EXAMINING PROPOSALS TO STRENGTHEN THE NATIONAL LABOR RELATIONS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

EXAMINING PROPOSALS TO STRENGTHEN THE NATIONAL LABOR RELATIONS ACT

Wednesday, July 25, 2012
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:02 a.m., in Room 2175, Rayburn House Office Building, Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Wilson, Rokita, Noem, Ross, Andrews, Kucinich, Kildee, Tierney, and Holt.

Also present: Representatives Kline and Miller.

Staff present: Adam Bennot, Press Assistant; 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; Brian Newell, Deputy Communications Director; Krisann Pearce, General Counsel; Linda Stevens, Chief Clerk/Assistant to the General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Tylease Alli, Minority Clerk; Jody Calemine, Minority Staff Director; John D'Elia, Minority Staff Assistant; Jonay Foster, Minority Fellow, Labor; Brian Levin, Minority New Media Press Assistant; Celine McNicholas, Minority Labor Counsel; Megan O'Reilly, Minority General Counsel; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Senior Counsel,

Chairman ROE. A quorum being present the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good morning, everyone.

I would like to thank the witnesses for being here with us. We have a distinguished panel and look forward to their testimony.

Over the last year this committee has taken action on numerous occasions to defend the rights of workers and employers from the harmful agenda of the National Labor Relations Board. Most notably, we have passed legislation that would prohibit the NLRB from dictating the location of American businesses and advanced a bill that would preserve longstanding union election procedures that protect employer free speech and worker free choice.

I hope our colleagues in the Senate will soon see the value in these positive proposals and hold a vote without further delay. In

the meantime, this committee must continue examining labor policies that affect the strength and competitiveness of America's workplaces. Toward that end, we will review today a number of decisions by the board and examine their impact on the workforce and discuss legislative solutions offered by members of the committee.

As we all know, foremost on the minds of many workers are the ongoing challenges they face in this tough economy. Roughly 13 million Americans are unemployed and searching for work.

Those fortunate to have a job watch helplessly as higher food and energy prices take more out of a paycheck that hasn't increased significantly in the recent years. In fact, hourly—average hourly wage earnings for private sector employees has risen less than $1 over the last 2 years.

No individual that works hard and earns a higher wage should be denied the fruits of his or her labor. Yet federal labor policy actually prevents union workers from receiving higher wages if they are not included in a collective bargaining agreement or agreed on—to by the union. Over the years the board has found employees in violation of the law for signing bonuses, expanding pay for commissioned associates, and implementing incentive programs that reward good work.

I am pleased to support a bill introduced by our colleague from Indiana, Representative Todd Rokita, which would amend the NLRA—National Labor Relations Act and permit employers to pay higher wages to their employees. The RAISE Act is a common sense reform that would provide relief to countless working families.

Workers are not only concerned about policies to keep their wages down; they also worry about the effects to undermine the democratic rights of the workplace. In its 2007 Dana decision the NLRB strengthened worker access to a secret ballot in the event their employer voluntarily recognized a union. Recognizing that intimidation and coercion often associated with card-check campaigns undermine employee free choice, the board's decision provided employees 45 days to request a secret ballot election.

Remarkably, the Obama NLRB reversed this important pro-worker decision. Once an employer decides it is—is it in his or her best interest to voluntarily recognize the union, some workers will be forced to wait years before participating in a free and fair union election.

We often hear the Obama board has been diligently promoting the workers—the rights of workers. However, its decision to restrict access to the secret ballot exposes the harsh reality behind such false rhetoric.

The Secret Ballot Protection Act will end the assault on the secret ballot once and for all. The bill, which I introduced and am proud to have the support of 69 of my House Republican colleagues, amends the National Labor Relations Act to ensure unions have to first win the vote in a secret ballot election before they can represent workers. And every person on this dais, including the president, is elected by secret ballot.

Finally, the board is simultaneously advancing policies that restrict employer rights while also working to expand its jurisdiction over the sovereign affairs of Indian tribes. In the 2004 landmark

San Manuel Indian Bingo and Casino decision the board overturned nearly 30 years of precedent in order to impose its authority on commercial activities owned and operated by Native Americans. The decision was issued with bipartisan support of the board members, which demonstrates that just because something is bipartisan doesn't mean it is good public policy.

We are honored to have today with us President Robert Porter, of the Seneca Nation of Indians, to discuss his experience with the board's flawed interpretation of the law and to express his support for the Tribal Labor Sovereignty Act. This important legislation, championed by our colleague from South Dakota, Representative Kristi Noem, would reassert the authority of tribal leaders over tribal affairs, free from the NLRB intrusion.

There is a great deal of work to be done to make NLRA more responsive to today's needs in the workplace. I look forward to working with all of my colleagues in that important effort.

And I will now recognize my distinguished colleague, Rob Andrews, senior Democrat member from the subcommittee, for his opening remarks?

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning, everyone. I would like to thank our witnesses for being with us. We have a distinguished panel and we look forward to their testimony.

Over the last year, this committee has taken action on numerous occasions to defend the rights of workers and employers from the harmful agenda of the National Labor Relations Board. Most notably, we have passed legislation that would prohibit the NLRB from dictating the location of American businesses and advanced a bill that would preserve long-standing union election procedures that protect employer free speech and worker free choice.

I hope our colleagues in the Senate will soon see the value in these positive proposals and hold a vote without further delay. In the meantime, this committee must continue examining labor policies that affect the strength and competitiveness of America's workplaces. Toward that end, we will review today a number of decisions by the board, examine their impact on the workforce, and discuss legislative solutions offered by members of the committee.

As we all know, foremost on the minds of many workers are the ongoing challenges they face in this tough economy. Roughly 13 million Americans are unemployed and searching for work. Those fortunate to have a job watch helplessly as higher food and energy prices take more out of a paycheck that hasn't increased significantly in recent years. In fact, average hourly earnings for private-sector employees has risen less than $1 over the last two years.

No individual that works hard and earns a higher wage should be denied the fruits of his or her labor. Yet federal labor policy actually prevents union workers from receiving higher wages if they are not included in a collective bargaining agreement or agreed to by the union. Over the years, the board has found employers in violation of the law for signing bonuses, expanding pay for commissioned associates, and implementing incentive programs that reward good work.

I am pleased to support a bill introduced by our colleague from Indiana, Representative Todd Rokita, which would amend the National Labor Relations Act and permit employers to pay higher wages to their employees. The RAISE Act is commonsense reform that would provide relief to countless working families.

Workers are not only concerned about policies that keep their wages down, they also worry about efforts to undermine the democratic rights of the workplace. In its 2007 Dana decision, the NLRB strengthened worker access to a secret ballot in the event their employer voluntarily recognized a union. Recognizing that intimidation and coercion often associated with card-check campaigns undermine employee free choice, the board's decision provided employees 45 days to request a secret ballot election.

Remarkably, the Obama NLRB reversed this important pro-worker decision. Once an employer decides it is in his or her best interest to voluntarily recognize the

union, some workers will be forced to wait years before participating in a free and fair union election. We often hear the Obama board has been diligently promoting the rights of workers. However, its decision to restrict access to the secret ballot exposes the harsh reality behind such false rhetoric.

The Secret Ballot Protection Act will end the assault on the secret ballot once and for all. The bill, which I introduced and am proud to have the support of 69 of my House Republican colleagues, amends the National Labor Relations Act to ensure unions have to first win the vote in a secret ballot election before they can represent workers.

Finally, the board is simultaneously advancing policies that restrict employer rights while also working to expand its jurisdiction over the sovereign affairs of Indian tribes. In the 2004 landmark San Manuel Indian Bingo & Casino decision, the board overturned nearly thirty years of precedent in order to impose its authority on commercial activities owned and operated by Native Americans. The decision was issued with bipartisan support of the board members, which demonstrates that just because something is bipartisan doesn't mean it is good public policy.

We are honored to have with us today President Robert Odawi Porter, of the Seneca Nation of Indians, to discuss his experience with the board's flawed interpretation of the law and to express his support for the Tribal Labor Sovereignty Act. This important legislation, championed by our colleague from South Dakota Representative Kristi Noem would reassert the authority of tribal leaders over tribal affairs, free from NLRB intrusion.

There is a great deal of work to be done to make the NLRA more responsive to the needs of today's workplaces. I look forward to working with all of my colleagues in that important effort. I will now recognize my distinguished colleague Rob Andrews, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. ANDREWS. Mr. Chairman, thank you and good morning. We appreciate the good-spiritedness which you conduct all the affairs of the subcommittee.

Good morning, ladies and gentlemen. Thank you for coming to testify with us this morning.

This is a hearing that I think starts from the premise of a story that isn't true, or an era that doesn't exist. The basic narrative here is that the so-called Obama labor board has run amuck and has made all sorts of radical decisions that are undermining the health of the U.S. economy. And it makes for good television.

But when you examine the facts of what has happened with the NLRB in the last couple years they tell a very different story. First of all, the labor board in the last couple of years has had a far higher percentage of unanimous decisions than the labor board did in the Bush years. So if there is such a radical and a huge divide within the board why is it that the board has had more unanimous decisions in the last 3 years than it did under the prior board?

Second is the Boeing case is part of this narrative, in which the board is characterized as, quote—"dictating where businesses can locate." Nothing could be a further mischaracterization of the Boeing case. In the Boeing case the board filed a complaint alleging that Boeing had threatened to move work because of the collective bargaining activities of unions in the state of Washington.

The case settled. Boeing and the board looked at the matter, they settled the case amicably, and the case is over. That is what the case was about.

There is no rule, there is no decision, there is no statute that says that any business must or must not locate in any place in the United States.

And so we are going to have a hearing this morning about other ideas about the National Labor Relations Board. I would respectfully suggest that what the Congress ought to be doing is three

things that would address the problems I think most of us hear about when we go back to our communities and our districts.

First is, the president in September of 2011 proposed the idea that small businesses that hire people should get a tax cut for doing so. We have never taken a vote on that proposal. We should.

Second is that although the private sector economy—businesses have added 4.3 million private sector jobs since March of 2010, public sector employment has dropped by over 600,000 people—teachers, firefighters, police officers, public works employees. There are a lot fewer of them than there were 2 years ago.

The president proposed a modest program of help to states and cities and localities to help rehire some of those police officers and firefighters and teachers. We have never taken a vote on that proposal and I think we should.

And finally, there is an unmitigated crisis in rural America because of the worst drought in decades. It is devastating the economy of rural America as we speak.

Republicans and Democrats working together on the Agriculture Committee passed a farm bill, and there are things in that bill I like and things in that bill that I do not like. But they passed a bill to help with this crisis in rural America.

The Congress is scheduled to adjourn next Friday for 6 weeks. As of now, from what we are hearing from the majority leadership, there won't be a vote on the farm bill either, as rural America suffers.

Now, I am not suggesting that the bills that our colleagues have put forward are not worth consideration. They are put forward in good spirit and good faith and they should be looked at.

What I am suggesting is in the wake of the continuing chronic problem of unemployment that the ideas the president has put forward should merit a vote. And at a time of great economic crisis in rural America the farm bill, that both Republicans and Democrats supported in the Agriculture Committee, should at least be voted on before we leave town for 6 weeks.

That seems to me to be a higher order of business for the Congress, and I would urge that we reconsider on that grounds.

Mr. Chairman, again, I appreciate the chance to be with you and to hear from the witnesses and look forward to their testimony.

Chairman ROE. Thank you, Mr. Andrews.

Pursuant to Committee Rule 7c, all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our very distinguished panel. First, the Honorable Robert Porter is the president of the Seneca Nation of Indians.

Welcome, Mr. President.

Mr. William Messenger is a staff attorney at the National Right to Work Legal Defense Foundation, located in Springfield, Virginia.

Ms. Devki Virk is a member of the—member of Bredhoff & Kaiser, PLLC, in Washington, D.C.

And I hope I pronounced your name correct—correctly.

Dr. Tim Kane is the chief economist at the Hudson Institute here in Washington, D.C.

Before I recognize you to provide your testimony let me briefly explain the lighting system. You have 5 minutes to present your testimony. When you begin the light in front of you will turn green; with 1 minute left the light will turn yellow; and when your time is expired the light will turn red, at which point I will ask you to wrap up your testimony as best you can.

And after everyone has testified members will each have 5 minutes to question the panel.

Well, first I would like to thank the witnesses for being here today, and now I will start with President Porter?

Is your mic on?

Mr. PORTER. Oh, how about that?

Chairman ROE. Better.

STATEMENT OF HON. ROBERT ODAWI PORTER, PRESIDENT, SENECA NATION OF INDIANS

Mr. PORTER. Excellent.

Nya-weh Ske-no. In our language, I am thankful that you are well, I am thankful to be here.

I am pleased to appear before you today to testify on how you might strengthen the National Labor Relations Act while at the same time strengthening respect for tribal sovereignty by enacting H.R. 2335, the Tribal Labor Sovereignty Act. I ask that my written testimony be placed in the record on behalf of the Seneca Nation of Indians, which I lead as its elected president.

The Seneca Nation is one of America's earliest allies, historically aligned with the other members of the Six Nations Iroquois Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty over 217 years ago. In that treaty the United States made several key promises to the Seneca Nation. Of direct relevance to this hearing today, the United States recognized the Seneca Nation as a sovereign nation and assured us that our property and activities on our territory would not be interfered with.

Because of this treaty-protected sovereign freedom, both our nation government and individual Seneca citizens have benefitted from the opportunity to resume our trade relations with non-Indians, especially during the last 40 years, focusing primarily on available businesses involving tobacco, gaming, hospitality, and related ventures. Key to our economic success has been our governmental sovereignty—our right to govern in our own way what happens in our own land.

Unfortunately, many aspects of our treaty-recognized freedoms have been eroded over time. Each of the three branches of the federal government has, from time to time, overturned decades of precedent in federal Indian law. A prime example of this legal regression can be found in the recent tribal labor management decisions taken by the National Labor Relations Board and the federal courts in the 2007 San Manuel case.

As you know well, the NLRA is the primary law governing relations between unions and employers. The NLRA defines employer as "any person acting as an agent of an employer, directly or indi-

rectly," but does not include within the term the United States, state governments, or any political subdivision thereof.

In San Manuel the NLRB asserted jurisdiction over tribal government employees in a case brought against the San Manuel Band, a federally recognized Indian tribal government, by a union competing with another union for the right to organize tribal government employees. Upon appeal by the tribe the federal courts found against the tribe, holding that the NLRB may apply the NLRA to tribal government employees. This was their holding despite the fact that there had been no intervening change in the NLRA statute for 70 years and despite the fact that the NLRB had ruled otherwise for decades.

The court's rationale was, in reality, a political policy decision, concluding that because the San Manuel tribal government casino employees—employs many non-Indians and caters primarily to non-Indian customers that it must be treated like a commercial rather than a governmental enterprise. That rationale was wrongheaded, both as a matter of law and of policy. For the Seneca Nation, as you can safely assume for all American Indian tribal governments, it is an affront to be told that our own tribal labor management laws, enacted as an expression of our own sovereignty on our own tribal lands, are not sufficient to protect our tribal government employees.

The Seneca Nation is proud of our labor policies and practices and cedes ground to no one, including the NLRB and the federal government, in our demonstrated commitment to workplace fairness, security, and benefits. For example, we have often exercised our sovereign right to utilize union labor in the construction of our casinos, and our government buildings, and our other public works projects. Our exercise of our sovereign control of our labor management relations reflects the fact that good government labor policy is good for business.

When a regulatory body like the NLRB or a reviewing court conjures up a new interpretation of longstanding statutory law in violation of the federal laws and treaties dealing with Indian nations we believe it is the duty of the Congress to enact a clarifying amendment which makes the statute reflect the original congressional intent, consistent with the Constitution and treaties of the United States.

This is why we urge you to include in your labor reform legislation the provisions of H.R. 2335, the Tribal Labor Sovereignty Act. This would clarify the NLRA to once again be interpreted to expressly exempt tribal government employers from the reach of the NLRA and the NLRB. I want to personally thank the sponsor of H.R. 2335, Congresswoman Kristi Noem, and her 63 co-sponsors, as well as the chairman of this committee, Chairman Roe, and the chairman of the full committee, Mr. Kline, for your support for this legislation.

Tribal self-determination has long been the goal of federal Indian policy, dating back to at least July of 1970, when President Nixon issued his "Special Message to Congress on Indian Affairs." Since then much progress has been made toward restoring recognition and respect for tribal sovereignty and self-determination, but the NLRB's decision in the San Manuel case to override tribal author-

ity and allow a federal takeover in this area of tribal governance is an outrage and it must be corrected.

By acknowledging the governmental status of Indian tribes H.R. 2335 will respect Indian nation governments as other governments are respected for purposes of the NLRA with regard to tribal government activities on tribal lands. The promise of labor law reform will positively impact Indian country only if it advances the first principles that are at the foundation of federal Indian policy at its best, that tribal nations are governments whose exclusive authority to govern all economic activity in our territory should be fully respected as a matter of federal law.

Resurrecting this tribal territorial sovereignty approach should be the urgent focus of any new labor law reform efforts. H.R. 2335 would do just that and deserves your support through to enactment.

Thank you for the opportunity to provide this testimony and I ask that it be made part of the record of the hearing. Nya-weh.

[The statement of Mr. Porter follows:]

Prepared Statement of Hon. Robert Odawi Porter, President, Seneca Nation of Indians

Nya-weh Ske-no.

Chairman Roe, Ranking Member Andrews, and members of the Subcommittee, I am thankful that you are well and I am pleased to appear before you today to testify on how you might strengthen the National Labor Relations Act (NLRA) while at the same time strengthening respect for tribal sovereignty by enacting H.R. 2335, the Tribal Labor Sovereignty Act of 2011.

I ask that my written testimony be placed in the record on behalf of the Seneca Nation of Indians, which I lead as its elected President.

Background on the Seneca Nation of Indians

The Seneca Nation of Indians ("Nation") is one of America's earliest allies, historically aligned with the other members of the historic Haudenosaunee (Six Nations Iroquois) Confederacy and living in peace with the American people since the signing of the Canandaigua Treaty over 217 years ago on November 11, 1794, 7 Stat. 44. Our Nation has entered into numerous treaties and agreements with the United States since that time. We have always sought to live up to our commitments, despite the fact that, repeatedly, the United States has not reciprocated in kind.

The United States made several key promises to the Seneca Nation in our Canandaigua Treaty. Of direct relevance to this hearing today, was a federal treaty recognition that the Seneca Nation is a sovereign nation and a federal treaty assurance that our property and activities on our Territory would not be interfered with. In particular, the United States expressly guaranteed that we would retain the "free use and enjoyment" of our lands. This promise has served as the basis for the unparalleled level of freedom possessed by the Seneca people today.

Because of our treaty-protected sovereign freedom, our Seneca Nation has been able to achieve some success in recovering from nearly 200 years of economic deprivation inflicted upon us by the United States due to devastating losses of our lands and resources. Both our Nation government and individual Seneca citizens have benefited from the opportunity to resume our trade relations with non-Indians during the last 40 years, focusing primarily on available business involving tobacco, gaming, hospitality, and ancillary ventures.

Key to our economic success has been our governmental sovereignty—our right to govern, in our own way, what happens on our land.

Federal labor law must be clarified to respect tribal sovereignty

Many aspects of our treaty-recognized freedoms have been eroded over time. All three branches of the federal government—judiciary, executive, and legislative—have directly caused or allowed this erosion to occur, sometimes even by overturning decades of precedent.

A prime example of this legal regression can be found in recent tribal labor management decisions taken by the National Labor Relations Board (NLRB) and the

federal courts in the San Manuel Indian Bingo and Casino v. NLRB case, 475 F.3d 1306 (D.C. Cir. 2007).

As you know full well, the National Labor Relations Act (NLRA), 29 U.S.C. § 160 et seq., is the primary law governing relations between unions and employers and guarantees the right of employees to organize, or not to organize, a union and to bargain collectively with their employers. The NLRA applies to "employers," and Section 2(2) of the Act defines "employer" as "any person acting as an agent of an employer, directly or indirectly," but does not include the United States, State governments, or any political subdivision thereof.

In San Manuel, the NLRB asserted subject-matter jurisdiction over tribal government employers in a case brought against the San Manuel Band of Serrano Mission Indians, a federally recognized Indian tribal government, by a union competing with another union for the right to organize tribal government employees. The San Manuel Band appealed to the federal courts, which found against the San Manuel Band, holding that the NLRB may apply the NLRA to tribal government employees at a casino the San Manuel Band operates on its lands. Despite the fact that there had been no intervening change in the NLRA statute, the NLRB and the courts reversed 70 years of precedent to find that Indian tribal governments are not exempt from NLRA requirements because they concluded that the NLRA statutory language contains no express exemption as it does for the federal and state governments. We believe this holding was unfounded and violative of our Treaty rights.

The judicial rationale was in reality a political policy rationale—the NLRB and the courts as a matter of policy concluded that because the San Manuel tribal government casino employs many non-Indians and caters primarily to non-Indian customers, it and all other similar tribal government enterprises should be treated like a commercial rather than governmental enterprise.

That rationale was wrong-headed, both as a matter of law, and of policy. For the Seneca Nation, as you can safely assume for all America Indian tribal governments, it is an affront to be told our own tribal labor management laws, enacted as an expression of our own tribal sovereignty, on our own tribal lands, are not sufficient to protect our tribal government employees.

The Seneca Nation is proud of our labor policies and practices. Seneca Nation employees are offered a compensation and benefits package that is more than competitive within our market, with best in class protections for employee rights and personnel procedures. We have also chosen to rely heavily on union labor, through project-labor agreements, in the construction of our gaming facilities. We cede ground to no one, including the NLRB and the federal government, in our demonstrated commitment to workplace fairness, security and benefits. Our exercise of our sovereign control of our labor management relations reflects the fact that good government labor policy is good for business. So you can imagine our displeasure and disappointment with the contrary judgment in the San Manuel case.

At issue in that case was whether the exclusions in the NLRA ("[t]he term 'employer' * * * shall not include the United States or any wholly owned Government corporation * * * or any State or political subdivision thereof * * *.") were intended to cover tribal government employers. The Court said the "Board could reasonably conclude that Congress's decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists." Id. at 1317.

When a regulatory body like the NLRB or a reviewing court conjures up a new interpretation of longstanding statutory law in violation of federal laws and treaties dealing with Indian nations, we believe it is the duty of the U.S. Congress to enact a clarifying amendment which makes the statute reflect the original congressional intent, consistent with the Constitution and treaties of the United States.

The Seneca Nation and other tribal governments have always sought to have key federal statutes consistently reflect and honor our treaty agreements and our governmental status. We have always insisted that federal law treat our tribal governments as it treats other governments. When court decisions or federal officials reinterpret longstanding statutory provisions to treat tribes as something other than governments, Congress should enact clarifying amendments to the law.

This is why we urge you to include in your labor reform legislation the provisions of H.R. 2335, the Tribal Labor Sovereignty Act of 2011, which would clarify the NLRA to once again be interpreted to expressly exempt tribal government employers from the reach of the NLRA and the NLRB. The Seneca Nation thanks the sponsor of H.R. 2335, Congresswoman Kristi Noem, and her 63 co-sponsors, including you, Chairman Roe, as well as the Chairman of the full Committee, Mr. Kline.

Conclusion

Tribal self-determination has long been the goal of federal Indian policy, dating back at least to July, 1970 when President Nixon issued his "Special Message to Congress on Indian Affairs." Since then much progress has been made toward restoring recognition and respect for tribal sovereignty and self-determination. But the NLRB's decision in the San Manuel case to override tribal authority and allow a federal takeover in this area of tribal governance is an outrage and must be corrected.

By acknowledging the governmental status of Indian tribes, the Noem bill, H.R. 2335, will respect Indian nation governments as other governments are respected for purposes of the application of the NLRA to tribal governmental activities on tribal lands.

The promise of labor law reform will positively impact Indian Country only if it advances the first principles that are at the foundation of federal Indian policy at its best—tribal nations are governments whose exclusive authority to govern all economic activity on our territory is fully respected as a matter of federal law. Resurrecting this tribal territorial sovereignty approach should be the urgent focus of any new labor law reform efforts. H.R. 2335 would do just that, and deserves your support through to enactment.

Thank you for this opportunity to provide testimony and I ask that it be made part of the record of this hearing. We also thank you for holding this hearing today. We hope it leads to prompt enactment of H.R. 2335.

