and what companies deal with and employers and unions deal with before the National Labor Relations Board is handled at the regional office level.

It is not handled at the highest level of the agency. They have cases they decide, yes. And ultimately, if one feels they need to push the issue all the way to get a final board order, yes, that could be done. But most of these cases are resolved.

Most of these cases are settled beforehand. Most companies don't have the wherewithal or the desire. I talk about Dan, Dan the pool guy. He doesn't have the money to fight a case all the way to the bitter end, and they don't want to do that.

Mr. WALBERG. Thank you. I would like to——

Ms. DAVIS. May I just address your question, as well?

Mr. WALBERG. I would like to yield the remainder of my time to Representative Gowdy.

Mr. GOWDY. I thank the gentleman.

Mr. Chairman, I would just say this in the remaining time. I started by talking about respect for the rule of law. And it really shouldn't matter, with the vagaries or vicissitudes of political cycles, what definitions mean. And I just find it to be dangerous that pro forma sessions have constitutional significance when there is a

Republican in the White House but they don't when there is a Democrat in the White House.

And recess has one definition when there is a Republican in the White House, but a different definition. And I think the chronology is important here. On December the 14th is when these names were submitted to the United States Senate. And the notion that they couldn't do any work, or this newfound functionality analysis when they passed the payroll tax extension, you can't have it both ways.

They send names on December the 14th, no background check, none of the proper paperwork required by the Senate. And then he waits a couple of days and he mask these recess appointments because it happens to be a political year. In 2010 it wasn't a political year, but his justice department argued that a recess must be longer than 3 days.

So the only thing different, Mr. Chairman, is the calendar. And I had hoped to go through this hearing without making reference to Boeing, but someone cited Boeing as an example of the wonder of the NLRB. And I will tell you, my perspective is, a lawsuit is filed. Once Boeing agrees to send more union work to Washington State, the lawsuit is withdrawn.

In the criminal justice system, you don't file complaints solely to get people to do what you want them to do. You either enforce the law—if Boeing made a mistake, don't withdraw with complaint. But don't use it to send more union work back to Washington State.

I thank the gentleman for yielding his time.

Chairman KLINE. Thank the gentleman.

Mr. Hinojosa?

Mr. HINOJOSA. Thank you. Chairman Kline and Ranking Member Miller, I am deeply concerned that this committee hearing is just another assault on American workers and the National Labor Relations Board. Instead, it seems to me that we in Congress should be doing everything possible to move a jobs agenda forward and provide relief to the millions of workers who have lost their jobs in the last 6 years.

My first question is for Susan Davis. Ms. Davis, in your expert testimony, does the Constitution give the president clear powers to make appointments when the U.S. Senate is in recess?

Ms. DAVIS. Yes, and I think no one on this panel would actually disagree with that.

Mr. HINOJOSA. When will the definition of when the Senate is in recess be available to us?

Ms. DAVIS. Well, I think that there are challenges that are going to be filed. And I agree, actually. I think it was a conservative estimate given that it was 2 years. I would actually say that this case winding its way up to the Supreme Court may take between two and 3 years.

Mr. HINOJOSA. Two to 3 years.

Ms. DAVIS. And if I may just add, the newfound functionality analysis which the congressman referred to dates back to President Monroe. This is not a new or radical doctrine.

Mr. HINOJOSA. Ms. Davis, in your testimony you mentioned that there are a number of significant cases pending at the board that

will provide important guidance to the employers, the workers, and to unions. Do these cases involve the proper standard for determining whether those individuals or contractors or employees covered by the NLRA?

And if the board were to lack a three-member quorum, what would happen to those pending cases?

Ms. DAVIS. Those pending cases would sit there for years.

Mr. HINOJOSA. Would the workers or the employers have any other remedies to seek redress?

Ms. DAVIS. There are no other remedies under our current legal system to seek clarity on labor management relations. So the notion of who is an employee, who is an independent contractor would not be resolved for years. That is something that is intellectually interesting to us.

But on the ground, for those taxi drivers in New York and others who are looking for clarity, it really is determinative of their ability to survive and support their families.