Nya-weh.

Chairman ROE. Thank you, President Porter.

Mr. Messenger?

STATEMENT OF WILLIAM L. MESSENGER, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

Mr. MESSENGER. Thank you, Chairman Roe, Ranking Member Andrews, distinguished committee members. Thank you for the opportunity to testify today on proposals to amend the National Labor Relations Act.

While the act needs to be improved in a number of areas I would like to focus today on the importance of protecting the right to a secret ballot election. I am a staff attorney with the National Right to Work Legal Defense Foundation. Since it was established in 1968 the foundation has provided free legal aid to thousands of individuals employees whose rights have been violated as a result of compulsory unionism.

Among other things, my colleague and I have represented many employees and actions to protect their right to a secret ballot, including the Dana and Lamons Gasket cases. Regrettably, the National Labor Relations Act is predicated on forcing individual employees to associate with unions based on the desires of a majority of their coworkers.

This in and of itself is wrongful. The right of each citizen to freely associate should not be subjected to the tyranny of the majority.

Congress should end this policy by amending the National Labor Relations Act to prohibit exclusive representation and compulsory dues requirements with the National Right to Work Act. However, to the extent that this policy persists, at a bare minimum Congress should ensure that at least a majority of employees desire union representation, and the best way to do this is to make a secret ballot election a condition for unionization.

The secret ballot is clearly superior for ascertaining employee free choice than its alternative, which is employer recognition pursuant to a card-check. Individuals are obviously more apt to vote

their conscience in the privacy of a voting booth than when being solicited by a union organizer to sign a card. It is no accident that secret ballot elections are the cornerstone of all democratic systems.

But secret ballots are also inherently superior to employer recognition for another reason, because only they are conducted and supervised by the board itself. In an election the board has actual knowledge of whether or not individual employees have voted for or against unionization before it is imposed.

This is not true of employer recognition. It is truly a private agreement in which an employer decrees a particular union to be the exclusive representative of its employees.

The board is not privy to this agreement and has no knowledge whatsoever of whether or not it reflects employee free choice. And in particular, the board has no knowledge of how those cards were obtained from individual employees.

And there are compelling reasons to suspect that employer recognition does not necessarily reflect employee free choice, but rather only the perceived self-interests of the union and the employer. And indeed, most employer recognition in and of itself is the product of a prearranged agreement between the employer and union before the union becomes a representative of employees.

Congress should not blindly entrust employees' associational rights to unions and employers. It is akin to putting the foxes in charge of the henhouse. Instead, Congress should require that a federal agency, the board, independently verify whether a majority of employees desire union representation in a secret ballot election before they are unionized.

And in addition, Congress should also amend the National Labor Relations Act to protect employees' rights after they are unionized—their right to be decertify or remove a union that is currently acting as a representative that the employees no longer support. As I discussed in my written testimony, the National Labor Relations Board has erected an increasing number of bars and obstacles to employees exercising their right to decertify a union they no longer support, and these bars and obstacles make it exceedingly difficult for employees to remove unions that they no longer support. I believe that Congress should also remove these bars to effectuate employee free choice.

Thank you. I would like to move that my written testimony be included in the record as part of this committee hearing, and my oral statement. And I look forward to answering any questions you may have.

[The statement of Mr. Messenger follows:]

Prepared Statement of William L. Messenger, Staff Attorney, National Right to Work Legal Defense Foundation

CHAIRMAN ROE AND DISTINGUISHED REPRESENTATIVES: Thank you for the opportunity to testify today in this hearing to examine proposals to strengthen the National Labor Relations Act. While the NLRA needs to be improved in a wide number of ways, I would like to focus my testimony today on the importance of protecting employees' right to a secret ballot election.

I am a Staff Attorney with the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to employees who choose to exercise their right to stand apart from unions and their agendas. Foundation attorneys, including myself, have represented numerous employees in

cases that involve protecting their right to a secret ballot election or protecting employees from the abuses of top-down union organizing.[1]

Protecting employees' privacy with a secret-ballot election is the very least that should be done to ameliorate the harm the government inflicts on employees through its policies of monopoly representation and compulsory unionism. The NLRA is predicated on forcing individuals to associate with unions. It does so by empowering unions to act as "exclusive representatives" of all employees in a bargaining unit under § 9(a) of the Act, 29 U.S.C. § 159(a), irrespective of whether each employee desires this ostensible representation, and by permitting unions to force employees to support them financially upon pain of losing their jobs. See 29 U.S.C. § 158(a)(3).

The federal government forcing individual employees not only to accept union representation against their will, but also to pay for this unwanted representation, is an affront to each individual's right to choose with whom he or she associates. This compulsion is wrong irrespective of whether or not the individual's co-workers desire to associate with a union. Each citizen's fundamental right to freedom of association should not be subjected to the tyranny of the majority. Thus, Congress should amend the NLRA to repeal monopoly representation or prohibit compulsory unionism with a national Right to Work Act.

However, to the extent that the federal government insists on imposing monopoly representation and compulsory unionism on workers under the NLRA, at a minimum it must ensure that a majority of workers truly support this imposition. The best and most obvious way to guarantee that a majority of employees want union representation is a secret ballot election.

Regrettably, the NLRA currently permits unionization based on private agreements between unions and employers, and without a secret-ballot election. See 29 U.S.C. § 159(a). Additionally, the National Labor Relation's Board is actively pursuing policies to deprive employees of their existing statutory right to a secret-ballot election to decertify unions that they no longer support. See, e.g., Lamons Gasket, 357 NLRB No. 72 (2011). Congress should thereby amend the NLRA to permit unionization based only on the results of a secret-ballot and to remove all Board-imposed bars on employees' right to a decertification election.

I. Secret-Ballot Elections Must Be Required Under the NLRA Because They Are Superior to Employer Recognition of a Union

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Thus, the Supreme Court has long recognized that Asecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.@ NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

Of course, the merit of any procedure must be evaluated in comparison to its alternatives. The alternative to the secret-ballot is "employer recognition" or "voluntary recognition," whereby an employer decrees that a particular union shall be the exclusive representative of its employees. This grant of recognition is generally predicated on an assertion that a majority of employees signed cards authorizing the union to act as their representative.

Secret-ballot elections are superior to employer recognition not only for the most obvious reason—that individuals are more apt to vote their conscience in the privacy of a voting booth than when being pressured by union organizers to sign an authorization card. See Section I(C), infra. Secret-ballot elections are also superior to employer recognition because the Board conducts and supervises the elections. By contrast, employer recognition is a private arrangement between a union and employer to which the Board is not privy. The Board has no actual knowledge of whether an employer's recognition of a union reflects the employees' free choice. See Sections I(B), infra. And there are compelling reasons to suspect that it will not. See Section I(C), infra. Given that Congress cannot trust the associational rights of employees to the self-interests of union officials and employers, unionization should only be permitted pursuant to a Board-conducted election.

A. The Board Does Not Know if an Employer-Recognized Union Has the Support of a Majority of Employees

Secret-ballot elections differ from employer recognition in that the latter is not conducted or supervised by the Board. Employer recognition is simply a private agreement in which an employer agrees to recognize a particular union as the exclusive representative of its employees. The Board is not a party to a recognition agreement. It does not review recognition agreements either before or after employers and unions enter into them. The Board has no actual knowledge whether or not an

employer-recognized union actually enjoys the true support of a majority of employees.

Unions and employers generally claim in their recognition agreements that the union has the support of a majority of employee based on authorization cards allegedly signed by employees. But the Board has no independent knowledge as to the truth or falsity of this claim. Most importantly, the Board has no knowledge of the conditions under which the cards were procured from employees.[2]

Accordingly, the NLRA's current policy of granting legal validity to employer-recognized unions, see 29 U.S.C. § 159(a), is predicated on the blindly trusting that a private agreement between a union and employer accurately reflects what employees actually desire. This is untenable, as the mere "fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union." Seattle Mariners, 335 NLRB 563, 567 n.2 (2001) (Member Hurtgen, dissenting).

Of course, in a secret-ballot election, the Board controls the conditions under which votes are cast and counts the ballots itself. In an election, unlike a card check, the Board has independent and actual knowledge as to whether a majority of those voting want union representation. For this reason alone, Board-conducted elections are inherently superior to card check recognition.

B. That an Employer Makes a Union the Representative of its Employees Is Not a Reliable Indicator of Whether Employees Support that Union

Not only does the government not know if employer-recognized unions actually have the uncoerced support of a majority of employees, there are several compelling reasons to believe that employee free choice is not reflected in private recognition agreements. Instead, the agreements reflect little more than the union and employer's perceived self-interests.

First, at their most basic level, recognition agreements are agreements in which two parties agree to take something from a third-party. Specifically, Party A (the employer) and Party B (the union) agree that a third-party (employees) shall surrender rights to Party B. The very construct of this arrangement makes it an inherently unreliable indicator of the desires of the third-party employees, as both parties to the agreement can satiate their self-interests at the expense of employees who are not privy to the agreement.

Second, unions and employers have a number of self-interested reasons to enter into recognition agreements that have nothing to do with effectuating employee free choice. Indeed, there is a long and sordid history of employers recognizing unions that lack the uncoerced support of a majority of employees.[3]

A union's self-interest in being recognized by an employer as its employees' representative is obvious. It is to acquire more members, more compulsory dues payments (in non-Right to Work states), more contributions to underfunded pension and welfare plans, and more power for union officials. Gaining more dues-paying members is a top priority for union officials, as union membership has been in general decline for decades.[4] Unions have an overwhelming self-interest in being recognized as monopoly representatives irrespective of whether or not employees actually support them.

Employers are apt to recognize unions to satiate perceived business interests, and not to effectuate employee free choice. These business interests include getting a union to cease waging a coercive "corporate campaign" against the employer, which involve a "wide and indefinite range of legal and potentially illegal tactics," such as "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." Smithfield Foods v. UFCW, 585 F.Supp.2d 789, 795 (E.D. Va. 2008) (quoting Food Lion, Inc. v. UFCW, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)).[5] Employers have also agreed to make unions the representative of their employees to obtain their political assistance;[6] to cut off organizing campaigns of unions less-favored by the employers;[7] to obtain bargaining concessions at the expense of other employees that the unions represent;[8] and to obtain union concessions at the expense of employees whom the unions organize in the future.[9]

Employers motivated by these and other perceived interests are obviously apt to recognize unions irrespective of employee support for them. Employees are little more than chattel in these arrangementsCthe consideration the employer is willing to trade to get something from the union. Given that unions and employers can be counted on to pursue their own perceived self-interests, it is irrational for the federal government to defer to their private decisions about whether or not employees want to be unionized.

Third, employer recognition of a union is usually the product of a pre-negotiated "organizing agreement" between the employer and union. In an organizing agreement, an employer agrees in advance to assist a particular union with organizing its employees. This employer assistance generally includes gag-clauses on any employer speech about the union or unionization, granting the union access to employees' workplaces for organizing, the release of private information about nonunion employees to the union, such as their home addresses and contact information, and a ban on secret-ballot elections conducted by the NLRB.[10]

These private organizing agreements establish conditions inhospitable to employee free choice. For example, to ensure that employees make informed decisions about whether to support or oppose unionization, Congress amended the NLRA to facilitate an "uninhibited, robust, and wide-open debate" between employers and unions. Chamber of Commerce v. Brown, 554 U.S. 60, 67-68 (2008) (citation omitted).[11] Indeed, employees have an implicit "underlying right to receive information opposing unionization" under the NLRA. Id. at 68. Yet, organizing agreements generally include gag-clauses on employer speech regarding unionization.[12] Some organizing agreements go even further, requiring that employers speak and conduct captive audience meetings on behalf of the union.[13] The intent and effect is to deprive employees of their "right to receive information opposing unionization," so that employees hear only one side of the story during organizing campaigns—that spun by the union.

Similarly, Congress did not grant unions any right to campaign in employees' workplace, see Lechmere v. NLRB, 502 U.S. 527, 532-34 (1992), or any right to personal information about employees prior to petitioning for an election. See Always Care Home Health Serv., 1998 WL 2001253 (NLRB G.C. 1998). Organizing agreements generally provide unions with both forms of employer assistance to allow union organizers to approach and harass employees in both their workplace and at their homes to sign union authorization cards.

Overall, the procedure prescribed by private organizing agreements—a systematic campaign jointly implemented by a union and employer against employees in their workplace and homes and in an environment devoid of relevant information about the union—are antithetical to employee free choice. These procedures are deliberately designed to ensure that employees sign cards that make the union their monopoly representative. It is unconscionable for Congress to blindly assume that the employer recognitions that are the fruit of this poisonous tree actually reflect the free will of employees.

Finally, the Supreme Court warned decades ago that deferring to even ostensibly "good faith" employer and union beliefs about employee preferences "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." International Ladies' Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (emphasis added); cf. Auciello Iron Works v. NLRB, 517 U.S. 781, 790 ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom"). The D.C. Circuit reiterated this warning in Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003), when it overruled a Board decision that deferred blindly to a recognition agreement between an employer and union without independently verifying whether employees actually supported the union. "By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee § 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in Garment Workers." Id. at 537.

Indeed, an ostensible purpose of the NLRA is to protect employee rights from employers and unions. Section 7 of the Act grants Aemployees@ the right to choose or reject union representation. 29 U.S.C. § 157. Sections 8(a) and 8(b) protect employee § 7 rights from the machinations of employers and unions. 29 U.S.C. §§ 158(a-b). To blindly trust employer and union decisions about how employees want to exercise their § 7 rights inverts the structure of the NLRA. It is akin to putting the foxes in charge of the henhouse. Congress must change this irrational policy.

C. Voting in the Privacy of a Voting Booth Effectuates Free Choice Better Than Being Solicited to Sign a Card By a Union Organizer

In addition to the fact that elections are conducted and supervised by the Board, the procedure of a secret-ballot election is also far superior to that of a card check. Casting a ballot in the privacy of a voting booth is far more conducive to free choice than being solicited to sign an authorization cards in their presence of one or more union organizers. Only in secret-ballot elections are employees given the privacy and space to vote their conscience free from immediate external pressure.

Moreover, once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end. By contrast, a choice to "vote" against the union by not signing an authorization card does not end the decision-making process for an employee in the maw of a card check drive. Often, it represents only the beginning of the harassment. Union organizers can solicit individuals again and again (and again) until they break down and sign a card.

Employee experience confirms that union organizers frequently harass, mislead, and threaten employees to make them sign union cards. Testimony and statements by employees who have been subjected to card check campaigns can be found in the appendix to this testimony. In the course of counseling employees who have been subjected to card-check campaigns, my colleagues and I at the Foundation are also familiar with the tactics used by union agents to cajole employees into signing cards: incessant home visits; informing employees that signing a card is just for more information, to merely express interest in the union, or to obtain a secret-ballot vote; promising employees unrealistic benefits after unionization; falsely informing employees that the union already has a majority and will soon be in power; and threatening employees with future discrimination when the union does come into power.

Union organizers have a strong incentive under current Board law to use these and other deceitful and unlawful tactics. Under current law, a signed card is presumptively valid. To invalidate a card used to support employer recognition, an unfair labor practice charge must be filed with the Board within six months (which is itself a daunting task for individuals unfamiliar with administrative procedures and labor law). The employee then has the burden of presenting clear and convincing evidence that the card was obtained through a material misrepresentation or coercion.[14] This burden is exceedingly difficult to meet because most union misrepresentations will not invalidate a card, to include union claims that signing a card is necessary to have a meeting, to get more information, or to have an election (unless the employee is expressly told that the card can only be used for this purpose).[15] And usually the only evidence of what a card signer was told will be their recollection of a conversion—i.e., "he-said, she-said" testimony—that union agents can easily deny. Even if an employee surmounts all of these burdens, only the particular card at issue will be invalidated and not the union's entire card-check campaign (unless the invalidated card or cards deprives the union of its majority). Given the low probability that pressuring and misleading employees will invalidate a card-check campaign, union organizers have little disincentive to using such unscrupulous to get employees to sign a card.

Perhaps the strongest evidence of the superiority of a secret-ballot election to a card check is that conduct that interferes with employee free choice in elections is inherent to any card check. In an election, the Board attempts to ensure that "laboratory" conditions exist in which the uninhibited desires of the employees can be ascertained. See General Shoe, 77 NLRB 124, 127 (1948). Conduct by employers and unions that upset these laboratory conditions will result in the election being overturned, even if that conduct does not rise to the level of an unfair labor practice. Id. Conduct that will result in the overturn of a Board election includes:

(1) electioneering activities, or even prolonged conversations with prospective voters, at or near a polling place because, among other things, "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible," Milchem, Inc., 170 NLRB 362, 362 (1968);[16]

(2) the union or employer keeping a list of employees who vote as they enter or exit the polling place (other than the official eligibility list);[17] and

(3) a union official handling cast ballots, even in the absence of proof of tampering, because, where "ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question," Fessler & Bowman, Inc., 341 NLRB 932, 933 (2004).

This sort of objectionable conduct occurs in all card check campaigns. When an employee signs (or refuses to sign) an authorization card, he is in the presence of the union organizer(s) who is attempting to get him to sign that card. In all cases the employee's decision is not secret because the union has the cards and maintains a list of who has signed one and who has not. Union officials handle these cards, as they are the individuals who collect them. Conduct that would not be tolerated in a Board-conducted election occurs in any card-check campaign.

The Board recognized this failing of employee-signed cards and petitions in Underground Service Alert, 315 NLRB 958 (1994). There, a majority of employees voted for union representation in a decertification election. However, before the electoral results were known, a majority of employees delivered a signed petition to their employer stating their opposition to the union. The Board held that the petition was a "less-preferred indicator of employee sentiment," particularly as com-

pared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method—the Board-conducted secret-ballot election." Id. at 961. This is because an election, typically * * * is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union.

Id. at 960 (citation omitted). Moreover, "[n]o one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters." Id.

Thus, even the rare card check drive that does not involve unfair labor practices committed against employees does not approach the laboratory conditions guaranteed in Board-conducted elections. In a card-check, union agents directly solicit employees to sign authorization cards (and thereby cast their "vote"), stand over them as they "vote,' know with certainty how they "voted," and then physically collect and handle these purported "votes." The superiority of Board supervised secret-ballot elections for protecting employee free choice to such a coercive procedure is beyond peradventure. Congress should thereby amend the Act to permit unionization only pursuant to a secret-ballot election.

II. The Right of Employees' to Remove a Union by Secret-Ballot Election Should Be Protected from the Board's Invention of Bars and Other Obstacles to Decertification Elections

Section 9(c)(1)(A)(ii) of the NLRA expressly grants employees the right to petition for a decertification election to remove the union currently acting as their representative. 29 U.S.C. § 159(c)(1)(A)(ii). Congress saw fit to prohibit the conduct of such elections only when "within * * * the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3).

Notwithstanding that the NLRA provides for only one bar to the conduct of elections, the Board has invented numerous new bars to prevent employees from decertifying unions that they no longer support. This includes:

(1) a "contract bar," which precludes employee petitions for decertification elections during the first three years of a collective bargaining agreement, save a 30-day window period near the end of that period, see Waste Management of Maryland, 338 NLRB 1002 (2003);

(2) a "recognition bar," which precludes employee petitions for decertification elections for up to one year after an employer recognizes a union as its employees' representative, see Lamons Gasket, 357 NLRB No. 72 (2011); and

(3) a "successor bar," which precludes employee petitions for decertification for up to one year after an employer is succeeded by another employer, see UGL-Unicco Services, 357 NLRB No. 76, *9 (2011).

The latter two election bars were reinstituted by President Obama's Board appointees to reverse prior decisions that permitted employees to request a secret-ballot election for a certain time period after employer recognition, see Dana Corp., 351 NLRB 434 (2007), overruled by Lamons Gasket, and after a change in the identity of their employer, see MV Transportation, 337 NLRB 770 (2002), overruled by UGL-Unicco.

In addition to erecting flat prohibitions on decertification elections, the Board has also instituted policies to make decertification effectively impossible for many employees. This includes, among other things, maintaining a "merger doctrine" under which, if an employer and union agree to merge one or more bargaining units into a single multi-location unit, any employee-filed decertification petition must cover the entire merged unit. Decertification petitions filed by employees that cover only the facility at which they are employed will be dismissed, even if that is the unit in which the employees were organized.[18]

The result of this doctrine is that unions can organize employees one facility at a time—or even one department at a time under a new Board ruling[19]—and then merge their unit into a much larger one that employees can never hope to decertify because merely requesting a decertification election requires a showing of interest signed by 30% of employees in the unit. Meeting this threshold, much less winning the election, is beyond the capabilities of most employees if their unit consists of thousands employees at multiple facilities.[20]

For example, assume that a grocery store chain has 20 area stores and 100 employees at each store. With the employer's complicity, a union can organize the employees of each store, one-at-a-time, by merely obtaining authorization cards from 51 store employees. The union can then merge each newly-organized store with all other organized stores into one combined unit. If the union organizes all stores, it can create a combined unit of 2,000 employees spread across 20 locations. An em-

ployee at a given store who wishes to decertify the union will face the herculean task of obtaining a showing of support for decertification from 667 employees scattered amongst multiple locations.

This example actually understates the true breadth and effect of the merger doctrine because some merged units are nationwide in scope. For example, the Teamsters have merged over 1,000 facilities of United Parcel Service (UPS) into a single unit.[21] Even if all employees of a particular facility, or even numerous facilities, wanted absolutely nothing further to do with the Teamsters, they are without any viable recourse to vote the union out of power.

Taken together, the combined effect of the Board's various election bars and merger doctrine is to deny employees their statutory right to choose, by secret-ballot election, whether or not they wish to continue to be represented by a particular union. An employer's recognition of a union will bar an election for up to one year.

The union's subsequent signing of a collective bargaining agreement will then bar an election for another three years, during which time the union can compel all employees to support it financially (except in Right to Work states). The merger of the employees' bargaining unit into a larger unit will effectively prevent the employees from ever voting on whether they desire union representation. Under this regime, unions and employers can squelch employees' right to reject unwanted union representation.

Congress should not permit the Board to turn union representation into a proverbial "roach motel," where employees can check in, but can never check out. To protect the right of employees to a secret-ballot election to decertify unions that they no longer support, Congress should amend:

(1) NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3), to provide that "This limitation is the only limit that may be placed on the conduct of elections;" and

(2) NLRA Section 9(c), 29 U.S.C. § 159(c), to include a new section 6 that provides that "In an election requested under subsection (1)(A)(ii), a bargaining unit that consists of represented employees at a single facility shall always be considered an appropriate unit notwithstanding the merger or inclusion of the employees in a larger, multi-facility, or multi-employer bargaining unit."

Conclusion

For these reasons, Congress should amend the NLRA so that exclusive union representation can be imposed pursuant only to a secret-ballot election, and amend the NLRA to ensure that employees can choose to reject union representation via a secret ballot election at any time other than within one year after a prior election. If employees' freedom to associate with a union is going to be subjected to the tyranny of the majority, at a minimum Congress should ensure that a majority of employees truly want to associate with that union.

ENDNOTES

[1] See, e.g., Lamons Gasket, 357 NLRB No. 72 (2011); Dana Corp. (Int'l Union, UAW), 356 NLRB No. 49 (2010), on appeal, No. 11-1256 (6th Cir.); Dana Corp., 351 NLRB 434 (2007); Mulhall v. Unite Here, 667 F.3d 1211 (11th Cir. 2012); Adcock v. Freightliner LLC, 550 F.3d 369 (4th Cir. 2008).

[2] Similarly, third party arbitrators often used by employer and unions to verify card checks have no knowledge of how the union authorization cards were obtained from employees. These third parties are little more than human calculators whose role is merely to count the cards provided by the union against a list of employees provided by the employer. The verification of a card check by an arbitrator says nothing about the conditions under which the union or employer obtained the cards from employees, or the validity of the employer's list.

[3] See e.g., Duane Reade, 338 NLRB 943 (2003); Fountain View Care Center, 317 NLRB 1286 (1995), enf'd, 88 F.3d 1278 (D.C. Cir. 1996); Brooklyn Hospital Center, 309 NLRB 1163; Famous Castings Corp., 301 NLRB 404 (1991); Systems Mgmt., 292 NLRB 1075 (1989), remanded on other grounds, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986); Meyer's Cafe & Konditorei, 282 NLRB 1 (1986); SMI of Worchester, 271 NLRB 1508 (1984); Price Crusher Food Warehouse, 249 NLRB 433 (1980); Vernitron Electrical Components, 221 NLRB 464 (1975), enf'd 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., 158 NLRB 1126 (1966).

[4] See Laura J. Cooper, Privatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator, 83 Ind. L.J. 1589, 1591 (2008).

[5] See, e.g., Cooper, 83 Ind. L.J. 1589, 159-93; Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Empl. Rel. L.J. 21 (Spring 1999); Herbert R. Northrup, Union "Corporate Campaigns" as Blackmail: the RICO Battle at Bayou Steel, 22 Harv. J.L. & Pub. Pol=y 771, 779-93 (1999); Pichler v. UNITE, 228 F.R.D. 230, 234-40 (E.D. Pa. 2005) (corporate campaign for organizing agreement), aff'd, 542 F.3d 380 (3d Cir. 2008); Smithfield Foods v. UFCW, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (same).

[6] See, e.g., Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1289 (11th Cir. 2010).

[7] See, e.g., Price Crusher Food Warehouse, 249 NLRB 433 (1980).

[8] See, e.g., Adcock v. Freightliner, LLC, 550 F.3d 369, 372 (4th Cir. 2008); Aguinaga v. UFCW, 993 F.2d 1463, 1471 (10th Cir. 1993); Kroger Co., 219 NLRB 388 (1975).

[9] See, e.g., Charles I. Cohen et al., Resisting its Own ObsolescenceBHow the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements, 20 Notre Dame J.L. Ethics & Pub. Pol=y 521, 533-34 (2006); Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966); Patterson v. Heartland Indus. Partners, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (moot on appeal); Dana Corp. (Int'l Union, UAW), 356 NLRB No. 49 (2010), on appeal, Case No. 11-1256 (6th Cir.); Plastech Eng. Prod., (Int'l Union, UAW), 2005 WL 4841723, *1-2 (NLRB Div. of Advice Mem. 2005); Thomas Built Buses (Int'l Union, UAW), No. 11-CA-20038 (NLRB Div. of Advice Mem. 2004) see also Jonathan P. Hiatt & Lee W. Jackson, Union Survival Strategies for the Twenty-First Century, 12 Lab. Law. 165, 176-77 ("Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement.").

[10] See Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; A. Eaton & J. Kriesky, Union Organizing Under Neutrality and Card Check Agreements, 55 Indus. & Lab. Rel. Rev. 42, 47-48 (2001). It is doubtful whether it is lawful for employers to agree to provide this valuable organization assistance to unions. Compare Mulhall v. Unite Here, 667 F.3d 1211 (1lth Cir. 2012) with Adcock v. Freightliner, LLC, 550 F.3d 369 (4th Cir. 2008).

[11] See also 29 U.S.C. § 158(c) (speech cannot constitute an unfair labor practice absent threat or promise of benefit); Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available."); NLRB v. Pratt & Whitney Air Craft Div., 789 F.2d 121, 134 (2d Cir. 1986) (employer speech Aaids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance@); NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right").

[12] See Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; Eaton & Kriesky, 55 Indus. & Lab. Rel. Rev. at 47-48.

[13] See, e.g., Dana Corp. (Int'l Union, UAW), 356 NLRB No. 49 (2010), on appeal, Case No. 11-1256 (6th Cir.); Thomas Built Buses (Int'l Union, UAW), Case No. 11-CA-20038 et seq., at 4-5 (NLRB Div. of Advice Mem. 17 Dec. 2004).

[14] See Photo Drive Up, 267 NLRB 329, 364 (1983).

[15] See Montgomery Ward & Co., 288 NLRB 126, 128 (1988), rev'd on other grounds, 904 F.2d 1156 (7th Cir. 1990); Levi Strauss & Co., 172 NLRB 732, 733 (1968); see also Mid-East Consolidation Warehouse, 247 NLRB 552, 560 (1980) (falsely informing employees that everyone was signing union cards did not invalidate card).

[16] See also Alliance Ware, Inc., 92 NLRB 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 NLRB 111 (1961) (same); Bio-Medical of Puerto Rico, 269 NLRB 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi-Cola Bottling Co., 291 NLRB 578 (1988) (same).

[17] Piggly-Wiggly, 168 NLRB 792 (1967).

[18] See, e.g., Westinghouse Elec. Corp., 227 NLRB 1932 (1977); General Elec. Co., 180 NLRB 1094 (1970); W. T. Grant Co., 179 NLRB 670 (1969); Arrow Unif., 300 NLRB 246 (1990).

[19] Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011).

[20] Westinghouse, 227 NLRB 1932, illustrates this application of the merger doctrine. In that case, the Board certified the union as a representative of employees at one particular plant in North Carolina. Slightly over one year later, the employees petitioned to decertify the union. The Board dismissed the petition because the North Carolina plant had been merged into a single nationwide unit consisting of all of the employer's plants. Thus, according to the Board, the only way the North Carolina employees could decertify would be on a nationwide basis.

[21] See United Parcel Service, 325 NLRB 37 (1997).

APPENDIX OF EMPLOYEE TESIMONY AND STATEMENTS

Congressional Testimony of Mike Ivey (2/8/2007)
http://www.nrtw.org/pdfs/Ivey.pdf
Congressional Testimony of Karen Mayhews (2/8/2007)
http://www.nrtw.org/pdfs/Mayhew.pdf
Statement by Freightliner Employee Katherine Ivey (1/24/2006)
http://www.nrtw.org/pdfs/20060124rico_ivey.pdf
Statement by Freightliner Employee Timothy Cochrane (1/24/2006)
http://www.nrtw.org/pdfs/20060124rico_cochrane.pdf
Declaration by Dana Corp Employee Clarice Atherholt (1/13/2004)
http://www.nrtw.org/neutrality/ClariceAtherholt.pdf
Statement by Dana Corp Employee Donna Stinson (5/12/2004)
http://www.nrtw.org/neutrality/Stinson-Statement.pdf
Statement by Thomas Built Bus Employee Jeff Ward (5/12/2004)
http://www.nrtw.org/neutrality/Ward-Statement.pdf
Statement by Collins & Aikman Employee Edna Dawson (5/12/2004)
http://www.nrtw.org/neutrality/Dawson-Statement.pdf
Declaration by Renaissance Hotel Employee Faith Jetter (11/19/2003)
http://www.nrtw.org/neutrality/FaithJetter.pdf

Declaration by Renaissance Hotel Employee David Harlich (11/19/2003)
http://www.nrtw.org/neutrality/DavidHarlich.pdf

Chairman ROE. Thank you, Mr. Messenger.
Ms. Virk?

STATEMENT OF DEVKI K. VIRK, MEMBER, BREDHOFF & KAISER, P.L.L.C.

Ms. VIRK. Chairman Roe, Ranking Member Andrews, and members of the committee, thank you for inviting me to appear before you today.

The title of this hearing is, "Examining Proposals to Strengthen the National Labor Relations Act." Unfortunately, based on my 15 years of experience as a lawyer mainly representing workers and their representatives, a review of these legislative initiatives shows that they are anything but. Indeed, in my view these measures actively undermine the fundamental structure of federal labor management relations policy.

The central premise of the NLRA is a simple one: that workplaces better serve all the stakeholders and better serve our society when employees as well as employers meaningfully participate in shaping their shared futures. That means, as the act recognizes, not only that those who create jobs but those who do those jobs deserve to be heard and deserve the right to insist that they be heard.

By allowing workers an effective voice in their economic future, collective bargaining serves as an important counterweight to ever-increasing wealth concentration and allows workers, families, and their communities to sustain economic stability even through difficult times, and to grow and advance in times of prosperity.

U.S. workers today in virtually every industry face a challenging economic climate: rising costs, stagnant or decreasing wages, employment levels that have yet to fully recover from the 2008 collapse. And employers live and operate in this same difficult environment.

Successful, mature collective bargaining relationships are those in which the representatives of both workers and management recognize that they are both invested in the success of the enterprise and that their best hope to solve difficult problems, be they economic or operational, is to make every effort to do so together. These are relationships in which both employers and employees recognize the fundamental truth, which is that they are in it together. Employees depend on the employer for their jobs; and the employer depends on employees to get the job done.

Employers and employees in collective bargaining relationships face challenges together, and in a successful relationship, one that involves give and take, ones in which both workers' and employers' views are considered and respected—they build a record of quietly remarkable accomplishment. In times of stability and growth employers invest in their workers' futures and their families. In tough times workers may forego negotiated economic gains to save jobs, permit the company to refinance debt, invest in infrastructure.

The shared prosperity and shared sacrifice occurs as demanded by ebbs and flows in the economy. The most visible recent example

of the latter, of course, is the American auto industry. But compromises, albeit on a smaller scale, are made by workers and employers every day to ensure the success of the operation as well as the success of the people who work there.

In my work I have had the opportunity to meet and advocate on behalf of people whose lives and those of their families were changed by the protections they were able to collectively bargain—scores of people who were unfairly fired, who would have lost their livelihoods if not for the due process protection required under their contracts; men and women who were able rise through the ranks because promotions were made on neutral, objective criteria rather than on who the hiring manager personally favored; countless workers who, but for the leave protections in their contracts, would have been subject to termination for taking time off to care for sick children, aging parents, or to address their own health.

The National Labor Relations Act framework is only that—a framework. It sets out ground rules for workers and employers to engage on reasonably equal footing. It does not prescribe outcomes. That is left for the parties in any individual collective bargaining relationship using creativity, leadership, and sheer determination in many cases to make things work. These are all traits, I would argue, that have historically been among the most valued in our national character.

Unfortunately, the proposals we are examining today do nothing to strengthen the NLRA's framework of self-determination. How can proposals that allow employers to ignore their workers' wishes to be represented, to destroy their rights to meaningful recourse and effective enforcement, would divest the board even of the jurisdiction to enforce the federal laws that created it be said to strengthen the NLRA? Only in an Orwellian sense.

That is bad for workers, of course, but the absence of meaningful workers' voice from the crucial decisions in their workplaces also means that those voices are largely absent from the national discourse to shape economic policies that will affect the future of our country for decades to come. And that is bad for all of us.

I thank the members for their time, and I welcome the committee's question and request that my written testimony be submitted as part of the record.

[The statement of Ms. Virk follows:]

Prepared Statement of Devki K. Virk, Bredhoff & Kaiser, P.L.L.C.

Chairman Roe, Ranking Member Andrews and Members of the Committee, thank you for your invitation to appear here today. My name is Devki Virk and I am a Member of the law firm of Bredhoff & Kaiser, P.L.L.C., in Washington, D.C. Since joining Bredhoff & Kaiser in 1996, I have represented labor organizations and workers in the public and private sector in a wide array of industries, including hospitality, manufacturing, public safety (fire and police), railway, and construction. My practice involves both federal and state court civil and administrative litigation, ranging from complex multi-party cases to individual employment matters, as well as arbitration. And much of my work is devoted to providing day-to-day advice regarding the rights of workers and their unions, and participating in collective bargaining and contract enforcement. After graduating from the University of Chicago in 1989, I worked for several years for a Chicago-based non-profit organization, and then obtained a law degree from the University of Illinois College of Law in Urbana-Champaign, graduating with honors in 1995 and serving as a law review editor and a teaching assistant for first-year contracts and the Uniform Commercial Code (UCC). Following law school, I clerked for the Honorable Martin L.C. Feldman, U.S.

District Judge for the Eastern District of Louisiana in New Orleans from 1995-1996 before joining Bredhoff and Kaiser as an associate.

Workers and employers face challenging economic times

U.S. workers today in virtually every industry face a challenging economic climate: rising costs, stagnant or decreasing wages, and employment levels that have yet to fully recover from the 2008 collapse. Employers, too, live and operate in this same difficult environment. And, although the stereotypical construct of labor-management relations usually involves unions unreasonably insisting on "more" without regard to the employer's future financial health, the Committee should not be surprised to hear that, at least in my experience, that stereotype—like most stereotypes—has little to do with the reality of labor-management relations today. Indeed, it is my experience that successful, mature labor management relationships are those in which the representatives of both the workers and management recognize that they are both invested in the success of the enterprise, and that their best hope to solve a difficult problem, be it economic or operational, is to make every effort do so together. These are relationships in which both employers and employees recognize the fundamental truth, which is that they are in it together: that employees depend on the employer for their jobs—paychecks to keep body and soul together or raise a family, and benefits with which a person can live and retire with dignity—and that the employer depends on the employees to get the job done.

That is not to say that solving problems is easy, even in an "adult" relationship. Far from it: in many instances, these are discussions that progress inch by painful inch, with stops and starts, and steps backwards and sideways, both sides pushing not only their counterparts, but themselves, and holding their breath. Furthermore, the more difficult the problem, usually the more difficult the range of solutions: creativity, the ability to maintain an open mind, strong leadership, and, above all, perseverance, must be present on both sides to reach a workable agreement. The precise traits necessary to succeed in this process—innovation, open-mindedness, decisiveness, leadership, and sheer determination—closely mirror those that, I would argue, have historically been among the most valued in our national character. This is the process that I know as collective bargaining.

Employers and employees who face challenges in collective bargaining face them together and, in a successful relationship—one that involves give and take, and one in which both workers' and employers' views are considered and respected—build a record of quietly remarkable accomplishments. In times of stability and growth, employers invest in the futures of workers and their families, agreeing to offer dependent health care and to set aside a portion of compensation to fund workers' retirement. In tough times, workers may forego negotiated economic gains, or agree to concessions to save jobs, to permit the company to refinance debt, to invest in infrastructure. This shared prosperity—and shared sacrifice—occurs as demanded by the ebbs and flows of the economy: the most visible recent example of the latter, of course, is in the American auto industry. But compromises, albeit on a smaller scale, are made by workers and employers every day to ensure the success of the operation, as well as that of its people.

In the private sector, it is the framework supplied by the National Labor Relations Act that—by making employees' collective voice a right, and not a privilege, and by requiring employers to sit down in good faith and on reasonably equal footing with the representatives chosen by their workers—permits this process to succeed. In turn, the bargaining process expressly ties together the fortunes of workers and employers, allowing workers the right to negotiate a fair share of the wealth they help to create, and requiring both employers and workers to make tough compromises to sustain the long-term growth of the organization.

The role of workers' rights in strengthening the economy

The central premise of the NLRA is that workplaces better serve all stakeholders when employees, as well as employers, meaningfully participate in shaping their shared futures. That means, as the Act recognizes, that not only those who create the jobs, but those who do them, deserve to be heard, and deserve the right to insist that they be heard. That premise has largely been borne out over the last 75 years: studies show that when workers can come together in the workplace and bargain with their employer, the middle class is stronger, poverty is lower, racial and gender wage disparities are reduced, and health and educational outcomes are better.[1] Workers who have a collective voice on the job earn more, on average, than those without such a voice, have more access to health care and are more likely to be able to retire. Historically, when more workers were in collective bargaining relationships, our country's middle class was by allowing workers an effective voice in their economic future, collective bargaining serves as an important counterweight to ever-

increasing wealth concentration, and allows workers, families, and their communities to sustain economic stability even through difficult times, and to grow and advance in times of prosperity. In my work, I have had the opportunity to meet and advocate on behalf of people whose lives, and those of their families, were changed by the protections that they were able to collectively bargain:

- Scores of people who would have lost their livelihoods if not for the due process required under their contracts. Among them—a cashier wrongfully fired for a single error after more than twenty years of faithful service—an error that we were able to prove she did not even make. Firefighters—who had in fact saved lives, and who time and again had shown not only their willingness, but their eagerness, to sacrifice on behalf of others—facing termination based on incorrect facts and negative publicity. Waiters and waitresses fired based on the unfounded complaint of a single dissatisfied customer or an anonymous internet review.
- Dishwashers and housekeepers who were able to see their lifetime of back-breaking, dirty work pay off as they raised themselves out of poverty, and even were able to send their children to college;
- Men and women who were able to rise through the ranks because promotions were made based on neutral, objective criteria—rather than on who the hiring manager personally favored;
- Countless workers who, but for the leave protections in their contracts, would have been subject to termination for taking time off to care for sick children, aging parents, or to address their own health problems;
- People who, after a lifetime of working with dangerous chemicals, were able to preserve their collectively bargained right to retire with affordable health care.

Unfortunately, I have also encountered people whose attempts to seek similar protections were repeatedly frustrated, blocked, and, ultimately, punished; these are people whose lives changed for the worse when they were unable to obtain timely or effective recourse from the Board.

The trials of one group of workers, employed by a hotel here in Washington, D.C., illustrates just how substantial and real the hurdles to self-organization can really be. This group, mostly immigrant women and men who clean rooms, prepare and serve food, and assist guests, approached the union in May 2003. Housekeepers (the women who clean up after guests) were alarmed by the mounting workload, which had risen to thousands of square feet per day. Most of these workers earned between $9.50 and $10.50 an hour for their labor, and could not afford the premium payments charged for health insurance. They also could not afford to stop working, and at least one woman had miscarried on the job. Restaurant servers, on the other hand, were concerned by their supervisors' apparent tendency to give busier sections and more hours to those he favored. These workers were so desperate for better conditions that even after they were illegally threatened with closure of the hotel, even after they were granted benefits to dissuade them from unionizing, and even after one of their leaders, a restaurant server, was illegally fired, they still voted by a margin of 2-1 to unionize.

The employer engaged in extensive pre and post-election litigation, contesting the composition of the bargaining unit, and filing and litigating—and losing—objections and unfair labor practices following the election. At the end of June 2004, almost one year after the election petition was initially filed, the Board finally certified the results. Within a few days, the employer announced that it was closing the restaurant for an indefinite period and laying off all of the workers (including the brother of the worker who had been illegally fired). Following the restaurant closure, the employer systematically ignored the union's requests for basic information about the unit (names of employees, current wage rates and classifications, current employee handbook and rules) and its requests to set a meeting date. Finally, after the union threatened to file charges with the NLRB, the employer agreed to a single bargaining date. That date was cancelled by the employer, as were subsequent dates, and the parties did not, in fact, sit down for the first time until March 30, 2005—nine months following certification, eighteen months following the election, and almost two years after the workers first began their organizing effort.

Once dragged to the table, the employer employed a series of tactics designed to frustrate the process, including refusing to put proposals in writing, refusing to schedule more than one session at a time, and delaying or refusing to provide necessary information. But at the same time as it was impeding workers from obtaining their goals at the table, the employer was also using a mixture of threats and bribes in the hotel to undermine collective bargaining, including intimidating workers, and promising substantial rewards—including a wage increase of $2.50, a hike of between 15 and 25% for most—if workers signed a petition disavowing their support for the union. Shortly after the one-year anniversary of the NLRB certification,

the employer advised the union that it was withdrawing recognition. It then held a meeting in the hotel and granted the workers the promised wage increase.

Unfair labor practice charges were filed and, following investigation, the Region not only issued complaint, but advised that it would take the highly unusual step of seeking injunctive relief in federal district court, to get the employer promptly back to the table. Following a trial, the Board prevailed on its motion, and an injunction indeed issued on June 5, 2006: just about three years after the election petition was filed. It should surprise no one that, although the employer indeed finally returned to the bargaining table, the workers no longer believed that they would ever realize the gains they had hoped—at least not without risking further firings, intimidation, and delay. As a consequence, no contract was reached.

I share this experience with the Committee not to provide an example in which the system failed. To the contrary: the "system," such as it is, worked as well as it could in this case. The Board dealt with the election litigation as promptly as its caseload permitted. Charges were filed and investigated, and complaint issued well within usual administrative processing timelines. And, indeed, this was one of the rare cases in which the Board authorized, and obtained, injunctive relief. And, although the employer did file pre and post-election litigation, it did not, in fact, take advantage of every lawful appeal or avenue of delay available to it. The process still took three years. I, for one, cannot blame workers for losing faith in a system under which, in the best case scenario, they still must wait three years simply for the employer to be ordered to recognize their chosen representative.

My experiences with workplace problems and solutions, both at and away from the bargaining table, have convinced me that real improvements to people's lives, and real economic and social progress, can be made when workers and their employers come together under the framework of the NLRA. That is why, as I explain in more detail below, I am alarmed by several of the measures being proposed which, it appears to me, attempt to fundamentally alter this framework and, in doing so, will effectively deprive workers of meaningful opportunities to participate in shaping not only their own futures, but the economic future of the country. I am also aware that the limitations of the current NLRA processes for self-organization are so extreme as to render it, even when it works as well as it can, practically ineffective. That is also why I believe that the modest efforts made by this NLRB to advise workers of their rights under the law and to streamline the process by which workers may choose a representative are worthwhile, if small, steps that make it slightly more likely that more workers who so choose will be able to have meaningful involvement in the vital decisions that affect not only their workplaces and their families, but their communities and, ultimately, our economy.

Recent NLRB initiatives to increase the effective enforcement of workers' rights

As this Committee is aware, the NLRB is the sole forum in which workers and their representatives may enforce the rights conferred by the NLRA. It should go without saying that a functional, fully-funded agency is essential to effective enforcement of these important federal rights. In addition to working diligently to clear its docket and more efficiently administer its business, the NLRB recently initiated two modest steps to increase effective enforcement of the Act's protections.

Election Rulemaking

Last December the NLRB issued a final rule to improve the process through which workers decide whether to form a union.

The Board's election procedures have been roundly criticized as antiquated, delay-ridden and easily susceptible to manipulation.[3] Changes were proposed by the Board in a Notice of Proposed Rule Making which issued in 2011. The Board held a two-day public comment hearing last July, and received testimony from numerous witnesses, as well as tens of thousands of written comments. In late November, the Board decided to issue a final rule on only certain portions of the proposed rules and did so on December 22, 2011. A federal district court judge recently ruled that the statute's quorum requirement was not satisfied on the day the rule was issued. Chamber of Commerce v. NLRB, Civil No. 11-2262 (D.D.C.) (May 14, 2012) (Boasberg, J.). I understand that the Board subsequently submitted a motion for rehearing, detailing the workings of its electronic system of voting and how Board Members are present in and participate in that process. That motion has not been decided, but while it remains pending, the rules have not been applied.

That is unfortunate. The new rules are aimed at ensuring that when workers are seeking an election to decide whether or not to choose a representative, they will have an election, not an endless series of litigation. These changes are aimed at creating a uniform, standardized process for resolving pre- and post-election disputes so that workers who want a vote get one as promptly as possible. The current sys-

tem has, over time, incorporated processes that delay finality of elections, sometimes for years, and create obstacles for workers who want to use the process. The new rules minimize opportunities for delay, and discourage frivolous and duplicative litigation. Further, the rules modernize the process to reflect changes in the ways in which people communicate, and also harmonize practices across the Board's Regions.

Specifically, the new election rules address the following:

• Ensure that administrative hearings are devoted to those issues relevant to determining an appropriate bargaining unit and other questions relating to whether an election should be conducted. Currently, parties can and do raise issues at the hearing which are not relevant to these issues and which result in unnecessary, expensive and time-consuming litigation which unduly burdens both this government agency as well as the parties.

• Consistent with many other administrative and judicial systems, provides the Board with discretion over its review of cases, including the extent to which briefing is allowed; the current system increases parties' litigation costs by mandating Board review of all post-election cases and requiring legal briefing regardless of the routine nature of the issues involved.

• Reduces litigation by consolidating appeals. Current rules require parties to file two separate appeals to seek Board review of pre-election issues and issues concerning the conduct of the election. These two appeal processes are consolidated, which reduces costs to all and avoids appeals which become moot as a result of the election results.

Notice Posting Rule

The Board also took an important step towards making its processes accessible and enhancing enforcement when it issued a requirement that a notice of employee rights be posted in workplaces covered by the statute. Enforcement of the Act's protections is dependent on workers knowing their rights. Yet, to the extent that workers know of the NLRA, they believe it applies only in already-unionized workplaces.[4] That, of course, is not the case. The NLRA applies in every workplace, unionized or not, and allows workers to engage in such basic activities as sharing information about their pay, banding together to petition for a change in policy, or asking for improved safety, and to do so free of reprisal.

In order to make sure that both workers and employers know the rights and obligations set forth in the Act, in late 2010, 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 the workplace. This Notice is virtually identical to the notice already 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 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.

Workers cannot be expected to exercise rights that they do not know about; by the same token, employers cannot be expected to respect such rights. It is difficult for me to construe legislation that would forbid the Board from implementing any rule requiring the posting of a notice of rights as anything other than an attempt to keep workers in the dark.