Mr. HINOJOSA. Thank you.

My next question is to Dennis Devaney. Mr. Devaney, should the NLRB be able to impose sanctions against lawyers for filing frivolous motions and for engaging in genuinely frivolous litigation?

Mr. DEVANEY. Obviously, the federal courts have the Rule 11 sanction as a possible remedy for that. Currently, the board doesn't have that, although it does have the ability to sanction lawyers who have violated the professional ethics rules that have been adopted by the board.

So that seems to me that is something that the Congress would be the proper determinant of, not me.

Mr. HINOJOSA. Mr. Devaney, in looking at some of the materials there is a section that talks about approximately 490 cases were resolved and were no longer pending at the board, even after New Process Steel. That means the line for everyone else who was waiting to have their court was shorter. Isn't it better to be in the shorter line?

Mr. DEVANEY. Well, I think it is better to be in the shorter line. But let me say this. When the—when the board, the two-member board, said they were going to be able to go forward they said we would only decide routine cases. I mean, my client certainly didn't believe it was a routine case, and spent substantial sums defending their position.

There were 100 cases that were taken on appeal. So, in fact, I completely disagree with Ms. Davis as to her characterization that all of these were just these routine matters. They weren't, you know. The fact that the boardmembers who wanted to delegate might have characterized them that way, certainly the parties that were being, you know, penalized didn't view them that way.

So I think it is just wrong. I think that is a wrong characterization.

Ms. DAVIS. May I just clarify?

Mr. HINOJOSA. Yes. Yes, you may.

Ms. DAVIS. I distinguish between, on the one hand, describing these cases as non precedent-setting cases, which I do. The cases that aren't rocking everyone's world. But let me clarify. And I do

agree with Mr. Devaney. These cases matter to the parties. They matter to the parties a lot.

And the fact that they were able to get decisions and certainty—and two-thirds of them, after the two-person board was declared quorum-less, decided to stick with those decisions. So I think those are important, and I think it shows the process works.

Mr. HINOJOSA. My time has——

Mr. DEVANEY. Can I just say I disagree with that. I think what happens is, if it is a notice posting—which was a lot of the issues there—the parties are not going to spend resources on lawyers, or their own resources, trying to have a notice posting changed. But on this——

Chairman KLINE. But——

Mr. DEVANEY. Yes.

Chairman KLINE. The gentleman's time really has expired.

Mr. DEVANEY. Thank you, Mr. Chairman.

Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Devaney, how many NLRB votes are necessary to override an NLRB precedent?

Mr. DEVANEY. Well, I think that is really important, Congressman. In fact, historically—at least going back to when I became a member of the board in 1988, coming forward to today—by tradition, the boardmembers have agreed that they will not change major precedent for significant precedent unless they have a five-member board and a majority of three.

And one of concerns, and one of the main concerns I have about the cloud over these recess appointments is, if there are major changes in policy by the new board, with a recess-appointed quorum—three of the five being recess appointees—then I do that these major cases are subject, then, after the litigate and the court's resolution, to be found not to be properly decided.

And that is bad process, that is bad policy.

Mr. GOODLATTE. So constitutional niceties could have some serious implications for people who not only might be waiting some time to get a decision, but then once the decision is rendered if it is then reversed because of the Supreme Court' ruling, you then have to start the process over again. Is that——

Mr. COOPER. No question about it. And I have to say that the 600 rubber stamps by the new board were also something I don't think was the finest hour of the NLRB when they revisited the two-member decisions. Only a handful of decisions came out differently, and I don't think that is particularly a good from a due process perspective.

Mr. GOODLATTE. And what is the NLRB's responsibility as a neutral arbitrator?

Mr. COOPER. Well, you know, I think that the board is supposed to impact the National Labor Relations Act, boardmembers are supposed to call them as they see them. You know, I think that is the proper functioning of the agency. I mean, certainly the Congress set up this statute so that when presidential elections happen they mean something, and the new president gets to appoint his members if there are vacancies on the agency.

Mr. GOODLATTE. Do you think you are, just noting the rubberstamping of the overwhelming majority of those recent decisions, do you think that reflects on their being a neutral arbitrator now?