Recent House initiatives that diminish workers' ability to have a meaningful voice in the workplace

The House has before it a number of initiatives to rework the NLRA that would further undermine workers' economic rights and, by doing so, make it less and less likely that the voices of workers will meaningfully count as we struggle to rebuild our economy and achieve a sustainable recovery. The following paragraphs address a few of those initiatives:

Undermining the Right to Bargain Collectively

H.R. 4385, THE REWARDING ACHIEVEMENT AND INCENTIVIZING SUCCESSFUL EMPLOYEES ("RAISE") ACT

The stated purpose of this bill is to reverse the NLRB's supposed "ban on individual raises" by permitting unionized employers to negotiate and provide wage improvements to individual employees above and beyond those offered to or negotiated through the union. In my experience, however, employers who believe strongly in fairly rewarding productivity or quality, or who wish to offer workers opportunities to earn beyond their base salary, easily find ways to do so within the NLRA's collec-

tive bargaining framework. Agreements in many industries contain incentive pay or bonuses, profit-sharing, production bonuses, additional compensation for work above and beyond the employee's regular duties, or rewards for innovation or exceptional quality. And merit increase systems, where increases are based on the employer's annual reviews or ratings, are not at all uncommon, particularly in professional or technical occupations. There is no "ban" on such provisions, so long as they are mutually agreed. But that is the key: mutual agreement by structurally independent, freely chosen representatives. That principle is, as noted above, the premise on which the NLRA is built. Both the employer and the workers must agree that such a provision is in their interest.

This bill would erase the workers' voice from that determination, and leave such wage increases completely in the hands of employers. Employers alone would decide who was deserving of extra money and who was not, and could do so free of any statutory standard (indeed, the statute does not even require that the raises it permits in fact be tied to individual achievement or success at all), without any objective, measurable metrics—and without any review or recourse by employees who felt that they were unfairly passed over.

One of the most commonly voiced reasons that workers want a binding contract is to ensure that the rules by which economic benefits and opportunities are apportioned are clear, objective, and uniformly applied; that is, to take these critical decisions out of the employer's sole discretion. This bill permits employers to unilaterally set the rules and apply them as they see fit—to institutionalize favoritism and employer discretion—and to do so regardless of the desires of the workers as a group. If the workers thought the exercise of such discretion was in their interest, they would agree to it, and any need for the proposed legislation would disappear. Indeed, it is only in those circumstances where workers would not agree that the legislation would have any effect, and would permit the employer to step in and override their wishes.

This legislation strikes at the core of the NLRA's framework of self-determination by workers, and active engagement on equal footing between workers and their employers. If enacted, it would essentially render collective bargaining on wages meaningless: why bargain collectively if, in the end, the employer maintains complete discretion over individual rewards?

Undermining the Right to Self-Organize

Despite its title, H.R. 3094, Workplace Democracy and Fairness Act, this bill would place further hurdles in the path of workers' right to self-organize. It would change the NLRB's election process to mandate that workers wait months and years for a vote by encouraging wasteful litigation and impose arbitrary waiting periods, even if the parties involved want to proceed sooner. It would incentivize marathon litigation by requiring that any and every issues be fully litigated and resolved before workers can have an opportunity to vote—regardless of whether the issues are even relevant to the election. Other provisions in the bill overthrow decades of Board rules that have been formulated in response to the needs of specific industries and, instead, applies a limited, inflexible, "one size fits all" standard to determine which groups of workers can be represented together. It will flood the Board with frivolous appeals, which will require additional funds and needlessly waste taxpayer monies.

Moreover, the bill would further restrict the already extremely limited ability of unions to contact workers. In most circumstances under current law, labor organizations are not allowed in the workplace—indeed, they are often not even allowed outside the workplace if that area is private land—and are relegated to contacting workers during their non-work time and in non-work locations. This bill would permit a labor organization only a single method by which to reach each worker (it envisions each worker selecting the method and disclosing that selection to the employer, to pass on to the NLRB), in contrast to the addresses that have routinely been required by law since the 1960s. Of course, all the while, employers have unlimited access to these same workers during their work-days, can compel their attendance at meetings to communicate their views, can compel them to furnish personal contact information, and can use that information to further communicate their views. These revisions undermine, rather than promote, fairness.

H.R. 2810, the Employee Rights Act, among other aspects, sets minimum (but no maximum) timelines for holding administrative hearings and elections, and prohibits the Regional Offices as well as the NLRB from exercising any discretion to move their dockets and streamline procedures. Further, notwithstanding the wealth of scholarly research and literature on the abuses of workers' rights by companies during organizing efforts set forth in the endnotes, this proposal actually imposes additional penalties only on union misconduct. Even a cursory review of NLRB data

reveals that the vast majority of unfair labor practice charges involve employer, not union, misconduct;[5] those claims also are found sufficient to issue complaint at a far higher rate.[6] Of 1,166 formal actions taken by the NLRB in Fiscal Year 2010 (the most recent year for which I was able to find data), 1,028 of those actions, almost 90%, were taken against employers. Further, the bill would change the rule that has governed workplace elections for more than 75 years—a rule that honors the choice of a majority of voting workers—to require a majority vote of the entire affected workforce. We do not apply such a rule when we elect our Congressional representatives; why, then, is it necessary in all of our workplaces, other than to make workers' selection of a representative even more difficult a task?

The Secret Ballot Protection Act, H.R. 972, is another measure that would strip workers of current rights. Since 1935, workers have had the right to decide whether to form a union through either an NRLB-conducted election process or to demonstrate their support for a union through signing cards or a petition authorizing a union to represent them in collective bargaining. This right has been endorsed by Congress and by the U.S. Supreme Court. This bill eliminates that right. Even if a majority of workers tell their employer that they want a union, and even if the employer wants to accede to their wishes, this bill nevertheless inflexibly injects a government agency into the process, expending time and resources, and delaying achievement of the parties' shared goal. It is difficult to understand the rationale for such a requirement. Nothing under current NLRA law that I am aware of requires an employer to recognize a labor organization without an election, even upon an unquestioned showing of majority support. Those employers who do agree to recognize without an election therefore do so voluntarily. This bill seeks, as I understand it, to categorically forbid such voluntary arrangements, even though the employer thought it a desirable alternative to the burdensome, expensive, and friction-laden NLRB election process.

The push to eliminate voluntary recognition as an option on grounds that unions "coerce" workers to sign cards is puzzling. According to the most recent data released by the Board, charges brought against labor unions account for just over one-quarter of all unfair labor practice charges filed (6,330, in comparison to over 17,000 charges brought against employers).[7] The Board finds merit and issues complaint in only a very small percentage of all cases filed—about 1,200 in FY 2010[8]—and, only about 10% of charges brought against unions on any theory resulted in a complaint, much less a determination of culpability. The fraction of claims found to have merit is even lower in the objections setting: only 3 were sustained out of the 92 objections filed in representation cases disposed of in FY 2010.[9] I am not aware of research showing that there exists any significant difference between the rate of coercion claims against unions in connection with card-signing initiatives as opposed to elections; certainly, in both situations, the rate of such claims is extremely small, and the likelihood that they have merit smaller yet.

Weakening Workers' Entitlement to Redress for Wrongful Acts

The House recently passed a proposal that takes broad aim at workers' rights by further weakening already ineffective remedies. H.R. 2587, titled "Protecting Jobs from Government Interference," would prohibit the NLRB from ever ordering an employer to reinstate work that was illegally eliminated—for example, closing and subcontracting of a department believed to be spearheading an organizing campaign, or abolishment of an individual workers' job because she exercised her federally protected right to challenge harsh working conditions. To be sure, the workers involved might receive some backpay. But the bill will immunize the employer from undoing its wrongful act, notwithstanding an adjudication that it violated federal law. For employees who have illegally lost their jobs, a right without a reinstatement remedy is hollow indeed. Most workers and their families rely on each paycheck for housing, food, and other essentials; little fat is left in most families' budgets these days. Yet, under this law, even when an employer decimates that family's budget by illegally outsourcing that worker's job, the employer need only pay what will amount, in most cases, to a modest fine: an amount equal to the fired worker's wages for the time period in question, but crediting back to the employer all of the money actually earned by the worker from other sources during that period. As most workers who have been fired or laid off can attest, a check is not a job: it is a band-aid, not a lasting solution. What rational worker, particularly when, as now, unemployment is high, would take the already substantial risk of protesting workplace conditions or lending support to an effort to organize a union, if he or she knew that no meaningful recourse was available for wrongful retaliation?

Other Impediments to Meaningful Enforcement of Workers' Rights

Several current proposals, such as H.R. 2854, forbid the NLRB from ever requiring employers to post notices informing employees about their federal rights under the NLRA. Other proposals are wholesale efforts to eliminate the NLRB as an enforcement agency. H.R. 2118 appears aimed at divesting the NLRB of the authority to enforce the Act's protections against contrary state law.

Other proposals either drastically restrict, or eliminate entirely, the NLRB's ability to enforce the law. H.R. 2978 reduces the agency to an investigative body, while providing for enforcement of unfair labor practice provisions of the Act exclusively through private rights of action. Theoretically, such a revision could provide workers with a more potent tool with which to enforce their rights; however, given the substantial expense of federal court actions and the relatively unequal resources of workers and employers, absent a cost-shifting provision similar to what is found in other federal workplace laws, that tool would, unfortunately, remain out of reach for the vast majority of workers who need it. Written on a broader scale, H.R. 2926 simply eliminates the Agency.

Conclusion

None of the legislative measures discussed will do anything to further the central purposes of the NLRA: to grant workers a meaningful opportunity to join together, if they wish, to better their own lives and those of their families and communities, and to insist on their right to be heard in workplace decisions that affect them. Indeed, taken together, it is difficult to view these measures as anything other than a broad-based, politicized attack on these purposes. Furthermore, these measures do not address the economic issues that I believe are most vital to our country, in both the short and the long term: the need for good jobs that can sustain generations and anchor our communities, and the growing concentration of wealth in the hands of a small proportion of the population. It is my hope that future hearings will focus on those urgent matters.

ENDNOTES

[1] John Schmitt, Unions and Upward Mobility for Latino Workers, Center for Economic and Policy Research, September 2008; *http://www.cepr.net/index.php/publications/reports/unions-and-upward-mobility-for-latino-workers/;* Unions and Upward Mobility for African-American Workers, Center for Economic and Policy Research, April 2008; *http://www.cepr.net/documents/publications/unions—2008—04.pdf;* Unions and Upward Mobility for Young Workers, October 2008; *http://www.cepr.net/index.php/publications/interactive-reports/unions-and-upward-mobility-for-young-workers/;* Unions and Upward Mobility for Women Workers, Center for Economic and Policy Research, December 2008; *http://lcc.aflcio.org/WhatsNewDocuments/EFCA/CEPRupwardwomenworkers2008.pdf;* The Union Wage Advantage for Low-Wage Workers, Center for Economic and Policy Research, May 2008; *http://lcc.aflcio.org/WhatsNewDocuments/EFCA/LowWageWorkers.pdf.;* Shawn Fremstad and John Schmitt, Unions Improve Jobs at the Bottom, November 29, 2007, *http://www.policyinnovations.org/ideas/commentary/data/unionization.* Bureau of Labor Statistics, 2006 Employment Benefits Survey, available at: *http://data.bls.gov/PDQ/servlet/SurveyOutputServlet;jsessionid=f03045af62dfW$3F$08$.*

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[4] See, e.g. Ronald Meisburg and Leslie E. Silverman, Why Should a Non-Union Company Care About the NLRB?, Society for Human Resource Management (August 11, 2010); see also Jonathan A. Segal, Labor Pains for Union Free Employers: Don't be caught unaware of nonunion employees' labor law rights, HR Magazine, Vol. 49, No. 3 (March 2004) ("Because these [Section 7] rights are granted under the NLRA—a law that HR professionals working in nonunion environments may be relatively unfamiliar with—they may come as a surprise to many employers that operate without unions.").

[5] See Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 2010, NLRB, available at: *http://www.nlrb.gov/sites/default/files/documents/3580/table—1a.pdf*

[6] Out of a rough total of 17,000 charges filed against employers, according to Table 1A, 1,028, or 6%, resulted in a formal complaint, according to Table 3A. In contrast, less than 2% of the

6,300 charges filed against unions resulted in complaint. Table 3A.—Formal Actions in Unfair Labor Practice Cases, Fiscal Year 2010, NLRB, available at: stronger, and wealth distribution less concentrated than it today. As documented in a recent Congressional Research Service study, the top 10% of the population held about two-thirds of the nation's wealth in 1989.stronger, and wealth distribution less concentrated than it today. As documented in a recent Congressional Research Service study, the top 10% of the population held about two-thirds of the nation's wealth in 1989.stronger, and wealth distribution less concentrated than it today. As documented in a recent Congressional Research Service study, the top 10% of the population held about two-thirds of the nation's wealth in 1989. *http://www.nlrb.gov/sites/default/files/documents/3580/table—3a.pdf.*

[7] See Table 1A.—Unfair Labor Practice Cases Received, Closed, and Pending, Fiscal Year 2010, NLRB, available at: *http://www.nlrb.gov/sites/default/files/documents/3580/table—1a.pdf*

[8] See Table 3A.—Formal Actions in Unfair Labor Practice Cases, Fiscal Year 2010, NLRB, available at: *http://www.nlrb.gov/sites/default/files/documents/3580/table—3a.pdf*

[9] Table 11-D., Disposition of Objections in Representation Cases Closed, Fiscal Year 2010, available at: *http://www.nlrb.gov/sites/default/files/documents/3580/table—11d.pdf*

Chairman ROE. Thank you.

Dr. Kane?

STATEMENT OF DR. TIM KANE, CHIEF ECONOMIST, HUDSON INSTITUTE

Mr. KANE. Chairman Roe, Ranking Member Andrews, and distinguished members, thank you for this opportunity to testify today.

As an aside, Congressman Kildee, it is a particular honor to speak before you today. I know my grandfather would be proud.

I will share an analysis I have done of the RAISE Act, sponsored by Congressman Rokita, of Indiana. The views expressed in this testimony are mine alone and do not necessarily represent those of the Hudson Institute.

As the grandson of an elected Democrat, Edward Kane, who was inspired by FDR to run for office in the city of Wyandotte, Michigan during the Great Depression, won, and served for decades in Michigan, I can promise you that I represent a family that puts the working man first. Also, I am honored to share my perspective as an economist and an entrepreneur.

I would like to thank all the members here for your tireless efforts to pull the U.S. economy out of the recession. The truth is that the policies put in place since 2009 have been an abject failure in terms of creating a jobs recovery despite the promises of the Obama administration's leading economists.

Recent calculations I did show that the employment-to-population ratio collapsed by a staggering 4 percent and has not recovered at all in the last 3 years. The employment ratio averaged 63 percent for 2 decades before the current recession, but it crashed to a modern low level of 58.2 where it has held steady, representing a permanent loss of 12 million jobs.

On the screens is a chart I recently put together in a Hudson report. My analysis of this ratio shows a complete recovery in four of the last five recessions, back to 1970. There was a 0 percent recovery today. The status quo is a powerful reminder that policies in place have prevented a recovery of 12 million jobs.

Turning to workers' rights, what are workers' rights? There is no economic or logical reason to require workers to surrender their individual rights when they bargain collectively or merely consent to a collective agreement. A collective agreement should be understood to establish minimum standards for all, not the maximum potential for anyone.

Unfortunately, U.S. labor law now allows collective bargaining rights to mean the suppression of individual bargaining rights. Now, as an economist, not a specialist in labor law, I had no idea that giving higher pay to union workers is illegal under the National Labor Relations Act.

In 2009, for example, the Brooklyn Hospital Center was ordered to stop giving $100 gift cards to its top nurses. This fails the common sense test and the economic test as well.

To predict the economic effects of the RAISE Act the key variable is what will happen to labor productivity. A 2003 academic study by David Metcalf found that a unionized firm's labor productivity was 14 percentage points more likely to be below the union—or pardon me, the industry average.

Now, in theory a unionized workforce will have positive effects and negative effects on productivity. Metcalf outlines four negative and five positive channels.

On the negative side, and I am quoting directly, "First, unions may be associated with restricting work practices. Second, industrial action may have an adverse impact. Third, union firms may invest less than non-union firms. Fourth, if unions are associated with an adversarial style of industrial relations the consequent low trust and lack of cooperation between the parties may lower productivity."

On the positive side—unions have a positive effect—"First, firms' responses to union relative wage effects may result in higher labor productivity, but this should not be interpreted as raising the welfare of society"—again, quoting directly. "Second, unions may play a monitoring role on behalf of the employer. Third, the familiar collective voice arguments may have favorable consequences. Fourth, it is sometimes held that a union presence may make managers less lethargic. And finally, unions stop the exploitation of labor, resulting in improved productivity."

So which of these wins out? Well, the RAISE Act has potential to remove some of the negative effects on productivity, but I don't see how it removes any of the positive effects.

The most important negative effects this act will remove is the ban on performance incentives. One study found that 20 percent of workers employed through CBAs, which include 7.6 million private sector union employees, operate under contracts that allow performance-based pay. This means 80 percent aren't allowed that pay. I think it is safe to assume a 10 percent productivity increase across the board for all 7.6 million union workers affected by the RAISE Act, which would be given directly—would mostly be given directly to workers in the form of higher pay.

Other economic effects that the act will make possible include higher firm revenues. Because the marginal productivity of labor will increase, affected firms will soon move to hire more workers in two waves.

Bottom line, I estimate a 200,000 new job estimate because of the RAISE Act over the next few years. Again, let me emphasize, the legislation has no potential to hurt jobs or wages.

Thank you.

[The statement of Mr. Kane follows:]

Prepared Statement of Tim Kane, Chief Economist, Hudson Institute

CHAIRMAN ROE, RANKING MEMBER ANDREWS, AND DISTINGUISHED MEMBERS OF THE CONGRESS: Thank you for this opportunity to testify today on the vital issue of worker rights, jobs, and the U.S. economy. I will share an analysis I have done of the RAISE Act, sponsored by Congressman Rokita of Indiana, which would allow employers to lift the "seniority ceiling" on workers' wages by allowing employers to pay individual workers more—but not less—than a Collective Bargaining Agreement (CBA) specifies. The views expressed in this testimony are mine alone and do not necessarily represent those of the Hudson Institute.

As the grandson of an elected Democrat, Edward Kane, who was inspired by President Franklin Delano Roosevelt to run for office in the city of Wyandotte, Michigan during the Great Depression, won, and served for decades in Michigan, I can promise you that I represent a family that has long put the American working man first and foremost. Also as the son of the president of a small manufacturing company, I can promise you that I bring the perspective of someone who appreciates how jobs are truly created. I've spent my career studying the U.S. economy, but have also founded and run a few software companies, so I am honored to share my perspective as an economist and entrepreneur.

I'd like to thank all of the Members here for your tireless efforts to pull the U.S. economy out of the recession. I know you share with me some frustration that the recession may have technically ended years ago, but job market remains mired in recession. We need to face the truth that the policies put in place since 2009 have been an abject failure in terms creating a recovery in U.S. employment, despite the promises of the Obama administration's leading economists.

Recent calculations I did show that the employment-to-population ratio collapsed by a staggering 4 percent during the recession, and it has not recovered at all in the last three years. Other measures of labor utilization such as the unemployment rate or payroll jobs created are not demographically neutral, masking elements such as worker discouragement and population change. The employment-population ratio averaged 63 percent for two decades before the current recession, but crashed to a modern low level of 58.2 percent in late 2009. In the most recent report from the Labor Department, it remains stuck 58.6 percent, where it has held steady for two and a half years, representing a permanent loss of 12 million jobs under this policy regime.

My analysis of employment-to-population shows a complete recovery after 54 months in 4 of the last 5 recessions going back to 1970. There was a 50% recovery after 2001 and a zero percent recovery today. The status quo is a powerful reminder that the policies in place today have prevented what should be by now a recovery of all 12 million jobs.

Worker rights

If I may turn the clock back in time to 1934 when my Grandfather ran for tax assessor in Wyandotte, the labor movement then was fighting to promote workers' rights against the abuses of some corporations. The abuses were real and the eventual victory of workers' rights represented what I believe was true progress.

What are workers' rights? Some say that workers have a right to bargain collectively, and I agree. Some say this is the limit of workers' rights, and I disagree. There is no economic or logical reason to require workers to surrender their individual rights when they bargain collectively, or merely consents to a collective agreement. A collective agreement should be understood to establish minimum standards for all, not the maximum potential for everyone.

Unfortunately, U.S. labor law has regressed over the decades such that the existence of collective bargaining rights now means the suppression of individual bargaining rights. To be honest, I am an economist, not a specialist in labor law, so I had no idea that giving higher pay to union workers is illegal under the National Labor Relations Act of 1935. The Supreme Court has actually upheld the law in extreme cases, and the NLRB routinely blocks companies that attempt to give individual raises. In 2009, for example, the NLRB ordered the Brooklyn Hospital Center to stop giving $100 gift cards to its top nurses. This fails the common sense test, and I believe it fails the economic test as well.

Economic analysis

I've conducted an analysis of the RAISE Act on the U.S. economy and would like to share the results briefly here. The RAISE Act—remarkable in its brevity—would allow companies with unionized workforces to offer bonuses and higher wages to some or all its workers than the current baselines contract. That is the whole matter at hand.

To predict the economic effect of the RAISE Act, the key variable is what will happen to labor productivity. The economic literature on unionization and productivity is mixed. A widely respected 1984 book by Freeman and Medoff (What Do Unions Do?) asserted a positive effect of unions on productivity in the U.S., but the claim has not held up well to more sophisticated statistical analysis in more recent studies, and has not been substantiated by any other broad-based studies. Barry Hirsch revisited the question in a 2004 paper published by the Journal of Labor Research and cited numerous other papers, notably Clark (1984) which find a negative relationship. For example, a 2003 study by Metcalf found that a unionized firm's labor productivity was 14 percentage points more likely to be below the industry average.

In theory, a unionized workforce will have positive and negative effects on productivity, which is why disentangling them across multiple industries and legal-market contexts is muddled. All economists agree and empirical data show that unions hurt firm profitability. That effect also is known to limit productivity growth, if not initial levels, which may be why the private sector industries with high unionization rates have declined so dramatically since the 1980s. Metcalf outlines four negative channels and five positive channels. On the negative side:

First, unions may be associated with restrictive work practices. Second, industrial action may have an adverse impact. Third, union firms may invest less than nonunion firms. Fourth, if unions are associated with an adversarial style of industrial relations the consequent low trust and lack of cooperation between the parties may lower productivity.

On the positive side:

First, firms' responses to union relative wage effects may result in higher labor productivity, but this should not be interpreted as raising the welfare of society. Second, unions may play a monitoring role on behalf of the employer. Third, the familiar collective voice arguments may have favorable consequences. Fourth, it is sometimes held that a union presence may make managers less lethargic. Finally, unions should stop exploitation of labor, resulting in improved productivity.

It is important to understand that none of the positive effects of unionization would be diminished by the Act. Indeed, the worst-case outcome of passing RAISE is a completely neutral effect on the economy. However, the Act has potential to remove some of the negative effects of unions on productivity. The most important negative effect this Act will remove is the ban on performance incentives. Metcalf discusses incentives, but I believe this merits consideration as one of the main productivity inhibitors of unionization. Seniority, rather than work effort and competence, is the dominant consideration for promotion and raises under most union rules.

Economic research shows that workers respond to incentives, with estimates of the increase in worker earnings ranging from 6 to 10 percent when pay is performance-based. The productivity gain is at least that high, but possibly much higher. We can imagine the effect will be even larger in firms which have never had merit-based pay. One study found that only 20 percent of workers employed through CBAs, which includes 7.6 million private sector union employees, operate under contracts that allow performance-based pay. That means 80 percent (6.1 million) of union workers have a wage ceiling enforced by U.S. law that makes individual performance bonuses and raises illegal, but would be legal after passage of the RAISE Act. I think it is safe to assume a 10 percent productivity increase across the board for all 7.6 million union workers affected by the RAISE Act, most which would be given directly to workers in the form of higher pay. The typical union worker will get a 5-10 percent raise in take-home pay.

Other economic effects that the Act will make possible include higher firm revenues. Because the marginal product of labor will increase, affected firms will soon move to hire more workers in two waves. The first wave will be to hire workers rather than expand capital investment because of labor's increased relative productive impact, but the second wave will be in response to higher profit potential as the firm expands. A conservative estimate is that each wave will increase employment by 1-2 percent above current levels, or roughly 200,000 new jobs over the next few years. Union jobs. The effects could be much higher. Again, let me emphasize the legislation has no potential to hurt jobs or wages.