Mr. COOPER. No. In fact, I thought was an unfortunate result of their original mistake, and decision to go forward when they only had two members.

Ms. DAVIS. I think Member Schaumber would actually be quite distressed to hear——

Mr. GOODLATTE. Ms. Davis. Regular order, Mr. Chairman. Ms. Davis was not recognized to answer the question.

I have a question now for Mr. Cooper about the legal constitutional niceties that Ms. Davis referred to.

Mr. DEVANEY. Congressman, could I just follow up one thing?

Mr. GOODLATTE. Go ahead, Mr. Devaney.

Mr. DEVANEY. And I talked to Member Schaumber and, in retrospect, I think he regrets having agreed to do the two-member decisions.

Mr. GOODLATTE. Thank you.

Mr. Cooper, when we talk about constitutional niceties here, we are not simply talking about the implications for these three appointments to the board, two of whom by the way were nominated with a couple of weeks of when the president, in my opinion, abused his authority under the Constitution and named them as recess appointments.

But be that as it may, the constitutional niceties referred to by Ms. Davis have implications far beyond those three members, do they not?

Mr. COOPER. They do.

Mr. GOODLATTE. They have implications far beyond the National Labor Relations Board, do they not?

Mr. COOPER. They do, Mr. Goodlatte.

Mr. GOODLATTE. They have implications that affect, really, the power of the United States Senate, acting as the designated portion of the United States Congress to advise and consent on presidential appointments with regard to virtually any appointment.

And it would really nullify the ability of the Senate to act in a timely fashion to review people for appointments if it were found that a couple of weeks after the president named somebody, when Senate is in pro forma session, that any president going forward—this one or any in the future—could name anybody they wanted to, to any position in the executive branch or judicial branch of our government.

Is that not correct?

Mr. COOPER. The recess appointment power would be very substantially, substantially expanded. And it is difficult to see what the limit on it would be, other than political limits, Mr. Goodlatte. Yes.

Mr. GOODLATTE. And those, therefore, constitutional niceties referred to by Ms. Davis are, in fact, going right to the very core of the United States Constitution in terms of the ability of the legislative branch to provide a crucial check against the enormous executive branch of our government, which has grown and grown and grown in terms of the number of agencies, the number of political appointments, the number of powers that are exercised by that

branch of the government to the detriment of those in the legislative branch who want to provide a check against the abuse of that power which one would think, exercising a recess appointment when the Senate is not in recess for these three members of the National Labor Relations Board, by this president seems to be a very serious abuse of executive power.

Do you agree with that?

Mr. COOPER. It would go to the core of the very careful design of the framers to divide the appointment power for vacant federal offices between the president, as a nominating authority, and the Senate as the confirmation authority.

Chairman KLINE. And the gentleman's time has expired.

Mrs. Davis?

Ms. DAVIS. Thank you very much. I would—oh, that Mrs. Davis. Sorry, the other Susan Davis. You can understand—I am sorry.

Mrs. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman. I appreciate that, and certainly want to acknowledge and recognize, you know, my namesake here, also a Berkeley grad. So that is good to have you here.

But I wanted to actually give Ms. Davis an opportunity to respond at this time. Because I think certainly my colleague, there was sort of a tone there that I think is appropriate for Ms. Davis to be able to respond to the issue of the constitutional niceties, clarifying any way that she wanted to.

But I also wanted to just speak to the uncertainty here that is been stated. And I am sorry that I had to leave for a few minutes and may have missed other questions regarding that. But certainly, employers are obviously concerned about that issue and what moves forward.

And I want you to respond to that. Because we know, and I am sure Ms. Davis, having, you know, advocated and worked hard on behalf of unions and working families in this country also sees that they don't always win the battle. There are issues before the organization, and they have to respond to that. So everybody wants certainty, and we know that that certainly affects our economy today.

Ms. Davis, could you first respond. And then also on that issue of areas in which we need to have an active organization here in order to move forward?

Ms. DAVIS. Thank you very much. I am not going to take up the chamber's time on any more of the constitutional debate. I think we have all made our views clear. I would like to say two things before I answer your question.

One is with respect to the picture of recess appointments gone wild, I really want to clarify what the facts are. Which is that this president has made 32 recess appointments, compared to more than a hundred recently done by past presidents. He is done so consistent with NLRB recess appointments in the past, and he has done so solely enable to allow two agencies to function, which I think distinguishes this from anything.

The second point I wanted to make very quickly is on precedent and the point that was made on precedent. Congress entrusted the enforcement of this act to an administrative agency rather than to the courts solely so that it could be free of precedent, and that it

could adjust itself to the workplace and the needs of the workplace, and the imperatives of collective bargaining.

The fact that people may not like what a board is going to do is not enough to essentially unravel what the statute has mandated that this board do. In terms of your ultimate question, which is what is the impact, I want to give you one example from my own practice.

I represented, years ago, a union, a national union, of registered nurses. There were nurses in Salt Lake City who came to this union—it is not a big union town—and said we would like a union because every day we are forced to do mandatory overtime. So there was a secret ballot election held.

Eighty percent of the members, the nurses, signed cards. And the regional director found that every single nurse in that unit, virtually every single nurse, was a supervisor. Notwithstanding that it was sort of impossible to be supervising yourself.

That decision, under these circumstances, would have nowhere to go. There would be no board to say let us look at this soberly and see whether, in fact, the entire unit is a supervisor. That is one of many, many examples that, notwithstanding the business that gets done at the region—and there is business done at the region—that ultimately any employer that wants to resist unionization will be able to do so unless we have a fully-functioning board that can render decisions.

Mrs. DAVIS OF CALIFORNIA. Would anyone else like to respond to that issue of uncertainty from——

Mr. COOPER. Did I just say that the best policy result would be to have a five-member board, confirmed with the advice and consent of the Senate, making that decision?

Mrs. DAVIS OF CALIFORNIA. We all, always, have a best scenario that we would like to see, I can assure you, from where we sit. Many, many times we don't think it has been the best way that things have been resolved, either. So I just want you to know that.

Mr. COOPER. I appreciate that, Congresswoman.

Mrs. DAVI OF CALIFORNIA. Yes, okay. Thank you very much. My time is up.

Chairman KLINE. Thank the gentlelady.

Mr. Kelly?

Mr. KELLY. Thank you, Chairman. And I am sorry I have missed most of the hearing. But I guess I come down to I have only been here a year. And it has been a fascinating year. And I guess we just can't wait—can either go from a campaign slogan or to the way we actually run government.

And we can pick and choose things that we can wait for and things that we can't wait for. I am a little bit confused. Because I believe that this happened not too long ago. And under section Article One, Section Five, Clause Two of the U.S. Constitution, the Senate is vested with the power to determine the rules of its proceedings.

Pursuant to this power, at the end of the Bush administration Senate Majority Leader Reid frequently codified pro forma sessions during recesses occurring within sessions of Congress to prevent the president from making recess appointments. November 2007, the Senate majority leader explicitly stated that the Senate would

be coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments.

Now clearly, Senator Reid considered these pro forma sessions to be actual sessions of the Senate that broke up the recesses. So during the final 14 months of the Bush administration, in which the Senate broke up recesses or pro forma sessions, the president made no recess appointments.

And I guess, Mr. Cooper, I really do, I question this. Because it is not just a matter of trust, which it seems the American people are having less and less trust in the the way we run Congress and the way the administration runs this. It goes back to another word that seems to be coming up quite often, and it is "hypocrisy."

And it is defined as "behavior of people who do things that tell other people not to do; behavior that does not agree with what someone claims to believe or feel." And I have got to go back to, again, Mr. Reid and, at the time, Senator Obama, really agreeing you shouldn't be making these appointments.

You shouldn't be doing this. I mean, I guess when it suits you it feels pretty good. And when it doesn't suit you, you can find an end run on it. So if you could just tell me just a little bit on that. What is your feeling on that? I mean, it was—is there really a precipice? Does it say that you shouldn't be making these appointments, or does it?