Conclusion

Currently, the National Labor Relations Act allows collective bargaining agreements (CBAs) that suppress individual bargaining rights. Specifically, CBAs can set wage floors and wage ceilings, barring merit-pay, even barring across the board raises by the employer to all workers. A better approach would not put collective rights at odds with individual rights, but to allow both to be realized.

The RAISE Act—less than 200 words of legislation—will restore the upside of individual worker rights and allow firms to give individual bonuses and raises.

Lifting the pay cap on union workers across America would provide a much needed boost to our economy. I estimate the RAISE Act will generate an average raise of 10 percent to union workers in response to new productivity gains based on new incentives. The follow-on effects will lead to increased firm revenues and the creation of an additional 200,000 union jobs in the United States.

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Chairman ROE. I want to thank all the witnesses for being under the time—amazing. So thank you all.

I am going to start by just going through three things very quickly. These are three very simple bills, and I will start with President Porter.

You know, first of all, I want to—basically to apologize to the Seneca Nation for the abysmal treatment that the federal government has done—U.S. government has done—it is embarrassing—over the 200 years of—it really is. I have reviewed your nation's history, and I come from an area where the Cherokee Nation in East Tennessee, and I am not sure what a sovereign nation is, and does this country keep a treaty.

So I wholeheartedly agree that you have a right on your nation's land to follow your nation's laws, and we have a treaty that said you could do that. So I want to——

Mr. PORTER. Appreciate that, Mr. Chairman.

Chairman ROE [continuing]. I want to make that statement to start with.

Secondly, I can't think of anything more precious than a secret ballot. I put a uniform on, left this country, spent 13 months in a foreign nation to help allow people to have that right.

And I have said many, many times on here, I am a—the son of a union labor—I grew up in a union household. And I can't think of anything more important than you as an individual—I exercised this right a week ago when I went and voted for myself. Our election is next week and we have early voting. So no one was behind that booth with me.

I say this, my wife claims she votes for me but I don't really know. It is a secret ballot. And she says she does, but—that is the importance of it. No one can intimidate you when you are back there.

If you want a union that is fine. It is a right in this country. You can do that.

But it is also your right not to have a union, and you should be free of any intimidation from an employer or an—the union to make that decision. A worker should have that right.

And lastly, I am astonished. I didn't know this either, that as an employer—we—I have a non-union workplace; we have 450 employees in my medical practice, and if I were unionized, I didn't know either, Dr. Kane, that it was illegal for me to take a good employee and incentivize them. And there are great employees in every business, there is no question about it.

As a matter of fact, I would not have had a successful medical practice for over 30 years without the great people I worked with. They helped make me what I was. It wasn't me; it was the people who worked directly with me every day. And I didn't look at them as working for me, they worked with me because our purpose was to take care of patients.

So that is the attitude I have about employees, is that they are the most valuable thing you have. And you reward the most valuable thing you have and you take care of it. And I think one of the great rewards you can have is to give that person a raise and help them during these times.

So just three statements, and one other statement, Dr. Kane, you made, which I found as the employment-to-population ratio—that is an amazing statistic. And I guess another way to put it, I have heard, in 2000—we have 11 million more people living today than we did in 2000 in this nation but we have 500,000 less people that

are employed than we did in 2000. So I think that says basically a different way the same thing.

President Porter, just your comments on your relationship with the—with what has happened to you and how this affects the running of your businesses in your nation.

Mr. PORTER. Well, thank you, Mr. Chairman, for the question.

We have a very strong relationship with our workforce, both in our government services side and also our revenue side. You know, the businesses that we operate exist because we don't have a tax base in our nation.

And so we have been wrestling with this specter that through this San Manuel decision and the changes in the NLRB that there will be a union-organizing activity that will occur in a way that would be inconsistent with the policies and goals of our government approach. We are a good employer. We provide good benefits to our workers and we have had a very positive working relationship during that time.

The interference with our sovereignty is of great concern in the abstract as well as in what might be the application in the future, and that is why I am here today and I am glad to have a chance to testify.

Chairman ROE. Thank you.

And, on the secret ballot, Mr. Messenger?

Mr. MESSENGER. Yes. The secret ballot is obviously something that should be protected—the right of each individual employee to vote in the privacy of the voting booth. As you said, you know, an individual—there is no one behind them when they are——

Chairman ROE. Is there any reason not to do it?

Mr. MESSENGER. Not that I can think of, Mr. Chairman.

Chairman ROE. Okay. Thank you.

And, Dr. Kane, on the RAISE Act, I can't—it is a 200-word bill. I can't see any reason why you wouldn't take good employees and give them a raise. I can't imagine why anybody in the union would mind.

Mr. KANE. Exactly, Congressman. I was—Mr. Chairman—I tried to analyze this economically and look what the negative effects on productivity would be. I couldn't see them.

So outside of the productivity conversation I am open to hearing ideas but, you know, there are these conflicting pressures on productivity, some positive, some negative. This bill, it is all positive.

And as you said, it is 200 words. There is no hiding the ball in there.

Chairman ROE. I thank you.

I yield my time now to Mr. Andrews?

Mr. ANDREWS. Thank you, Mr. Chairman.

I thank the witnesses for their excellent preparation this morning.

Mr. Messenger, you are in favor of repealing exclusive representation for unions. Is that correct?

Mr. MESSENGER. Yes, sir.

Mr. ANDREWS. And do you think that—is it a fair statement that you assume that that repeal would help to create more economic growth and more jobs in the country?

Mr. MESSENGER. I believe that it would.

Mr. ANDREWS. Dr. Kane, do you agree with that conclusion? Do you think that the abolition of the exclusive representation rights of unions would create more jobs and more economic growth?

Mr. KANE. Abolition of rights—I don't follow, sir.

Mr. ANDREWS. Well, Mr. Messenger's testimony says that he thinks that the monopoly representation that is achieved when a union is recognized should be repealed and that all members of the bargaining unit should have the right to opt out of that. Do you think that that would lead to more jobs and more economic growth?

Mr. KANE. Congressman, the way I looked at it—if I can limit myself to the RAISE Act, and I don't know if I can——

Mr. ANDREWS. Well, you could answer my question.

Mr. KANE. Yes, sir.

Mr. ANDREWS. If you don't have an opinion, tell us. But do you think it would engender more economic growth, or less, or the same?

Mr. KANE. I don't think it would hurt growth, but I disagree with the premise, sir, that there is a conflict between collective rights and individual rights.

Mr. ANDREWS. You don't think it would hurt growth. Do you think it would encourage more economic growth?

Essentially, this is what is I guess known in the political parlance as "right-to-work." So right-to-work laws, do you think that they encourage or discourage economic growth?

Mr. KANE. I think right-to-work laws encourage economic growth.

Mr. ANDREWS. Okay.

I want to ask you, do you know—assuming that position, then, I assume you would think that unemployment rates would be lower in right-to-work jurisdictions than in non-right-to-work jurisdictions. Is that right?

Mr. KANE. Depends on too many factors to make a claim like that.

Mr. ANDREWS. So you don't think it necessarily will be the driving force?

Mr. KANE. I think if I did an econometric analysis I might be able to isolate an effect that it would be—right-to-work would have a net positive effect, but I don't think you can do a simple analysis. California has got a lot of negative weight on it——

Mr. ANDREWS. Do you know what the median unemployment rate is in right-to-work states?

Mr. KANE. No, sir.

Mr. ANDREWS. Do you know how it compares to the median right-to-work—median unemployment rate in unionized states?

Mr. KANE. No, sir.

Mr. ANDREWS. Would it surprise you to know that the median unemployment rate in right-to-work states is 7.8 percent and the unemployment rate—median rate in the non-right-to-work states is lower, is 7.5. That contradict your conclusion?

Mr. KANE. Absolutely not. I mean, you can look for a cure for cancer and say it affects one race of people more than another race and it is somehow their fault. You have to look at a lot of factors.

Mr. ANDREWS. That is true, although I am not sure what the aberrant factor would be. You are a very skilled economist. You know what a regression analysis is, right?

Mr. KANE. Sure.

Mr. ANDREWS. When you look at a correlation coefficient—am I correct, because I am an amateur at this—assuming that if the correlation coefficient is one you have a perfect match between a cause and an effect, basically; and if it is zero you have no relationship at all.

Mr. KANE. Yes, sir.

Mr. ANDREWS. I am going to submit for the record this graph, in which we plotted the unemployment rates in right-to-work states against the unemployment rates in states that do not have right-to-work statutes. Could you guess for us what the correlation coefficient is?

Mr. KANE. Based on where you are leading I can guess.

Mr. ANDREWS. What do you think it is?

Mr. KANE. Well, this would be what we call—you are leaving out—you have omitted variable bias when you do a direct chart like that. You are omitting variables that matter for the unemployment rate that would then isolate the actual effect. So I would actually suggest that——

Mr. ANDREWS. So you must disagree with Mr. Messenger, then, who said that he thinks that the repeal of exclusive representation authority of unions would promote economic growth. You disagree with him?

Mr. KANE. I don't think I disagree with him, but I——

Mr. ANDREWS. You agree with him?

Mr. KANE. Sorry, sir. I am still——

Mr. ANDREWS. He says that right-to-work laws encourage more job growth. Do you agree or disagree?

Mr. KANE. Absolutely, I agree.

Mr. ANDREWS. So how do you explain a correlation coefficient of 0.05 when you look at right-to-work—when you actually look at the percentage of unionized workforce——

Mr. KANE. Yes.

Mr. ANDREWS [continuing]. And you plot that against the unemployment rate in the state the correlation is 0.05. How do you explain that?

Mr. KANE. Well, barring a lecture on econometrics I would explain it by——

Mr. ANDREWS. Well, you are barred from giving such——

Mr. KANE. Yes, sir. I would say one, it has omitted variable bias; two, it depends on the timeframe. So I am curious what the timeframe of the chart is.

Mr. ANDREWS. What might some of those variable biases be? What else would cause—you would admit that at least looking at these two factors there is no correlation whatsoever between the percentage of the unionized workforce and the unemployment rate, right?

Mr. KANE. Well, sir, I would say one of the omitted variables would be a hurricane. So, for example, New Orleans—you know, weather—droughts, as you mentioned.

Mr. ANDREWS. What about the other 49 states that didn't have a hurricane, or 47 that didn't——

Mr. KANE. Absolutely. So there are so many factors that go into this that it is hard to say just one thing. You would have to consider them all and then do a chart based on that.

But also, the timing matters. So is this over the last 10 years, the last 20 years? I could probably get a chart for you 10 years before that one that would show a different relationship.

Mr. ANDREWS. I would love to see that.

Thank you.

Chairman ROE. Thank you.

Mr. Rokita?

Mr. ROKITA. Thank you, Mr. Chairman.

Real quickly, Dr. Kane, did you want to respond any more to Mr. Andrews' line of questioning before I went on?

Mr. KANE. No, sir. Thank you.

Mr. ROKITA. Okay, thank you.

I want to thank all the witnesses for being here today. I want to thank the chairman for holding this hearing, as it regards the RAISE Act. I want to thank my—so many of my colleagues, including Ms. Noem, Mr. Ross, and the chairman for co-sponsoring the RAISE Act.

I want to quickly read some excerpts from a letter sent by a firm called Miller & Long, which is a contracting firm here in the D.C. area. And Mr. Brett McMahon says, "Even though we are not a union company I have met plenty of hardworking union members. However, their contracts do not permit their employers to reward their effort. The RAISE Act would allow union employers to grant individual merit raises to employees covered by a collective bargaining agreement. I cannot think of anything more fundamental, logical, or conducive to greater productivity and job satisfaction than loosening the unfair constraints on individual achievement. The RAISE Act would reward hard work. It seems so simple to say that hard work should be rewarded in this country. It is a sad testimony on the nature of our politics that such a bill does not enjoy unanimous support. Every working person deserves a chance to get ahead and to have their individual effort justly rewarded." Mr. Chairman, I ask for inclusion in the record.

[The information follows:]

July 24, 2012.

Hon. PHIL ROE, *419 Cannon House Office Building,*
U.S. House of Representatives, Washington, DC 20515.

DEAR REPRESENTATIVE: I am proud to say that Miller & Long DC is a merit shop company. Advancement in rank and compensation is earned through individual effort and hustle. One of my primary tasks is to continuously evaluate each person. I seek out those that go the extra mile. It makes us a more productive, positive and profitable place to work. The younger people entering the business need to know that they can get ahead, and that their hustle will be rewarded. The more experienced folks enjoy working with people whose efforts have garnered their respect.

I firmly believe that these values are universal. Even though we are not a union company, I have met plenty of hard-working union members. However, their contracts do not permit their employers to reward their effort. Union organizers have targeted Miller and Long in the past, but our employees have consistently decided that remaining a merit shot best served their interests. I am concerned that—if a future organizing campaign succeeded—a union contract would prevent us from rewarding hustle and hard work. This would undercut our productivity and would be a serious threat to the health of our business.

I was disappointed, but not shocked when the union leadership's political arm decided to oppose the RAISE Act. The RAISE Act would allow union signatory employers to grant individual merit raises to employees covered by a collective bargaining agreement. I cannot think of anything more fundamental, logical, and conducive to greater productivity and job satisfaction than loosening the unfair constraints on individual achievement.

The RAISE Act would reward hard work. It seems so simple to say that hard work should be rewarded in this country. It is a sad testimony to the nature of our politics that such a bill does not enjoy unanimous support. Every working person deserves a chance to get ahead and to have their individual effort justly rewarded.

Sincerely,

BRETT MCMAHON, *President,*
Miller & Long DC, Inc.

Chairman ROE. Without objection, so ordered.

Mr. ROKITA. Now, the reason I took some time to state that is because I am in complete association with the chairman's remarks when he started the questioning and I can't do any better by them. But the moral imperative that he laid out here with regard to these three bills is exactly on point.

Given that then, starting with Dr. Kane, can you give me specific examples of unions telling a company not to pay workers more? Because given what I just read that seems like a strange objection.

Mr. KANE. Yes, sir. I read a few examples. There is a background paper from the Heritage Foundation—I forget the publication—by James Sherk that lists a few examples that surprised me.

One example had a firm that wanted to give everyone in the company the exact same raise and the union objected to it. It was taken to the NLRB, and the NLRB, in I think what might have been a unanimous decision, to Mr. Andrews' point, agreed with what the law says today that the firm wasn't allowed to make that raise. So I would probably vote the same way on the NLRB even though I disagree with the law.

So it is up to Congress to free companies and to free workers to get these merit raises.

Mr. ROKITA. Well, how can an employer provide a performance-based pay increase? How often are provisions allowing the performance-based pay increases found in collective bargaining agreements, and why are they excluded?

Mr. KANE. The analysis I have seen by—in a paper by David Metcalf in 2003 that 20 percent of CBAs already allow merit pay, so it is not an extraordinary thing. But the fact that it is already allowed means it should be logical and that it could be spread to the other 80 percent of workers under unions without harming those unions.

In fact, I would predict this would be a shot in the arm for unions, which have been declining. So if you care about union health over the future U.S. economy this would be a bill you would support, as well.

Mr. ROKITA. Okay, so just to be clear, union contracts don't raise wages, or do they, or how often?

Mr. KANE. I don't think you can make a claim one way or the other. I think the fact that there is a collective bargaining agreement raises wages across the board, but having the RAISE Act in place would also allow that collective right to still exist and individual raises to occur, as well.

Mr. ROKITA. And why would businesses pay more if they did not have to?

Mr. KANE. Well, let's look at the minimum wage. Two percent of the American workforce gets paid the minimum wage, so it is this great puzzle: Why do 98 percent of the workers get more than that when firms don't have to?

As a former employer, I pay people what they are worth, especially if a worker is extremely talented and gets a job offer from somewhere else, I want to be able to give them a raise to retain them. And in fact, we see that happen to unions, that the—there are losses of talented workers and the firms and the unions aren't able to retain those individuals. The RAISE Act would change that.

Mr. ROKITA. And what kind of data do you have—and again, if it was in your testimony, if you can repeat it—do you have to show how much performance pay raises wages, by percentage or——

Mr. KANE. That is my analysis. My analysis is the productivity difference between firms that have incentive pay and don't, that—what effect it would have where it is barred. I analyzed 10 percent increase, maybe a 200,000 job increase—union job increase as a result of the RAISE Act. But that is my analysis.

As far as citation about losing workers, I can get that to you and add it to the testimony.

Mr. ROKITA. Okay. And percent pay increase?

Mr. KANE. Well, if we have a 10 percent increase in marginal productive labor you could say it is half and half—half goes to the workers, half goes to the firm. But I think that will filter back into hiring more workers, as well.

Mr. ROKITA. Thank you.

Mr. Chairman, my time is expired. Thank you for having the hearing.

Chairman ROE. I thank the gentleman for yielding.

Mr. Miller?

Mr. MILLER. Thank you, Mr. Chairman.

For the past 75 years, as has been discussed here in this hearing, the decision was made that the right to form a union belonged to the workers themselves, and the exercise of these rights has served, I believe, this country well. I believe that they contributed to the building of the middle class and to ensure the prospect that our children can build even a better life for themselves, and that there—better than their parents.

Certainly I have been dedicated to the idea of strengthening the National Labor Relations Act to make sure that, in fact, this decision rested with the workers. And yet, throughout this entire Congress we have seen the majority here continue to propose legislation—and throughout the hearings here—to really take away much of the say the workers have over their workplace.

We have seen them pass the Outsourcers Bill of Rights, which eliminated the National Labor Relations Board authority to order an employer to restore job and production after employers unlawfully retaliate. You don't get to retaliate for people exercising their rights under the law, and yet that is what that legislation would do.

Republicans passed the Election Prevention Act, which effectively delays and ultimately prevents union elections. How does that

strengthen the National Labor Relations Act? How does outsourcing jobs strengthen the National Relations Act?

Republicans introduced the Secret Ballot Protection Act, which eliminates the ability of employers to voluntarily recognize unions based upon the showing of majority support. And yet, we see in many instances where in workplaces that is done the working relationships are better among those organizations with their employees.

The Republicans—the RAISE Act that is just under discussion here, which lets employers avoid discussing wage increases with employees, going around the employer organization, offering wage increases to selected individuals to break down the strength of the union under the National Labor Relations Act. And it doesn't require any wage increases at all.

Ms. Vick—Virk—excuse me, Ms. Virk, in your opinion, you have listened to this back and forth here, do you believe that this is strengthening the National Relations Act?

Ms. VIRK. No, sir, I do not. In fact, I believe it fundamentally alters the structure of self-determination that the—that is the very premise of the act. As you pointed out, the notion that has been in place for 75 years is that workers themselves have a right to choose—a federally enforceable right to choose whether or not they want to deal with their employers individually or whether they wish to deal with their employers collectively. And if the workers choose to deal with their employers collectively the act provides that the employers must respect that choice so that the workers can insist that their voices be heard.

Mr. MILLER. That is the premise of the law.

Ms. VIRK. That is the premise of the law.

Mr. MILLER. This decision belongs to the workers.

Ms. VIRK. That is exactly right. And legislation such as the RAISE Act, which was just under discussion, what it does is effectively take wages, which are obviously a critical component of any collective bargaining negotiation, and takes that decision and puts it back exclusively, essentially, in the hands of the employer.

It destroys or it takes exclusive representation and chips at it. It goes a ways towards Mr. Messenger's proposal, or what he would like to see happen, which is the death of exclusive representation and having everybody atavistically individually bargain.

That is not the premise of the National Labor Relations Act. The premise of the act is that if people want to join collectively and want to deal with their employer collectively they have the absolute right to do so.

Mr. MILLER. Well, I am just struck by the fact that as we title this hearing, "Strengthening the National Labor Relations Act," and as we talk about that throughout the year, this committee has let go unaddressed probably the most corrosive scandal in the board's history that has not been addressed at all by this committee despite repeated requests. Are you familiar with reports by the board's inspector general as regarding member Hayes and member Flynn?

Ms. VIRK. I am generally familiar with them, yes, sir.

Mr. MILLER. So we have two reports of the passage of confidential deliberative material now from former member Terence Flynn

to select private parties outside the board. You represent people in these contests all the time. Can you imagine that you would—it would be appropriate to pass deliberative, confidential information from the board to the outside parties?

Ms. VIRK. No. I can't see why that would be proper.

Mr. MILLER. Do you know what—for what use these documents were used that they were passed outside of the board?

Ms. VIRK. I can't imagine.

Mr. MILLER. Mr. Kane, do you know for what purposes these documents were used that were passed outside the board?

Mr. KANE. I am not familiar with it, sir.

Mr. MILLER. Mr. Porter, do you know for what reasons these documents were used when they were passed outside the board?

Mr. PORTER. I am not familiar with the issue.

Mr. MILLER. Mr. Messenger, do you know?

Mr. MESSENGER. No, sir. I do not know.

Mr. MILLER. And neither does this committee. And yet, in fact, the processes of the board were violated by members of the board, according to the inspector general, and we find no interest in this committee at all. You talk about undermining the law is when people start leaking deliberative information to lawyers and to others outside the board.

We tried to contact—Mr. Andrews tried to contact the lawyer to get Mr. Chambler here to attend this hearing to explain this and his lawyer can't find him. Apparently he is hiding from his attorney. But he said to send the message that he wasn't turning down the request to appear; he just couldn't find him. So I guess he is hiding in a culvert somewhere while his attorney searches for them.

But it is just unbelievable that this committee would engage in this activity of undermining the board and not deal with the scandal going on on the—in the board at the same time. Thank you.

Chairman ROE. Thank the chairman for yielding back.

Mrs. Noem?

Mrs. NOEM. Thank you, Mr. Chairman, for holding this hearing today on all these issues regarding the National Labor Relations Act. While I am supportive of all the bills that are being heard today, obviously the Tribal Labor Sovereignty Act highlights an issue that is very dear to me and the tribes in South Dakota and others across the country.

So I want to thank you, President Porter, for being here and for your testimony on this legislation. I found it very insightful, and a hands-on experience is always good insight to have when we are talking about policy and what happens in real life.

The NLRB decision from several years ago is an affront to the principle of tribal sovereignty, which is referenced in the Constitution. It is especially concerning given the activist stance that the NLRB has taken. While the Tribal Labor Sovereignty Act stands to defend the constitutionality protected principle of tribal sovereignty, I believe it would also go a long way in continuing to promote economic opportunities and development on tribal lands by eliminating ambiguity that exists in current law.

One of the things I hear most from businesses in my state, tribally owned and others, is the need for certainty from the govern-

ment, that they will know what the rules are and what they will be in the future and can plan accordingly. And I believe that this is one of the glaring examples of the need for certainty and agree with you, President Porter, in—that clarification is needed.

On behalf of the federal government and this hearing, this is a step in the right direction.

So for you, President Porter, I have a question: You mentioned in your testimony that the Seneca Nation has strong employee rights protections in place and procedures as well. And I think that this gets to the heart of what the Tribal Sovereignty Act is all about, allowing tribes to govern their own affairs in accordance with their sovereignty. So could you talk about how those policies were implemented within your nation and within your tribal government?

Mr. PORTER. Thank you, Congresswoman.

Our nation does have due process and protections for our workforce in a couple of different ways. Our nation's council, or legislature, has established laws, you know, that govern the regulation of workers in the—in our government.

We have created separate governmental bodies that have administered our workforce in our casinos and other businesses. They have also their own policies and procedures that have been adopted by which employees have a definition of their rights and also a recourse, through grievance procedures, by which they can be heard in the event of disagreement between them and their immediate supervisors.

So we do our best. As our businesses have grown they have grown very rapidly, and my prediction is that over time and in the years to come they will continue to evolve and advance as the needs of workers grow and our government continues to mature in this responsibility.

Mrs. NOEM. So what has been the response by tribal members and employees that have been working for the tribally owned government?

Mr. PORTER. Well, I have learned, you know, in my short time in elected office that it is difficult to make everyone happy. But it is true that we have provided, I think, a mechanism that provides a substantial degree of responsible employer relations, that, you know, we have a recourse, disputes are addressed. You know, people go to work every day. They are happy that they have jobs.

We have created 4,000 jobs in the last 10 years and it has been a very significant benefit for not just our nation but for all of the people in Western New York who want to work. And from that standard I think it is working very well for us.

Mrs. NOEM. Is there an opportunity for them to give feedback to you into those policies and procedures so that you can work to put changes in place that they would recommend as employees?

Mr. PORTER. Absolutely. You know, I receive a lot of just unsolicited requests from members of our own nation as well as some of our employees about different problems that they have. I always try to work within the chain of command in terms of, you know, taking it back to the executives or the directors who are responsible for the workforce.

But we do find a way in our small society of decision-makers to be able to address concerns that our people as well as our workers are raising.

Mrs. NOEM. Have you found it—you know, that ability to dynamically react and meet the needs of the employees has been of benefit to you in setting up some of these policies and——

Mr. PORTER. Absolutely. We have fantastic businesses. Our gaming business does well. The private sector businesses—the individually owned businesses are struggling to continue to improve, and people have choices, you know, when it comes to where they want to work within our nation government businesses, the private sector, or even off the territory.

So I think it is working as best as it can. After most of the last 200 years of our people living in abject poverty we have done an awful lot over the last 40 years and I hope to continue that growth in the future.

Mrs. NOEM. Great. I just was curious, what—do you know what the standard was that was used by the NLRB to determine whether it had jurisdiction over a tribal enterprise before San Manuel?

Mr. PORTER. As to why they continue to recognize our sovereignty?

Mrs. NOEM. What the standard was before that decision——

Mr. PORTER. I think it was common sense, quite honestly, because we are governments, and no differently than the statute reads that the United States or state governments are exempted from the coverage of the law, I think it was a common sense understanding that tribal governments would also be exempted. And I think it is only because we decided to grow businesses and generate monies for our people that the board, frankly, without almost no principle, changed the standard.

Mrs. NOEM. Well, thank you. Thank you for being here.

Chairman ROE. Dr. Holt?

Mr. HOLT. I thank the chair.

I would point to the statements of Mr. Miller and Mr. Andrews at the beginning of this hearing that there are things that we should be dealing with today, whether it is leaks that completely undermine the ability of the NLRB to function, or whether it is ways to have more workers employed. And I think Mr. Andrews at least laid the groundwork for the case that moving to right-to-work is not going to result in more workers being employed; and I think Mr. Miller made the case that if we are going to have a functioning NLRB we have to exert some oversight.

Ms. Vick—Virk, I beg your pardon—first one specific question that I would like to clear up: It has been repeatedly stated that it is now illegal for a unionized employer to give bonuses to their employees. Is that true?

Ms. VIRK. I thank you for the opportunity to speak on that question. No, it is not true. It is only unlawful if the employer does not deal with the representative chosen by the workers if the workers have chosen a representative. Is——

Mr. HOLT. Thank you.

Well, now I wanted to talk a little more generally, Ms. Virk, about why we are even talking about a representation for a group of workers collectively. Without the body of law and precedent asso-

ciated with the NLRB, that whole body, do you think workers have equal footing with employers when it comes to wages and working conditions, benefits and the other matters of employment?

Ms. VIRK. Do you mean, are workers—do they exercise the same level of bargaining power——

Mr. HOLT. I guess I am asking, why was the National Labor Relations Act and associate—and associated law passed in the first place? Historically, are workers on an equal footing with their employers?

Ms. VIRK. No, they are not. And that is the reason that Congress gave them an enforceable right to act collectively if they so chose.

Mr. HOLT. So in this legislation that the majority has laid out today for our consideration, the legislation that would eliminate the NLRB's authority to order an employer to restore jobs as part of a—if an employer unlawfully retaliates against employees, or legislation that would delay union elections, or what is called the Secret Ballot Protection Act, or the so-called RAISE Act that we were talking about that would allow an employer to set wages outside of the collective bargaining agreement, or legislation that would restrain the enforcement of any state law on grounds that it is preempted by or conflicts with the National Labor Relations Act—in other words, a state could pass laws in direct conflict to federal labor law—do you see, in any or all of these bills, any anti-union bias or pro-union bias? In other words, is this really about making the NLRB more efficient, more functional, or is it really to get at whether unions can operate in the interest of workers?

Ms. VIRK. I guess the way that I would see it, Congressman, is that these measures taken individually or collectively undermine workers' rights, and in doing so they undermine the rights of workers' chosen representatives, which in many cases where workers have chosen collective representation are labor unions. But what they really do is chip away at individuals' rights or allow employers to ignore individuals' own wishes to be represented collectively, or their own wishes at the bargaining table, or their own wishes as to whether to be represented at all.

Mr. HOLT. So let's take, for example, the Secret Ballot Protection Act. How does that reduce workers' rights?

Ms. VIRK. Well, voluntary recognition, which this act would eliminate, has been in place and has been a part—a historical part of the National Labor Relations Act since its inception in 1935. Thousands and thousands and thousands of workers have freely and easily chosen to be represented by an agent collectively for the purpose of bargaining with their employer and have done so simply by signing a card or signing a petition that have been presented to their employer, and their employers have agreed to respect their workers' wishes without an election.

The act permits secret ballot elections and many thousands of employees have also been organized, if they so choose, by secret ballot election.

What the Secret Ballot Protection Act, as I understand it, would do is take away that first option of voluntary recognition—take away the option of employees to simply come together and say, a majority of them, "We want a union," and present a petition or

cards to their employer saying exactly that and allow the employer the right to respect that. That is what it would take away.

Mr. HOLT. Thank you.

Chairman ROE. Thank you.

Mr. Tierney?

Mr. TIERNEY. Thank you.

You know, I took your point, Ms. Virk, on the notion that most of these statutes that are being proposed seem to be more about taking away the strength of the National Labor Relations Act than increasing it, but one—aside from one of the statutes here, one that always got me was the provision—the ruling of the board that there would be a notice posted which would inform members of unions of their right to join or to refrain from joining a union. And my understanding is that that notice could be downloaded for free of charge off the Labor Relations Board's site and then need only to be posted the same place that all other work notices are posted.

Can you explain to me what the problem with that seems to be, for people that object to that?

Ms. VIRK. I don't understand why anyone would take a position that people should remain ignorant of rights that they—clearly are enshrined in federal law. And I would say, member Tierney, that in fact, the notice posting is required in all workplaces, union and non-union, to inform non-union people of their rights.

And in fact, you know, given that most non-union workers don't even know that they have the right to act collectively, don't even know that they have a right to discuss wages or working conditions or complain about those conditions to each other or to their employer to try to seek redress, seems to me that informing those non-union workers, which are an ever-growing percentage of our workforce, of their rights, I really see no reason not to do that.

Mr. TIERNEY. Well, part of the charge of the National Labor Relations Board, of course, is to enforce its own statutes, rules, and regulations. Is that correct?

Ms. VIRK. That is correct.

Mr. TIERNEY. And how would a—how would not posting this or not giving people information about their own rights strengthen the board's position or ability to do that?

Ms. VIRK. I don't see how it could strengthen it at all. I could only see that it would further undermine people's knowledge and, therefore, their enforcement of those rights that they absolutely have.

Mr. TIERNEY. With respect to the so-called RAISE Act, my understanding under current law—and correct me; you are the expert here—under current law collective bargaining agreements already provide for merit pay raises if people—increases if people want to do that?

Ms. VIRK. If the parties mutually agree to it. And member Tierney, I mean, member Rokita said—asked of witness Kane how often are these arrangements of merit pay allowed, and I think the real answer to that is—Mr. Kane said 20 percent of agreements. I don't know whether that is right or not.

But the real answer is, as often as both parties agree to that. And that is the beauty of the act is that it sets up a process and then the parties who are involved in—the bargaining parties them-

selves select what provisions work for them under their particular circumstances. It is as often as those parties decide there should be.

Mr. TIERNEY. Can you explore a little bit broadly for us, how does changing that and passing the RAISE Act, how would that undermine the purpose of the statute?

Ms. VIRK. As I understand it, it would, as I said before, take away the union's right or labor organization's right to exclusively represent workers with regard to wages. Wages are a critical—perhaps the most or one of the most critical economic components in any package, and it would allow the employers to agree with the workers' chosen representative to one thing and then go, without consulting with the union, behind the backs of workers' chosen representative to decide in their discretion who was deserving of additional money and who was not.

And if a majority of the workers in that workplace don't believe that employers' discretion to decide who is deserving and who is not is in their interest, that wish should be respected. And that is what the RAISE Act undermines.

Mr. TIERNEY. Well, currently under the existing law, if a state were to pass any legislation that conflicted with or undermined or preempted federal law under the National Labor Relations Act does the board have the authority to take any action?

Ms. VIRK. It is my understanding that the general council has the authority to sue in federal court.

Mr. TIERNEY. And that strengthens their position of being able to enforce their own rules and regulations in the National Labor Relations Act, is that the theory here?

Ms. VIRK. Certainly. And strengthens the national labor policy of uniform federal labor law.

Mr. TIERNEY. So could you explain to me how passage of H.R. 2118 would—which would strain them from taking such action, would say that they cannot go in and challenge a state who does that, how does that somehow strengthen the National Labor Relations Act?

Ms. VIRK. As I said, really only in an—the Orwellian sense, in that it does the opposite.

Mr. TIERNEY. Seems there is a lot of that going around here today.

Thank you. I yield back.

Chairman ROE. Mr. Kildee?

Mr. KILDEE. Thank you, Mr. Chairman.

First of all, Tim, it is good to see you again. You come from a great family. I have great memories of your grandfather.

Mr. KANE. Thank you, sir.

Mr. KILDEE. We may not agree on these issues, but I certainly respect you personally.

Mr. Virk, how have the recently enacted rules of the NLRB improved the efficiency of union elections and reduced delays?

Ms. VIRK. As I understand those rules, sir, they have been enacted but not enforced. They would do two main things.

They would streamline the pre-election and post-election hearing processes, which currently can be, even in the best case scenario, very long, drawn-out affairs in which an employer pre-hearing, pre-

election, after a majority of employees have decided that they want a representative or decided that they want an election, an employer can stall that process for weeks and even months on end, raising any number of issues that are irrelevant to the—that might be irrelevant to the ultimate outcome of the election.

What the new rules do—and they can do the same thing post-election. After an election is held an employer has a right—a union has a right, as well—to file objections as to the conduct of the election and another hearing process is held. Both of those outcomes of those processes can be separately appealed to the labor board. They are held in front of an administrative law judge and the outcomes can be appealed to the labor board, which again adds additional delay both on the front end and on the back end.

You know, the example that is in my written testimony is actually sadly an example in which the board did every single thing they could and the union, which was voted in by a two-to-one margin by the employees, did not actually receive certification until almost a year after the election petition was filed. The new rules that the board wanted to promulgate would streamline that so they would consolidate appeals and have certain timelines that would have to be met, and also limit the kinds of issues that could be raised pre-election so that the purpose is that the employees want an election, they get an election and they get an election promptly, again, trying to respect the wishes of the workers whose rights are protected by the NLRA.

The second thing that they would do is, as I understand it, under current law the employer is required to provide names and addresses of employees only. Most people these days communicate most often by phone or by e-mail, and under the board's rule there would be additional information provided to the—to a labor organization about how to communicate with the individual employees within the bargaining unit. Mind you, the employer, of course, has access to all of that information as well as access to each and every member of the bargaining unit every day, day in and day out, because they work there and the employer controls their time when they work.

All the new rules would do would be to give a labor union who sought to organize that workforce an additional method of communication—essentially, to modernize the methods of communication. That is my understanding as to the two major parts of that rule.

Mr. KILDEE. Thank you.

I yield the balance of my time to the gentleman from New Jersey.

Mr. ANDREWS. I thank my friend for yielding.

I want to ask Mr. Messenger a question: My understanding of the present law is that if a majority of workers in a bargaining unit sign a card or petition to say they don't want the union anymore and the employer then unilaterally says, okay, I am going to stop collectively bargaining, that the law doesn't require a secret ballot to decertify the union, does it?

Mr. MESSENGER. It does not. However——

Mr. ANDREWS. I mean, you spoke movingly about your devotion to secret ballot. Would you have a secret ballot in that circumstance?

Mr. MESSENGER. Yes.
Mr. ANDREWS. You would?
Mr. MESSENGER. Yes.
Mr. ANDREWS. Is that in the bill that is before the committee, or does that omitted—is that change omitted?
Mr. MESSENGER. I don't know off the top of my head. I would have to look——
Mr. ANDREWS. My reading of the bill is that it does not create that situation. So would it be your recommendation that if the bill before the committee does not require a secret ballot to decertify the union that be added?
Mr. MESSENGER. Yes. However——
Mr. ANDREWS. Thank you.
I yield back.
Chairman ROE. Mr. Kucinich?
Mr. KUCINICH. Thank you very much, Mr. Chairman.
Question for Ms. Virk: In Mr. Kane's testimony he argues that current labor law suppresses individual bargaining rights. Can you tell this committee or subcommittee, how have collective bargaining rights affected the living standards of the middle class since the enactment of the National Labor Relations Act?
Ms. VIRK. I am not an economist like Mr. Kane, but my understanding is that historical trends show quite clearly than when workers choose to join together in any given workplace or industry they better themselves. When there are profits to distribute workers get a share of that; when there is income to the farm workers get a share of that if they bargain collectively. And they are much more likely—and more workers as a group are more likely to get more when they bargain together.
And that is, I think, has been, historically, since 1935 when the Labor Act was passed in the depths of the Depression, it was viewed as an engine to stimulate wage growth, to stimulate and increase economic stability within communities——
Mr. KUCINICH. Well, wait a minute. You know, you say stimulate wage growth. You are speaking not only the organized workforce but the part of the workforce that is not organized, their wages go up as well because there is such a thing as patterns that are set in organized labor——
Ms. VIRK. That is exactly correct, Mr. Kucinich. There is essentially a halo effect. Miller & Long, the employer whose letter member Rokita put into the record, compete regularly in the Washington, D.C. area with construction employers who are unionized, and one of the reasons, perhaps, that they pay good wages is because the unionized construction industry in Washington, D.C. pays good wages.
And it is a rising tide when there is an industry that has significant unionization, and it is a rising tide that lifts all the boats in that industry.
Mr. KUCINICH. So as someone who is involved in negotiating collective bargaining agreements, the people who you work on behalf of, as their counselor explain to us what they tell you why it is important to them.
Ms. VIRK. Why it is important to them to have that——
Mr. KUCINICH. Yes. To have that right.

Ms. VIRK. I think for two reasons, fundamentally. First, they believe that they—if they band together that they will be able to share when an employer prospers, and that they will—secondly, I think, that they will have a meaningful voice in workplace decisions other than economic decisions that affect them in their everyday working life. Respect and dignity on the job are two things that I think most lawyers who represent labor organizations and workers hear as one of the main reasons that people want to unionize.

Mr. KUCINICH. Thank you, Ms. Virk.

Mr. Chairman and members of the committee, we are looking at a particular right here that workers have, the right to collective bargaining, but really it is part of a penumbra of rights: the right to organize, the right to collective bargaining, the right to strike, the right to decent wages and benefits, the right to a safe workplace, the right to a secure retirement. These are part and parcel of rights that workers in a democratic society have.

And so what we are speaking about here is not simply the economics that may become involved. There is a very powerful social and even moral statement here that has to do with the rights of workers. And there is a moral tradition that is connected with the annunciation of those rights.

I thank the chair.

Chairman ROE. Thank you for yielding.

I will now yield time to Mr. Andrews for his closing statement?

Mr. ANDREWS. Well, thank you, Mr. Chairman. I, again, would like to thank you for conducting the hearing and the ladies and gentlemen for their preparation this morning.

I think what the American people want us to do is to work together to create the conditions where jobs can be created by entrepreneurs and employers in the country. That is their agenda. And I think that the litmus test we have to run anything we do here through is that.

And although the legislative proposals made are certainly important and made in good faith, I think they fail that litmus test of really addressing the problem of jobs in the country.

As I said earlier, there are many other things that the Congress could be doing that we are ignoring, and frankly, the evidence—the record here is devoid of any evidence that the enactment of these bills would engender economic growth; I think some of the evidence points in the other direction, that the less collective bargaining you have the higher unemployment can be. At best it is controversial, but there is certainly no record that would show that an assault on collective bargaining would grow jobs.

The particular points being made here I think are lacking, that we have heard that employers who have a collective bargaining agreement can't give merit pay, that is just not true. What is true is if the collective bargaining agreement allows for a merit pay system you have one; if it isn't, you don't. And if the workers want to decertify the union they can.

We have heard about the sanctity of the secret ballot. Well, the truth of the matter is that under the present law the employees can always choose to have a secret ballot under present law, should they choose to in the way of choosing whether they want a union or not, with one exception, which is if the employer unilaterally

withdraws from collective bargaining because there has been a petition signed by a majority of the workers, then there is no secret ballot.

Now, I think to Mr. Messenger's credit, he is consistent and he agrees that that is an inadequacy in the law. But the bill before the committee doesn't fix that inadequacy; it goes after the other ones.

So I certainly think these are important topics that are offered in good faith but they are the wrong agenda for the country right now. I think the agenda for the country right now should be tax cuts for small businesses that create jobs. It should be the ways to get police officers, firefighters, teachers back to work. It should be to deal with the terrible drought conditions in rural America that are destroying the agricultural economy. That is what we should be working on.

And I know some of those things are outside of our jurisdiction but they are not outside of our responsibility. That is what I think we should be doing here today, but I do very much appreciate the witnesses' participation, and you, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding.

And I also want to thank this very succinct group of witnesses. You got to the point quickly and made your points well and I appreciate that.

I agree with my friend, Mr. Andrews, about the need in this country to create jobs, and I think one of the things that I go back to is my position as a small business person and as a local mayor. The way I ended up helping create jobs was—how the government did where I was—was created an environment where businesses could succeed, and that is by lowering regulations and making it easier to operate your business.

And I would give you an example: In our small community of 60,000-plus people, for the 3 years prior to coming to Congress, in 2005 to 2008, we issued $200 million in building permits in a city of 60,000 people. That is pretty good. And guess what I knew by doing that? By having those businesses grow—we are not an income tax state in Tennessee—that allowed, I knew down the line those property taxes were going to be paid and those sales taxes were going to be paid. And with that money I didn't have to borrow money; I could go have that money to pay teachers and firefighters. Not borrow money and hire them, but to do it in that way.

To show you how fiscal management works, we increased our fund balance in our local community from 2003 to $2 million to $24 million without raising taxes. We cut the size of government.

And guess what happened? In 2008 in little Johnson City, Tennessee, when everybody else was going off a fiscal cliff our bond rating went up, and it went up because we had money in the bank. So that is how you run, by limited government making business—a business-friendly environment and allowing that to happen.

And I had to chuckle. Mr. Andrews made my palms sweaty back to my statistics class when he talked about the correlation coefficient. My heart rate went up.

But I do believe in America they don't know what that is, and I think what they want is a job with a higher paycheck. I think in very simple terms that is what we want.

And in 1935 a very basic flaw in workers' rights was recognized and a good law was passed, the NLRA. But there needs to be some improvement to that NLRA, I think, and I know that for myself this, I believe—I agree with Chairman Miller when he said he wanted to strengthen worker rights, and that is what I think we are trying to do, first by allowing a good worker to be—and Ms. Virk is correct, you can do that now, but there are also good workers—I have had them work for me, and I can tell you, one of the worst days of your life as a physician is when your nurse leaves. I mean, that is a bad day because you have got to hire someone else who doesn't know what they are doing. So you want to keep good employees and you want to allow—you should have the right to—if you have a sterling employee outside that agreement—to do that.

Number two, I think, I am so passionate about someone's right to a secret ballot, and I wholeheartedly agree with Mr. Andrews, and I certainly would be open to having the secret ballot for decertification, and if we include that I would love to have him on the bill, since it was your suggestion, so I would be glad to do that.

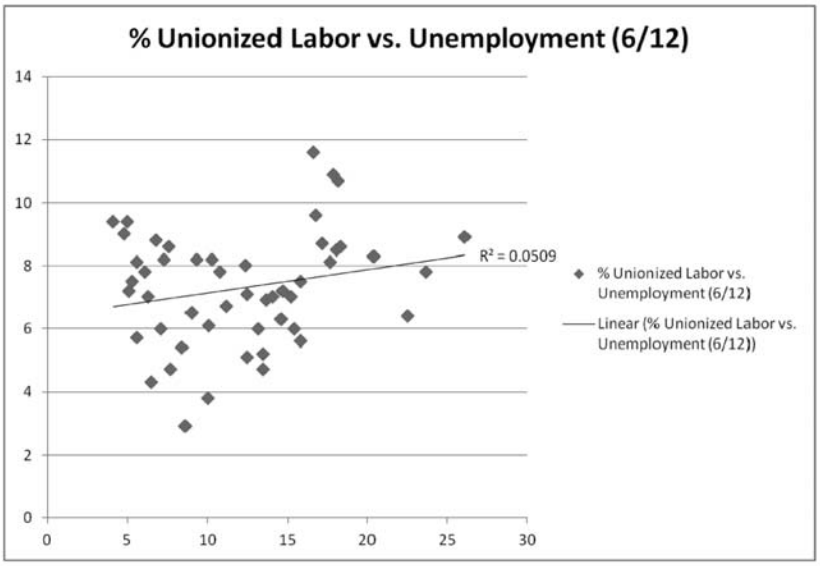
And lastly, I think it—and to President Porter, I think it is a requirement that we keep our word. And I appreciate what you are doing for one of the most disadvantages of—disadvantaged populations in our country, that is our Native Americans. It is shameful.

My father could not stand one of the Tennessee presidents, Andrew Jackson, because of his treatment of the Cherokee Nation. And I think what we need to have the federal government in your case is to—excuse my French, but to butt out and to allow you to carry on your own business.

And I appreciate your all being here, and I want to close by what I think is an Indian, maybe a Seneca saying, and it is, "When you were born you cried and the world rejoiced. Live your life so that when you die the world cries and you rejoice."

And with that, our meeting is adjourned.

[Additional submission of Mr. Andrews follows:]



[Additional submissions of Mr. Miller follow:]

U.S. CONGRESS,
Washington, DC, May 11, 2012.

Hon. JOHN KLINE, *Chairman,*
Committee on Education and the Workforce, 2181 Rayburn House Office Building, Washington, DC 20515.

DEAR CHAIRMAN KLINE: To date, the Committee Majority has requested thousands of documents from the National Labor Relations Board ("the Board") and held six legislative and oversight hearings related to the Board and the National Labor Relations Act. The Majority has also stated in its Budget Views and Estimates for FY 2013 that "[t]he committee will remain vigilant in oversight of the NLRB * * *" Such vigilance is particularly needed now as we confront the most corrosive scandal in the Board's history.

As you know, the Board's Inspector General has issued three investigative reports so far this year that raise serious questions about the conduct of current and former Members of the Board.[1] The most recent reports on Member Terence Flynn detail extensive disclosure of internal, deliberative information by Mr. Flynn to select private parties for their private benefit. Such behavior threatens the Board's integrity and strikes at the very heart of its ability to effectively and efficiently function as an adjudicatory and rulemaking body bound by principles of due process and fair play. The Inspector General has called these matters "a serious threat to the Board's decisional due process."[2] After concluding that Member Flynn released deliberative nonpublic information, the Inspector General in his most recent report states that:

Members of administrative bodies such as the Board cannot freely discuss decisions and points of law and fact if they are fearful that the positions that they take during deliberative discussions or in drafts of documents are going to be made public, distributed to pundits, or leaked to parties.[3]

These reports cannot be ignored by our Committee. We respectfully request that you convene a full Committee hearing post haste with the Inspector General to pro-

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[1] See, Memorandum, Report of Investigation-OIG-I-467 from Board Inspector General David Berry to Board Chairman Mark Pearce and Board Member Brian Hayes (January 23, 2012). See also, Memorandum, Report of Investigation-OIG-I-468 from Board Inspector General David Berry (March 19, 2012) and Memorandum, Supplemental Report of Investigation-OIG-I-468 from Board Inspector General David Berry to the Board (April 30, 2012).

[2] Supplemental Report of Investigation-OIG-I-468 at 13.

[3] Id. At 10 and 11

vide all of our members the opportunity to ask questions and explore in depth the findings and potential consequences of his investigative reports.

A hearing with the Inspector General is only a preliminary step in our efforts to fully investigate these matters. We have begun the process of seeking the voluntary cooperation of a number of principals to provide the Committee with information on their involvement.