I mean, when does it matter? I mean, when it matters to me and I can say that it is important, or then I could say, "Well, you know what? I guess in that situation I meant it, in this situation I don't." And this idea that we just can't wait, how long would we have had to wait to actually get these folks vetted and approved?

Mr. COOPER. Well, Mr. Kelly, it is certainly historically accurate, as you have recounted, that the first time that this pro forma session method of calling the Senate into session was ever used was under the Democratic regime and against, essentially, President Bush's ability to make recess appointments.

President Bush, as you say, did not make any recess appointments from that point forward. He, one must assume, respected the Senate's judgment. And what I would suggest is essentially binding judgment, under its own rulemaking power, to determine for itself when it is in session and when it is not.

And not until January 4 has a president—and here, President Obama, obviously, decided not to respect that, that judgment of the Senate concerning its own proceedings. I have testified, and I have provided the committee with my lengthy statement on the constitutionality of this. And I simply believe that President Obama exceeded his authorities when he did so.

Mr. KELLY. No, and I appreciate that. And I guess, really, we can look at the Senate as truly being the silent majority. When it comes to anything really important, they remain very silent. I just don't understand how somebody who could have been so articulate in the previous administration suddenly goes deaftone with this. And says, "Wow, you know, I am not sure."

But it is truly the height of hypocrisy the way these things are working right now. In the previous administration, don't do it, shouldn't do it, Senate has to vet them. And to this one it is like, well, we just can't wait. We can't wait for these folks to actually

run our government. We are going to have to just find a way to get around them.

I think it is absolutely pathetic and preposterous that we sit back and we have to have hearings on things that, to the average guy, looks to be, again, the height of hypocrisy to say one thing and then do quite another. And I thank you.

And I yield back my time.

Chairman KLINE. The gentleman yields back. There being no other members to ask question, I want to thank the panel. And I am going to yield to Mr. Miller for any closing remarks and comments that he may have.

Mr. Miller, you are recognized.

Mr. MILLER. Thank you, Mr. Chairman. And thank you again to the witnesses and to all of the members who participated. I think my conclusion would be, at the end of this hearing, is that this should be in the Supreme Court. Whether a Democratic leader or a Republican leader or a constellation of leaders between the House and the Senate, or the 60-vote rule conspired to deny the president the right to have and make recess appointments should be determined by the court.

I appreciate the right of the Senate to set its own rules, but does the right to set its own rules get to trump the president's constitutional authority? I don't know the answer to that question. I think I know the answer I like. I am stunned that George Bush didn't—when you see a construct that is admitted to, designed to prevent you from exercising your constitutional authority, I think you may have an obligation to challenge that, as president of the United States.

Just as the Senate or the House would challenge it immediately if we thought the president was stepping in, when they swarmed in here and, you know, the Department of Justice starts swarming in here opening up members of the offices, the bipartisans said, "Whoa, whoa, whoa, whoa. Out of this building," under the Constitution.

So these are important decisions. And you clearly had a construct here, you had a construct. The House wasn't going to let the Senate go into recess, and they weren't going to let the requirement to come in every 3 days to do legislative business that couldn't be agreed to by unanimous consent.

And you saw that it was on TV night after night in the House, where a member would stand up on the House, just try to, you know, strike the last word, speak for one minute, do something. The person in the chair abandoned the chair, closed it down. They wanted nothing to happen here.

It is interesting, and I think Ms. Davis makes a critical point. What is different about this is there is a Consumer Financial Protection Bureau that can't function without a director, and this agency can't function without a quorum. And we know the interests that are trying to keep this agency from functioning, including a majority of the Republican caucus in this House that sought to defund it.

They don't see value added here for the employer community or for the employee community. So nothing gained, nothing lost, you know. They are happy with that decision. You have Senator from

South Carolina saying he thinks, you know, if this agency ceases to function that is progress.

But that is not the president's duty, and that is not the president carrying out the function of his office. And that doesn't meet the demand of where there's people trying to be protected against the machinations of the financial community that we have witnessed over the last several years, or workers trying to be protected in the place, or the employer's trying to be protected.