Evidence from all three investigative reports has been shared with the Department of Justice. While the Department of Justice is responsible for investigating whether any of the subjects in the Inspector General's investigative reports committed crimes, we are responsible for directly overseeing the effective and efficient performance of the Board. According to the Inspector General's latest report, such performance is in peril. With the Board's ability to properly function at stake, it is incumbent upon us to fully engage as the oversight committee.

Thank you for your consideration of this request.

Sincerely,

GEORGE MILLER, *Senior Democratic Member,*
Committee on Education and the Workforce;
ROBERT E. ANDREWS, *Ranking Member,*
Subcommittee on Health, Employment, Labor and Pensions.

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

March 19, 2012

From: David P. Berry
Inspector General

Subject: Report of Investigation – OIG-I-468

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving allegations of improper conduct by Terence Flynn during the time that he was serving as a Chief Counsel. As a result of our investigative efforts, we found that Mr. Flynn, while serving as a Chief Counsel, violated the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

FACTS

Background

1. Mr. Flynn began working at the NLRB in 2004 as the Chief Counsel to Board Member Peter Schaumber. (IE 1)

2. After Member Schaumber's term ended on August 27, 2010, Mr. Flynn, along with the rest of the staff members, was assigned to Board Member Brian Hayes. (IE 1)

3. On January 5, 2011, the White House announced that the President intended to nominate Mr. Flynn to be a Board Member. (IE 1)

4. On January 9, 2012, Mr. Flynn received a recess appointment as a Board Member. (IE 1)

5. Mr. Flynn's nomination as a Board Member is pending consideration by the U.S. Senate's Committee on Health, Education, Labor, and Pensions. (IE 1)

Litigation Assistance

6. On August 30, 2011, the Board published a rule that requires employers to post a notice informing employees of their rights afforded by the National Labor Relations Act. (IE 2)

7. On September 2, 2011, Mr. Flynn sent the following request to the NLRB librarian: (IE 3)

From: Flynn, Terence F.
Sent: Friday, September 02, 2011 2:54 PM
To: [redacted] Law Librarian
Subject: Research question

[redacted] I don't know if you are the person to ask about this, but I am looking to track down the initial papers (I don't know if it was an injunction proceeding or some other complaint) filed by the American Hospital Association seeking to block the Board's healthcare rulemaking. I'm sure those materials would be lurking around the library somewhere. Any ideas? (I realize you are probably gone for the day and won't be in until Tuesday). Thanks. Terry.

8. Thereafter, Mr. Flynn and Peter Kirsanow, a former Board Member, exchanged the following messages: (IE 4)

From: Kirsanow, Peter [pkirsanow@beneschlaw.com]
Sent: Wednesday, September 07, 2011 11:03 AM
To: Flynn, Terence F
Subject: RE: District Court Case

thanks Terry!

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Wednesday, September 07, 2011 11:01 AM
To: Kirsanow, Peter
Subject: FW: District Court Case

Sorry, Pete. Looks like you are going to have to go with Westlaw archive retrieval.

From: [redacted] Law Librarian
Sent: Wednesday, September 07, 2011 10:58 AM
To: Flynn, Terence F.
Subject: RE: District Court Case

I'm afraid we're finding nothing on this case. If the AHA sued to stop a rulemaking then there wouldn't be an inciting NLRB case that would have produced a paper trail. We've looked through all our stuff just in case and blown the fluffy clouds of dust off the microfiche and microfilm, and asked the Records Department to strap on their headlamps and pith helmets and go prospecting, but to no avail.

Since the case predates PACER coverage, I'm afraid the only way to get these documents is going to be to request them from the court, and they'll probably have to dig them up from storage somewhere.

The only other Hail Mary option that we could think of would be checking with the ExecSec's office or the GC to see if they kept something floating around.

Sorry! I wish I could have been more helpful. Let me know if you'd like me to start the process of retrieving the case file from the Court.

[redacted]

From: Flynn, Terence F.
Sent: Tuesday, September 06, 2011 3:11 PM
To: [redacted]
Subject: RE: District Court Case

Yes, that is it.

From: [redacted]
Sent: Tuesday, September 06, 2011 3:00 PM
To: Flynn, Terence F.
Subject: District Court Case

This appears to be the decision in the District Court that eventually ended up at the Supreme Court in 1990. If it's the right one, I can ask if Case Records still has anything associated with it.

[The remainder of the message included an excerpt from Westlaw]

9. On September 7, 2011, Mr. Flynn sent an e-mail message to former Member Kirsanow that read "Pete: You may have already pulled a copy of this petition as well" and included as an attachment a document from Westlaw related to a Petition for Review of a rule under, among other citations, the Administrative Procedure Act. (IE 5)

10. On September 8, 2011, former Member Kirsanow, as the attorney for the National Association of Manufacturers, filed a case in the U.S. District Court for the District of Columbia seeking to prevent the NLRB from implementing the notice posting rule. (IE 6)

11. When interviewed, the Law Librarian provided the following information: (IE 7)

a. He recalled performing the research for Mr. Flynn and estimated that he spent 2 or 3 hours on the research and that he used Westlaw, BNA-LERC, and PACER to conduct the research; and

b. During the time that he conducted the research for Mr. Flynn, he had other official work that he could have been doing.

12. On September 19, 2011, Mr. Flynn forwarded the following e-mail message to former Member Kirsanow: (IE 8)

From: Flynn, Terence F
Sent: Monday, September 19 2011 4 11 PM
To: 'Peter Kirsanow'
Subject: FW second complaint on the notice posting rule
Importance: High
Attachments: NFIB NRTW complaint pdf notice of related cases pdf

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From: HELTZER, LES (Hdqs)
Sent: Monday, September 19, 2011 4:02 PM
To: Pearce, Mark G.; Becker, Craig; Hayes, Brian
Cc: Hirozawa, Kent; Colwell, John F.; Winkler, Peter D.; Murphy, James R.; Flynn, Terence F.; Schiff, Robert; Cowen, William B.; Garza, Jose
Subject: FW: second complaint on the notice posting rule
Importance: High

All—

I am forwarding the attached a Complaint for Declaratory and Injunctive Relief regarding the Final Rule Posting of Employee Rights. The complaint was filed jointly on 9 16/11 in the US Dist Ct in DC by the Right to Work Legal Defense and Education Foundation and the National Federation of Independent Business.

LES HELTZER
EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD

From: [redacted]
Sent: Monday, September 19, 2011 3:47 PM
To: Solomon, Lafe E.; Malone, Celeste J.; Abruzzo, Jennifer; HELTZER, LES (Hdqs); Ferguson, John H.; Lieber, Margery E.; Moskowitz, Eric G. [redacted Attorney]
Subject: second complaint on the notice posting rule

Attached, please find the second complaint, this one by both Right to Work and the National Federation of Independent Business The first claim for relief is largely identical to the NAM complaint (with the exception that it references Section 8(c), but the second claim adds a First Amendment allegation)

[redacted] and I are considering whether to file a motion for consolidation of the two cases it should not be opposed, b/c the plaintiffs in the second case listed the NAM as a related case in the other attachment Also both cases have been assigned to Judge Berman

[redacted]

13. Mr. Flynn also sent the message to former Member Schaumber. (IE 9)

14. The attorney who sent the original e-mail message considered the information regarding the consideration of whether to file a motion for consolidation of the cases to be attorney-client information. (IE 10)

Assistance and Disclosure of Deliberative Information

15. On November 18, 2011, Mr. Flynn stated in an e-mail message to Name, a former Chief Counsel, that the D. H. Horton decision may not issue because Member Hayes is recused, but that the majority wanted to press forward and that there is a New Process problem in doing so. (IE 11)

16. On November 18, 2011, in response to a follow-up message from Mr. Name, Mr. Flynn disclosed legal advice that the Board received from the Division of Enforcement Litigation regarding going forward with the D. H. Horton decision with the recusal of Member Hayes. (IE 12)

17. Prior to his employment at the NLRB, Mr. Flynn was employed by the law firm Crowell & Moring, LLP. (IE 1)

18. On June 17, 2011, Mr. Flynn forwarded an e-mail message to an attorney at Crowell & Moring, LLP, stating that the proposed representation rules would be published on June 22, 2011, and that comments would be due on August 22, 2011. (IE 13)

19. On June 21, 2011, the NLRB issued its public announcement of the proposed representation rules and the date that the comments would be due. (IE 14)

20. On August 17, 2011, Mr. Flynn sent an e-mail message to two attorneys at Crowell & Moring, LLP, that discussed an action filed under the Freedom of Information Act in the U.S. District Court for the District of Columbia seeking documents related to the Boeing unfair labor practice case that stated he "would love to see something juicy emerge out of these fishing expeditions" and "[u]nfortunately, these guys would readily destroy anything embarrassing." (IE 15)

21. On August 25, 2011, Mr. Flynn sent an e-mail message that provided advice on practicing before the NLRB to an attorney from Crowell & Moring, LLP. (IE 16)

22. On September 16, 2011, Mr. Flynn had an exchange of e-mail messages with an attorney at Crowell & Moring, LLP, that discussed agreements that an employer and union could make prior to the employer's voluntary recognition of the union. (IE 17)

23. On September 16, 2011, Mr. Flynn sought the assistance of Board staff in responding to the request for information from the attorney at Crowell & Moring, LLP, about agreements that an employer and union could make prior to the employer's voluntary recognition of the union. (IE 18)

24. On October 28, 2011, Mr. Flynn responded to a question from an attorney at Crowell & Moring, LLP, regarding "10(j)" approval by stating that a Board Member would dissent on a matter that had not been voted on. (IE 19)

25. An examination of the hard drive from Mr. Flynn's Government computer disclosed that, on July 6, 2010, a document identified as "Schaumber business plan.doc" was edited. (IE 20)

26. The business plan included the following: (IE 21)

> My practice will be developed in part by leveraging my Agency connections and focusing the attention of senior management on the likely priorities of the Obama Board and strategies to respond to them. I have worked closely with the Chairman of the current Board for over seven years and with the other two Democrat Members for six months. I have had many discussions with the newly confirmed Republican Member, Brian Hayes, and will be working with him regularly for the balance of my current term. I know well all of the significant players on the Board-side of the Agency and many on the General Counsel side, including most of the Regional Directors, who are responsible for much of the day-to-day decision making regarding prosecutions of alleged unfair labor practices.. . .

27. An examination of the hard drive from Mr. Flynn's Government computer disclosed that, on September 3, 2010, 6 days after former Member Schaumber's term ended, a document identified as "Schaumber SuppBusPlan.doc" was edited. (IE 1 & 20)

28. The supplemental business plan included, among other things, that former Member Schaumber would "serve as a liaison for the firm on matters requiring high level intervention at the National Labor Relations Board and other Government agencies" and would "provide advice and counsel to existing clients both unionized and un-unionized on current Board developments." (IE 22)

29. The documents identified as "Schaumber business plan.doc" and "Schaumber SuppBusPlan.doc" were both found in the file directory path "Documents and Settings\tflynn\My Documents." (IE 20)

30. A file identified as "sHAUMBER wsj ARTICLE.doc" was found on the Government computer that is assigned to Mr. Flynn in the file directory path "Documents and Settings\tflynn\My Documents" with a file creation date of September 21, 2010. (IE 20 & 23)

31. An examination of the hard drive from Mr. Flynn's Government computer disclosed that a file identified as "sHAUMBER wsj ARTICLE.doc" was edited. (IE 20 & 23)

32. On May 4, 2011, Mr. Flynn forwarded a copy of an e-mail message to former Member Schaumber that originated from the Executive Secretary requesting information on cases that present a certain issue that the Board would like to modify or overrule the precedent. (IE 24)

33. On June 10, 2011, former Member Schaumber requested assistance by e-mail message from Mr. Flynn with finding out information about a hearing because he wanted to make a recommendation to the attorney representing South Carolina regarding intervening in the Boeing case based upon the delay of the Acting General Counsel in filing the complaint. (IE 25)

34. On June 10, 2011, Mr. Flynn responded to former Member Schaumber in a reply e-mail message by stating that he was not sure of which hearing, but for the notice posting the details will go out with the "NPRM" and if it is the "Hill" he should contact Member Hayes. (IE 25)

35. On July 28, 2011, former Member Schaumber sent an e-mail message to Mr. Flynn stating that he had a debate with Andy Stern that night on the Boeing legislation and asking about cases involving unlawful transfers. (IE 26)

36. On July 28, 2011, Mr. Flynn responded to former Member Schaumber by describing two cases that he could recall. (IE 26)

37. On July 29, 2011, Mr. Flynn forwarded an e-mail message to former Member Schaumber that had as an attachment internal memorandums between the Office of the General Counsel and the Board. (IE 27)

38. An official from the Division of Enforcement Litigation reviewed the memorandums and stated that one of them contained legal advice to the Board. (IE 28)

39. On August 3, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that the Beck decisions were "flowing out" and disclosed the Acting General Counsel's recommendation regarding whether the Board should join in certain litigation as an amicus party. (IE 29)

40. On August 10, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber discussing the deliberations of a former Chairman in the Mezonos Maven Bakery Inc. decision. (IE 30)

41. On August 22, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that the final rule for the notice posting, with a dissent by Member Hayes, would be posted that day or the next day. (IE 31)

42. On August 31, 2011, Mr. Flynn sent former Member Schaumber an e-mail message stating that a certain Member was researching the authority of the Board to act in a certain situation. (IE 32)

43. On August 30, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NoticePosting8-29.doc." (IE 33)

44. The track changes for "NoticePosting8-29.doc" recorded that Mr. Flynn edited the document on August 30, 2011, from 10:42 a.m. to 11:42 a.m. (IE 33)

45. A file titled "Schaumber NoticePosting8-29.doc" was found on the Government computer that is assigned to Mr. Flynn in the file directory path "Documents and Settings\tflynn\My Documents." (IE 20)

46. On September 2, 2011, the *National Review Online* published an article by former Member Schaumber that appears to be a further revised version of "NoticePosting8-29.doc." (IE 34)

47. On September 15, 2011, Mr. Flynn responded by e-mail message to a request from former Member Schaumber to look at a list of cases. Mr. Flynn responded that he did not see any Beck cases and that he would pass it "around" to see if anyone else had additions. (IE 35)

48. On September 15, 2011, Mr. Flynn forwarded the list of cases provided to him by former Member Schaumber to four NLRB attorneys. (IE 36)

49. On September 19, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber stating that there were no additional thoughts on the list of cases. (IE 37)

50. On September 19, 2011, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a document known as "Lead Cases 9 16 11.doc" that provided the Member and attorney assignments and the status of certain cases pending before the Board. (IE 38)

51. On September 23, 2011, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a document titled "Lead Cases 9 22 11 (2).doc" that provided the Member and attorney assignments and status of certain cases pending before the Board. (IE 39)

52. On September 30, 2011, Mr. Flynn responded to an e-mail message from former Member Schaumber with comments on pending legislation regarding the Specialty Healthcare decision. (IE 40)

53. On October 11, 2011, Mr. Flynn, in response to a question about a pending case, forwarded to former Member Schaumber an e-mail message that named the counsels who were assigned to a case and that a certain Member had circulated a draft that had been approved by another Member, but not yet considered by a third Member. (IE 41)

54. On November 30, 2011, at 8:07 a.m., Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document containing an analysis that had been

prepared by three Board counsels of the resolution for the representation rule that would be considered at the Board's open meeting. (IE 42)

55. On November 29, 2011, the day prior to sending the counsel's analysis to former Member Schaumber, Mr. Flynn received an e-mail message from him that read: (IE 43)

From: peter@schaumber.com
Sent: Tuesday, November 29, 2011 8:23 AM
To: Flynn, Terence F ; Terry Flynn Personal
Subject: Hayes

I am on Fox twice today. Can I say Brian will be at the public "deliberations" tomorrow? I would add that it is not usual for a member to withhold a vote until he sees the majority's proposed rule and the decision supporting it.
Sent from my Verizon Wireless BlackBerry

56. The analysis by the three counsels was not done at Mr. Flynn's request and was for a Board Member. (IE 44)

57. In addition to Mr. Flynn, each of the three counsels provided his comments to the other counsels. (IE 44)

58. A comparison of the document sent by Mr. Flynn to former Member Schaumber and the comments submitted by the counsel shows that the comments were included in the document without change. (IE 42 & 44)

59. On November 30, 2011, at 8:36 a.m., former Member Schaumber replied to Mr. Flynn's e-mail message stating "Thanks. I sent an op ed that went up on NRO to you last night[.]" (IE 45)

60. On November 30, 2011, at 9:04, Mr. Flynn sent an e-mail to Member Hayes with a link to the "op ed" at the National Review Online that was referenced in former Member Schaumber's reply e-mail message. (IE 46)

61. On December 13, 2011, Mr. Flynn sent former Member Schaumber an e-mail message as follows: (IE 47)

From: Flynn, Terence F.
Sent: Tuesday, December 13, 2011 9:46 AM
To: Flynn, Terence F., 'peter@schaumber.com'
Subject: RE: Final Rule Resolution thoughts.doc

Peter In the course of responding to a FOIA request today, I noticed that I inadvertently sent this document to you; it was intended for Peter Carlton. Please return the document to me. Thanks. Hope all is well.

From: Flynn, Terence F.
Sent: Wednesday, November 30, 2011 8:08 AM
To: 'peter@schaumber.com'
Subject: Final Rule Resolution thoughts.doc

Thoughts from counsel on the resolution

62. The November 30, 2011, reply by former Member Schaumber was found in the "Deleted Items" folder of a Outlook PST file created on December 5, 2011, from Mr. Flynn's Government e-mail account on the NLRB's Outlook server. (IE 48)

63. When interviewed, the Board's Solicitor provided the following information: (IE 49)

a. The Board does not release deliberative information to the public;

b. The categories of information that are generally considered to be deliberative information include the Member assigned to a case, the counsel assigned to the case, the active status of a pending case, and the pre-decisional votes of any particular Member;

c. Except for the final votes, the deliberative information remains privileged even after a decision is issued;

d. Communication between a Member and his or her counsel would also be deliberative;

e. When the General Counsel is acting in his capacity as the Board's attorney, his legal advice and analysis would be privileged;

f. In response to requests from Congressional committees, the Board has withheld deliberative information.

64. When asked, Chairman Pearce stated that he did not approve the release of Board documents by Mr. Flynn. (IE 50)

65. When asked, former Chairman Liebman stated: (IE 51)

a. She did not approve the release of Board documents by Mr. Flynn; and

b. She considered any comments that she made to her staff counsels involving decisions on a case to be deliberative information that was confidential.

66. On June 23, 2011, Mr. Flynn received advice from an Agency ethics official regarding making comments on the rulemaking. She stated: (IE 52)

a. There is no ethical prohibition on speaking to someone who calls about mechanical or technical questions, as the rulemaking is public information;

b. Doing so, however, could have implications for him in light of his pending nomination – particularly if it became known publicly that any information someone might submit came from him;

c. It is a thin line between offering public information and offering up personal opinion;

d. He should assume that anything he might say could make it to the press, which could give the appearance that these people are trying to curry favor with him because of his pending nomination, or that he is providing those individuals with inside information that is not available to the general public; and

e. It is probably in his best interest, and the Agency's as well, to refer the individuals to the Office of Executive Secretary or the Office of Public Affairs.

67. On September 12, 2011, a candidate for the Republican nomination for President announced that former Member Schaumber would serve as a co-chair of the campaign's Labor Policy Advisory Group. (IE 53)

68. Mr. Flynn was interviewed on March 15, 2012. A transcript of the interview is at IE 54.

69. Former Member Kirsanow did not respond to our requests for an interview.

70. The NLRB policy for its telecommunications system is at IE 55.

ANALYSIS

The facts as outlined above provide a basis for finding that Mr. Flynn violated the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

Standards of Ethical Conduct for Employees of the Executive Branch

The standards state that an employee shall not "allow the improper use of nonpublic information to further his own interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. 2635.703(a). "Nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know had not been made available to the general public." 5 C.F.R. 2635.703(b).

Information regarding the deliberations of the Board is protected from disclosure by the *Guide for Staff Counsel of the National Labor Relations Board.* The information protected from disclosure includes the identity of the Board Member or staff assigned to a case and the status of a case. Additionally, staff counsels are only authorized to discuss pending cases with personnel on the Board-side of the Agency. Unauthorized disclosure of information either before or after a case is issued is grounds for discharge. In addition to those restrictions, all NLRB employees are prohibited from releasing Agency documents without written consent by the Chairman or General Counsel. 29 C.F.R. 102.118. Attorney-client information in intra-agency memorandum is protected by both Federal statute, 5 U.S.C. 552(b)(5), and the rules of professional responsibility in every U.S. jurisdiction.

The manner in which the Board has implemented its policies to protect its deliberative information was described by the Solicitor in a May 25, 2011, letter to the U.S. House of Representative's Committee on Education and the Workforce. In refusing to provide deliberative information to the Committee, the Solicitor explained that "deliberative, pre-decisional documents and communication are treated with the highest confidentiality" and "it is very rare for any deliberative, pre-decisional communication to be distributed more broadly than those persons directly involved in the consideration of a case."

The information provided by Mr. Flynn involving the lead case lists, pre-decisional votes and positions of the members, the identity of counsel assigned to a case, the status of cases, the researching issues in cases, the deliberation of the former Chairman in Mezonos Maven Bakery Inc., the desire of two members to press forward in D.H. Horton, advice to the Board on D.H. Horton, and the analysis of the Board's resolution on the representation rule, were all deliberative, pre-decisional information that was protected from disclosure and considered by the NLRB to be the most confidential of Agency information. Likewise, the information in the e-mail message from the attorney involved in the notice posting litigation and advice of the Acting General Counsel were attorney-client information and protected from disclosure.

Given Mr. Flynn's position as a Chief Counsel and his years of service, he knew, or should have known, that he had a duty to maintain the confidence of the information that he received in the performance of his official duties.

We also find that the improper disclosure of information to former Members Kirsanow and Schaumber amounted to a conversion of the information for the private benefit of former Member Kirsanow and his client, the National Association of Manufacturers, and former Member Schaumber's labor relations consulting and/or legal practice. The improper disclosures of information to former Member Schaumber were particularly detrimental to the Board's deliberative process in that they involved the positions of Board Members and staff prior to the public announcement of Board decisions and disclosure of the type of information that could have a chilling effect on the operation of the Board and may prejudice the due process rights of the parties in pending and future cases. See Page 9 of attachment to IE 48.

The standards state that "[a]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." 5 C.F.R. 2635.705(b). Mr. Flynn's requests to the Law Librarian to research and locate documents for former Member Kirsanow violated that standard. Providing assistance to an individual who is engaging in a legal action against the NLRB is not within the scope of duties of the Law Librarian, nor is it authorized by law or regulation. Also, reviewing case lists or providing assessments of labor law issues for former Member Schaumber and attorneys who are Mr. Flynn's former law firm associates are not within the scope of the duties of Mr. Flynn's subordinate Board counsel.

The standards also required Mr. Flynn, as a Chief Counsel, to use his official time in an "honest effort" to perform official duties. See, 5 C.F.R. 2635.705(a). Mr. Flynn was not authorized to use official time to provide editorial services to former Member Schaumber or otherwise assist him with his labor relations consulting and/or legal practice. Because of the ongoing and continuous nature of the assistance provided by Mr. Flynn to former Member Schaumber, we find that Mr. Flynn violated this standard. We note that, in general, we were only able to review e-mail records from May 2011 forward that remained on the NLRB e-mail server through the period of this investigation.

The standards also state that an employee shall not use Government property for other than an authorized purpose. 5 C.F.R. 2635.704. The term "Government property" includes telecommunications equipment and services. Id. Mr. Flynn was clearly not authorized to use the NLRB's e-mail system to disclose nonpublic information, and his conduct also violated the NLRB's written policy of acceptable use of its information technology resources. That policy states, in part, that it is unacceptable to use the e-mail system for activity that is illegal or inappropriate in the workplace or to send material that is libelous or tends to involve defamation of character. See IE 55. The policy also states that it is unacceptable to use the e-mail resources for commercial purpose or in support of "for profit" activities. The use of the e-mail system by Mr. Flynn violated those provisions.