So this isn't about this committee. We won't resolve this issue. We can argue this, and we damn near have, until the cows come home. The fact of the matter, this belongs in the court for the sake of our Constitution. And I think it is just very important to understand. I don't know, maybe the court can ignore all of the background.

But this table was set for a purpose, and the purpose was if the Senate had wanted to go the House could have kept them from going into recess. So you came up with this other mechanism. I was told a lot of times, in law school, that just can't do directly you can't do indirectly. So they couldn't directly deny the right of a recess appointment so they put together a construct to deny him the right of recess appointment.

I think this president is absolutely correct, and did a lot of work with George Bush. I am just stunned that he didn't see it the same way in terms of the office of the presidency. There is a lot of things they do down there in the name of the office of the presidency that strikes us as crazy, wrong, outrageous and all the rest of that.

But there is a certain duty that runs with that president beyond what most people associate with it. And I think, in this case, he is properly challenging the—I got a lot of things he could challenge in the Senate. I think we have unanimity over here on that. But in this particular one, I think he is right in terms of whether or not agencies that we have designed legislatively not to function except under certain constructs that they can't function, and he is prevented from putting in place the mechanism that will allow it to function—in this case, a director and/or members of the board.

And it is clear what is going on here. This is an absolute assault against the National Labor Relations Board. And it will continue, and hopefully the Supreme Court will speak sooner than later. I hope it doesn't take 2 years, but if it does the Constitution's worth it and we will see where it goes.

Thank you very much for your participation in the hearing.

Chairman KLINE. I thank the gentleman. I want to thank the witnesses, of course. I think there has been agreement here in some areas. Everybody at the table, and probably everybody up here, agrees that the president has the authority, the power, the constitutional power and sometimes the absolute necessity to make recess appointments.

There is clearly a difference over whether or not he had the power to make a recess appointment when the Senate was in pro forma session. And the testimony here today has revealed that this is going to cause difficulties throughout our economy as employers, employees, workers, whether unionized or not, are struggling over whether or not decisions made by this board—the five-member

board that has now a majority of three that were appointed while the Senate was in pro forma session.

That raises all sorts of questions. we are trying to look at things that can help Americans get back to work, create jobs. And it is the judgment of many of us that this has put us in a awkward position. The reason that the Constitution requires Senate confirmation is so that the president and the Congress—in this case, represented by the Senate—will come together and agree on what should constitute the makeup of a board such as the NLRB or the cabinet.

And this president has made appointments that have been confirmed by the Senate, cabinet secretaries, justices to the Supreme Court, other judicial appointees, other agency appointees. So it is possible for this president or any president, but we are talking specifically this president, to make an appointment and have it confirmed by the Senate.

What we had hoped would happen here, and would resolve this uncertainty, is that the president make an appointment and then work with the Senate to get appointees that they can actually confirm so that you have a working quorum. Now, we are not going to decide that. I agree with the ranking member and others that we are not going to be able to overturn that here in the House.

But we are concerned about the act, the National Labor Relations Act, and the board fall under the jurisdiction of committee. And at some point, it seems to me, we may need to address that law. We have made some changes to the National Labor Relations Act from this committee in this House that haven't been acted upon in the Senate.

My thought is that at some point it is going to require a larger overhaul. So this information is informative. This is not a legislative hearing. I don't have such a piece of legislation here in front of me. But clearly, there have been difficulties. I have expressed to the ranking member, aside, that we see this problem with the National Labor Relations Board year after year after year. Because of the nature of it, it swings back and forth depending upon whether or not you have a Republican in the White House or a Democrat in the White House.

It is worth our taking a look at. And I think the concerns of many of us, and the concerns raised here, are important as we look forward to the impact going forward and things that we may want to consider in this committee to affect that, acknowledging that we are not going to tell the Supreme Court or any other courts how they are going to rule on what I think is a very, very important matter.

Again, this is a very, very learned and distinguished panel of witnesses. I have learned new words here today. I will probably never use them again. But, again, I want to thank you very, very much for your attendance today. There being no further business, this hearing is adjourned.

[Whereupon, at 12:19 p.m., the committee was adjourned.]