The ethics advice provided to Mr. Flynn is not sufficient to provide him with safe harbor. See 5 C.F.R. 2635.107. That advice was narrowly tailored and addressed only comments that he might make involving mechanical or technical questions involving rulemaking. The e-mail message to former Member Schaumber involved providing advance notice that the rule would be issued rather than answering a mechanical or technical question. As such, Mr. Flynn did not act in accordance with the advice that he received from the Agency's ethics officer. With regard to forwarding the internal Agency e-mail message about the status of the announcement of the rulemaking to an attorney at Crowell & Moring, LLP, it occurred 5 days before Mr. Flynn requested the ethics officer's advice.

We discussed our interpretation of the standards in this matter with the U.S. Office of Government Ethics and the Designated Agency Ethics Official.

Lack of Candor

When asked about the November 30, 2011, e-mail message to former Member Schaumber that had as an attachment a document containing an analysis that had been prepared by Board counsel of the resolution for the representation rule that would be considered at the Board's open meeting, IE 42, Mr. Flynn stated:

> And I did not remember sending this to Peter Schaumber. I don't know why I would have. There's no reason why I would have sent this to Peter Schaumber. And I believe what happened here is that this was an auto-fill option on my Outlook and that was misdirected to Peter. It should have gone to Peter Name. And I discovered that error when we were responding to a FOIA request. And I sent

Member Schaumber an e-mail notifying him of -- former Member Schaumber an e-mail notifying him of the error and asking that he return it.

Had Mr. Flynn sent former Member Schaumber the e-mail message in error, he would have realized the error, as early as 29 minutes later, when he received the reply e-mail message from former Member Schaumber thanking him for it rather than 13 days later when reviewing his e-mail messages for a FOIA request. We know that Mr. Flynn was aware of the e-mail reply because Outlook indicates that it was opened and we found it in the "Deleted Items" folder, indicating that Mr. Flynn was aware that he received it and then deleted it. The latest the e-mail message could have been deleted was December 5, 2011, because that is the date the PST file was downloaded from the NLRB's Outlook server. December 5, 2011, is also the date that Mr. Flynn was informed that he was the subject of an OIG investigation involving, in part, his communication with former Member Schaumber. Also, the reply by former Member Schaumber made reference to his article being posted at the *National Review Online*. Twenty-eight minutes after that e-mail message was sent, Mr. Flynn sent Member Hayes an e-mail message with a link to the article on the *National Review Online* Web site. The reference to that opinion piece by former Member Schaumber certainly would have indicated to Mr. Flynn that he sent the message to the wrong "Peter" had he actually done so.

When we reviewed the document that Mr. Flynn sent to former Member Schaumber, we found that it was comprised of counsels' comments that had been sent to Mr. Flynn the prior day by the three counsels via three e-mail messages – one from each counsel. The counsels' comments appear to have been "cut and pasted" into the document because they were unedited and each remained in its original font. Each of the three counsels who contributed the comments was included as addressees on each of the e-mail messages that transmitted the comments to Mr. Flynn. We could not find that Mr. Flynn made any notations or comments in the document. Given that Peter Name already had the comments, there was absolutely no reason for Mr. Flynn to forward the comments, including Peter Name own comment, to him. Moreover, we know that the request for comments did not originate with Mr. Flynn nor were the comments intended for use.

We also find that Mr. Flynn's statement that he did not know how former Member Kirsanow was going to use the information that he requested from the Law Librarian is not credible. On September 7, 2011, he sent former Member Kirsanow an e-mail message that read "Pete: You may have already pulled a copy of this petition as well" and included an attached Westlaw document that was a Petition for Review of a regulation that was completely unrelated to the NLRB. The only reason to send such an e-mail message to former Member Kirsanow is if Mr. Flynn knew that he was preparing or considering filing such an action involving the recently issued NLRB rule.

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General

Memorandum

April 30, 2012

To: The Board

From: David P. Berry
Inspector General

Subject: Supplemental Report of Investigation – OIG-I-468

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving allegations of improper conduct by Terence Flynn during the time that he was serving as a Chief Counsel. In a prior report, dated March 19, 2012, we found that Mr. Flynn, while serving as a Chief Counsel, violated the Standards of Ethical Conduct for Employees of the Executive Branch and that he lacked candor during the investigatory interview.

Following the issuance of that report, Mr. Flynn made certain public statements that caused us concern and we determined that it was necessary to continue our investigative efforts. Our initial investigative efforts involved reviewing e-mail messages between about May 5, 2011 and December 5, 2011. To continue our investigation, we requested that the Office of the Chief Information Officer restore Mr. Flynn's e-mail account as of the following dates: September 26, 2010; November 11, 2010; January 31, 2011; and May 5, 2011. Through this process, we compiled a group of e-mail messages that spans from approximately the time that former Member Peter Schaumber's term as a Board Member ended until the date that Mr. Flynn was notified that he was the subject of an OIG investigation.

Through our additional investigative efforts, we determined that Mr. Flynn released deliberative nonpublic information that included, among other things, a draft of a Board majority decision and four dissents that had not yet been issued, as well as other deliberative nonpublic information involving the processing of cases and issues by the Board.

FACTS

Release of Draft Board Decisions

1. At 8:51 a.m., on October 1, 2010, former Member Schaumber sent Mr. Flynn an e-mail message that read: (IE 1)

> Can you keep me posted on what Board decisions I should be reading?

2. In a reply e-mail message at 9:45 a.m. on October 1, 2010, Mr. Flynn responded "sure" and mentioned publicly available information that had appeared in the Daily Labor Report. (IE 1)

3. At 9:47 a.m., on October 1, 2010, Mr. Flynn forwarded an e-mail message, dated September 30, 2010, to former Member Schaumber that had as an attachment a dissent by Member Brian Hayes in the case *Richie's Installations, Inc.*, 21-CC-3337. (IE 2)

4. Member Hayes' dissent was first circulated to the panel on September 30, 2010. (IE 3)

5. The final panel Board Member voted on *Richie's Installations, Inc.*, on September 30, 2010. (IE 3)

6. The Board decision in *Richie's Installations, Inc.* was issued on October 7, 2010. (IE 4)

7. In his dissent, Member Hayes noted that the reasons for his dissent are fully set forth in the joint dissent in *Eliason & Knuth*, 355 NLRB No. 159 (2010). (IE 2 & 4)

8. Member Hayes was joined in the joint dissent in *Eliason & Knuth* by then-Member Schaumber. (IE 5)

9. At 2:23 p.m., on October 6, 2010, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a dissent by Member Brian Hayes in the Request for Review in *New York University,* 2-RC-23481. (IE 6)

10. On October 6, 2010, former Member Schaumber responded by reply e-mail message to Mr. Flynn that stated "[g]reat dissent." (IE 7)

11. Member Hayes' dissent was circulated to the panel on October 6, 2010, at 12:40 p.m. (IE 8)

12. The final panel Board Member voted on *New York University* on October 20, 2010. (IE 9)

13. The Board's decision on the Request for Review in *New York University* was issued on October 25, 2010. (IE 10)

14. On January 20, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a dissent by Member Hayes in the decision in *Mastec Direct TV*, 10-RC-15707. (IE 11)

15. On January 20, 2011, former Member Schaumber responded by reply e-mail message to Mr. Flynn that stated: (IE 12)

> Thanks, only skimmed, but quite good. It would have been nice if he cited me ☺

16. Member Hayes' dissent in *Mastec Direct TV* was circulated to the other panel members on January 5, 2011 and revised dissent was circulated on February 17, 2011. (IE 13)

17. The final panel Board Member voted on *Mastec Direct TV* on March 1, 2011. (IE 13)

18. On March 11, 2011, the Board's decision in *Mastec Direct TV* was issued. (IE 14)

19. On January 25, 2011, Mr. Flynn sent an e-mail message to former Member Schaumber that had as an attachment a draft of a decision by Member Becker in the case of *Albertson's LLC*, 28-CA-22546. (IE 15)

20. The panel considering Member Craig Becker's draft decision also included Chairman Wilma Liebman and Member Mark Pearce. (IE 16)

21. Member Becker's draft decision was circulated to the panel on January 24, 2011. (IE 16)

22. When released by Mr. Flynn to former Member Schaumber, Member Becker's draft had not been voted on by the panel. (IE 15)

23. On February 10, 2011, Albertson's LLC made a request to the Board to withdraw its exceptions to the Administrative Law Judge's decision, citing the concurrence of the charging party. (IE 17)

24. On February 25, 2011, the request for withdrawal of the exceptions was approved by an Associate Executive Secretary acting at the direction of the Board. (IE 18)

Release of Other Deliberative Information and Assistance

25. In the earlier report, we stated that an examination of the hard drive from Mr. Flynn's Government computer disclosed that, on September 3, 2010, 6 days after former Member Schaumber's term ended, a document identified as "Schaumber SuppBusPlan.doc" was edited. (Fact 27 of the prior report)

26. On August 31, 2010, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "SuppBusPlan.doc" and asked that Mr. Flynn take a look at it. (IE 19)

27. On September 3, 2010, at 11:40 a.m., Mr. Flynn sent a reply e-mail message to former Member Schaumber with an attachment titled "SuppBusPlan.doc." (IE 20)

28. On September 3, 2010, at 12:26 p.m., Mr. Flynn sent a second e-mail message with an attachment titled "SCHAUMBER SuppBusPlan.doc" and a message that read: (IE 21)

> Peter: This is a recreation of what I sent before. Please confirm receipt of this one.

29. On September 10, 2010, Mr. Flynn forwarded to former Member Schaumber an e-mail message that had as an attachment a memorandum from Member Hayes to the Board stating Member Hayes' position on the issue of the General Counsel's request for electronic posting of remedy notices. Mr. Flynn added a comment that read "[s]howing some backbone …" (IE 22)

30. On September 20, 2010, Mr. Flynn forwarded to former Member Schaumber an e-mail message that contained a proposal regarding 10(j) processing from Chairman Liebman that she wished to discuss at a meeting with the Board and senior Board managers. (IE 23)

31. In the earlier report, we stated that a file identified as "sCHAUMBER wsj ARTICLE.doc" was found on the Government computer that is assigned to Mr. Flynn in the file directory path "Documents and Settings\tflynn\My Documents" with a file creation date of September 21, 2010. (Fact 30 of the earlier report)

32. On September 21, 2010, former Member Schaumber sent an e-mail message to Mr. Flynn with an attachment identified as "wsj ARTICLE.doc." (IE 24)

33. On September 21, 2010, Mr. Flynn responded to former Member Schaumber by a reply e-mail message that included as an attachment an edited article identified as "sCHAUMBER wsj ARTICLE.doc" and stating: (IE 25)

> Peter: I have attached proposed mods, though I confess to having some misgivings; I'm not sure that having an angry glare focused on the Board (and you by Union-side people) advances the prospect of my nomination, even though it does not appear imminent.

34. On September 22, 2010, former Member Schaumber responded: (IE 26)

> Spoke with Schneider today. He sees no problems with your nomination. It is being held up because they are not ready to nominate a GC. They are holding up other nominations pending yours, such as the head of the GPO. The unions want the Obama nominee for GPO to be confirmed.
>
> He sees no problem with the wsj op ed for you – the WH is not looking for reasons to hold your nomination up – but for me.

> Has anyone done any research on what, if any requirements, the APA places on agency rule-making?

35. On October 12, 2010, Mr. Flynn sent former Member Schaumber an e-mail message stating that the Board "will be voting Kroger this Friday" and stating his opinion on the likely outcome of the vote. (IE 27)

36. The Board met in an Agenda on October 13, 2010, during which it deliberated on *Kroger Limited Partnership*, 25-CB-08896. (IE 28)

37. The Board has not issued its decision in *Kroger Limited Partnership*. (IE 28)

38. On November 1, 2010, Mr. Flynn sent an e-mail message to former Member Schaumber stating that certain decisions had been issued by the Board, including the grant of review in the *New York University* Request for Review. The e-mail message included the following in reference to the grant of review: (IE 29)

> [T]he case Wilma [redacted] Deliberative [redacted] m [redacted]

39. On November 30, 2010, former Member Schaumber sent Mr. Flynn an e-mail message asking if Mr. Flynn was aware of any recent handbook or insignia wearing cases other than *Stabilus, Inc.* and added a reference to the status of Mr. Flynn's nomination. (IE 30)

40. On November, 30, 2010, Mr. Flynn stated "[n]ot that I can think of" in a reply e-mail message to former Member Schaumber. (IE 30)

41. On January 6, 2011, Mr. Flynn sent former Member Schaumber an e-mail message stating "Thank you, my friend" followed by the White House press release announcing Mr. Flynn's nomination as a Board Member. (IE 31)

42. On January 6, 2011, former Member Schaumber responded to Mr. Flynn's e-mail message with the following: (IE 31)

> You're welcome. Schneider has been keeping me informed. He was surprised I wanted to remain engaged on these issues and told me this week that he hopes I knew that a renomination would have been mine for the asking. I told him that I knew that but that I had had eight great years, that you were available to take my spot and I wanted you to have the opportunity. So do a good job, as I am sure you will.

43. On January 14, 2011, Chairman Liebman sent an e-mail message to the Board, Chief and Deputy Chief Counsels, the Solicitor, and the Executive Secretary detailing the matters that were her top priorities for final issuance by the end of her term. (IE 32)

44. On February 3, 2011, Mr. Flynn forwarded the e-mail message with Chairman Liebman's priorities to former Member Schaumber. (IE 32)

45. On March 2, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that included the following question: (IE 33)

> Peter: Can you think of any ethical restraints on a Board member discussing a proposed change to election procedures that has not yet been made public – raising concerns both about the substance of the proposal and the manner in which it is being moved through the Agency (i.e. without open and public discussion, etc.)? That seems different to me than discussing an actual case while it is pending.

46. At 9:49 a.m., on March 30, 2011, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpED.doc" with a message that read in part "Here it is. Thanks. …" (IE 34)

47. At 11:13 a.m., on March 30, 2011, Mr. Flynn responded to former Member Schaumber: (IE 35)

> I've reviewed this and am happy to suggest revisions, but they will be extensive and I can't guarantee I can get through them today. This week, for sure.

48. At 11:31 a.m., on March 30, 2011, former Member Schaumber sent Mr. Flynn an e-mail message that had as an attachment a document titled "SpecialityHeathcareBackgroundPaper2.doc." (IE 36)

49. At 8:47 a.m., on March 31, 2011, former Member Schaumber sent Mr. Flynn an e-mail message with the subject "Additional thoughts" and stated "[o]n re-reading what I wrote its approach may be too narrow. What do you think of the approach below?" and appears to provide additional or replacement paragraphs for the document provided the day before. (IE 37)

50. At 10:25 a.m., on March 31, 2011, former Member Schaumber sent Mr. Flynn additional editorial thoughts for the document provided the day before. (IE 38)

51. At 10:58 a.m., on March 31, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpEd.doc." (IE 39)

52. On April 1, 2011, Mr. Flynn sent former Member Schaumber an e-mail message that had as an attachment a document titled "NewSpecialtyHealthCareOpEd.doc" with a message that read "[n]oticed two typos." (IE 40)

53. At 11:19 a.m., on April 18, 2011, former Member Schaumber sent Mr. Flynn a link to the Specialty Healthcare document as it appeared as an editorial on The Hill's Congress Blog. (IE 41)

54. At 11:30 a.m., on April 18, 2011, Mr. Flynn responded to former Member Schaumber "[m]aybe it will be picked up by others." (IE 41)

55. The editorial at the link appears to be the document edited by Mr. Flynn. (IE 42)

56. At 12:43 p.m., on April 18, 2011, Chairman Liebman sent Mr. Flynn an e-mail message that read: (IE 43)

> Trust you saw this. http://thehill.com/blogs/congress-blog/labor/156577-nlrb-skirts-formal-rulemaking-requirements
> Perhaps even wrote it.

57. At 2:15 p.m., on April 18, 2011, Mr. Flynn responded to Chairman Liebman "I'm not familiar with that blog, but thank you." (IE 43)

58. On April 19, 2011, former Member Schaumber sent Mr. Flynn an e-mail message with "talking points" for a video that he was doing that afternoon and asking "[s]ee any dangers," to which Mr. Flynn responded "not really." (IE 44)

59. When asked during an interview, in late April 2011, with staff from the U.S. Senate's Committee on Health, Education, Labor and Pensions, Mr. Flynn deferred on some questions on the grounds that the issue could come before him as a Board Member. (IE 45)

60. On October 13, 2011, former Member Schaumber asked Mr. Flynn for his personal e-mail address. Mr. Flynn responded by providing the e-mail address E-mail Address. (IE 46)

61. When interviewed, Member Hayes stated that he has no memory of ever authorizing Mr. Flynn to release a draft dissent to former Member Schaumber. (IE 47)

62. Former Member Schaumber did not respond to our request for an interview. (IE 48)

63. The following facts relate to issues raised by Mr. Flynn when he was interviewed:

a. The Deputy Chief Counsel on the former Member Schaumber staff stated that it was his practice to provide the staff with electronic copies of Member Hayes' dissents that contain substantive analysis once the draft dissent was posted for circulation to the panel. The Deputy Chief Counsel stated that he believed that the staff understood that the decision had not yet been issued. (IE 49)

b. The Board's Solicitor described the Board's deliberative process as follows: (IE 50)

> He has observed that a dissent, once circulated, can cause the majority to make substantive changes in the draft majority opinion. A change in the draft majority opinion may then result in a change in the draft dissent. He has also observed that this back and forth may continue for a period of time with the dissenting and majority Members making additional changes to their respective draft opinions in response to their colleague's arguments. As a result of this deliberative process, there have been situations where a dissenting view became the majority opinion, and other situations where a majority opinion has changed sufficiently for the dissenting Member to join the majority.
>
> Another element of the Board's deliberative process is what is referred to as "noting off." Most decisions are issued by a panel of three Members, rather than by the full Board. When that occurs, the non-participating Board Members must "note off" on the decision before it is issued. A Member may decline to "note off" and elect to participate in the deliberations in any particular decision. When that occurs, the decision approved by the previous panel will not issue, and the deliberative process will resume with the new Member participating. This "noting off" process is not required in a small subset of cases that are considered by the "Panel of the Month."
>
> A Board decision is not "final" until it is issued. The Board considers a decision to be "issued" when it is posted on the NLRB Web site. Until a decision is issued, any Board Member may withdraw his or her vote and cause the deliberations to resume.

c. A standard performance appraisal plan is used for both a Chief Counsel and a Deputy Chief Counsel. Critical Element 2 appears to address the outreach that has been noted by Mr. Flynn: (IE 51)

> Demonstrate business acumen, and collaborate with stakeholders. Listen to and engage stakeholders (colleagues, labor organizations, and professional associations, customers and other federal agencies) to identify needs and expectations. Develop processes for two way communications that build strong alliances, involve stakeholders in making decisions and gain cooperation to achieve mutually satisfying solutions. Represent the Agency in a professional and competent manner. Develop and execute plans to achieve organizational goals, leveraging resources (human, financial, technology, etc.) to maximize efficiency and produce high quality results.

d. The organizational measure for Critical Element 2 that relates to outreach states: (IE 51)

> Engage in effective outreach with customers and stakeholders *as appropriate*; communicate the Agency's interest, policies, and programs with parties, the labor-management bar, oversight agencies, the public, and other stakeholders, *as appropriate*. In doing so, listen to and consider stakeholders' interests developing processes for two-way communications to identify needs and expectations. [Emphasis added]

e. A Motion for Recusal was filed in the *New York University* case asking that Chairman Liebman not participate in the decision. The motion was based on a claim that Chairman Liebman sought empirical evidence to bolster the view that she expressed in the *Brown* decision. The motion was filed on August 11, 2011. (IE 52)

f. The Board issued *Picini Flooring*, on October 22, 2010. The decision contains a dissent by Member Hayes that incorporates parts of the memorandum from Member Hayes to the Board stating Member Hayes' position on the issue of the General Counsel's request for electronic posting of remedy notices – see fact 29. (IE 53)

g. The Board publishes a monthly Sunshine Act Notice in the Federal Register that reads: (IE 54)

> Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also 5 U.S.C. 552b(c)(10).

64. On April 26, 2012, Mr. Flynn was interviewed. A transcript of Mr. Flynn's April 26, 2012, interview is provided at IE 55.

ANALYSIS

As with the first report, we find that the release of deliberative information as outlined in the facts to be a violation of the *Standards of Ethical Conduct for Employees of the Executive Branch*. Those standards state that an employee shall not "allow the improper use of nonpublic information to further his own interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. 2635.703(a). "Nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know had not been made available to the general public." 5 C.F.R. 2635.703(b).

As a quasi-judicial body, the Board issues decisions that affect the statutory and property rights of the parties -- employers, employees, and labor organizations. The deliberative process established by the Board, including the protection of deliberative information, is essential in ensuring that the parties receive due process.

In deliberating upon a case, a Board Member must be able to change his or her mind; be open to persuasion by a colleague's arguments; and make, modify, and abandon arguments to his or her colleagues. At the Board, this process occurs through the exchange of drafts of decisions and dissents. Throughout the deliberative process, each Board Member is provided the opportunity to review the drafts of decisions and dissents, propose and accept modifications, and vote. As explained by the Solicitor, this process envisions the exchange of drafts not merely to state the position of a Board Member, but also as a means to persuade his or her colleagues to accept the reasoning stated therein. The dissenting opinion plays a critical role in this process, as was recently stated by Member Hayes in a dissent published in the Federal Register on April 30, 2012, at 25571:

> Specific to law, dissents are a useful tool in effecting well-reasoned legal decisions. Indeed, Supreme Court Justice Ruth Bader Ginsburg has stated that dissents are important because they can "lead the author of the majority opinion to refine and clarify her initial circulation" and may be persuasive enough to "attract the votes necessary to become the opinion of the Court." See Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn.L.Rev. 1, 4 (2010). My experience as a Board Member confirms Justice Ginsburg's observation. On numerous occasions, circulated dissents have prompted substantial revision of prior draft majority opinions, and in some instances an initial dissent ultimately became the Board's final decision.

The prohibition on the release of deliberative information allows for the free flow of ideas and the freedom to take, modify, and abandon positions in the Board's deliberative process. This protection has its roots in our jurisprudence. The Supreme Court has stated that "those who expect public dissemination of their remarks may well temper candor with a concern for appearance and their own interest to the detriment of the decision making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974). The release of deliberative information, even for Congressional oversight, raises significant concerns for the rights of parties to an administrative process and an examination as to the reasons for a decision in a case that is pending threatens the appearance of impartiality of the decision maker at the expense of the due process of the parties. See *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966); see also Solicitor's letter to Chairman John Kline, Committee on Education and the Workforce, U.S. House of Representatives, dated May 25, 2011.

Mr. Flynn's public statement that he has engaged in no wrongdoing strikes at the very heart of the Board and all but eviscerates the due process procedures that the Board has established. Members of administrative bodies such as the Board cannot freely discuss

decisions and points of law and fact if they are fearful that the positions that they take during deliberative discussions or in drafts of documents are going to be made public, distributed to pundits, or leaked to parties. If Mr. Flynn has in fact done nothing wrong, then there is nothing stopping any Board employee from discussing deliberative case information with whomever he or she chooses or writing opinion-editorial pieces under his or her own or a pen name.

The release of deliberative information by the NLRB is in fact prohibited by the NLRB's policies and regulations. Information regarding the deliberations of the Board is protected from disclosure by the *Guide for Staff Counsel of the National Labor Relations Board*. The information protected from disclosure includes the identity of the Board Member or staff assigned to a case and the status of a case. Additionally, staff counsels are only authorized to discuss pending cases with personnel on the Board-side of the Agency. Unauthorized disclosure of information either before or after a case is issued is grounds for discharge. In addition to those restrictions, all NLRB employees are prohibited from releasing Agency documents without written consent by the Chairman, the Board, or General Counsel. 29 C.F.R. 102.118. These restrictions do not include provisions that allow for exceptions based upon an individual's subjective determination of the significance of the information. Rather, they provide a clear bright-line rule that once broken can result in serious consequences.

When interviewed, Mr. Flynn has asserted that his release of information was legitimate outreach and implied, through his counsel's objections, that he has inherent authority to release deliberative information. Nothing in Mr. Flynn's performance standards authorize the release of deliberative information. Rather, Mr. Flynn is expected to "engage in effective outreach with customers and stakeholders *as appropriate*; communicate the Agency's interest, policies, and programs with parties, the labor-management bar, oversight agencies, the public, and other stakeholders, *as appropriate*." (Emphasis added) Providing draft decisions in violation of a Federal regulation to an individual, even to a former Board Member, cannot be appropriate outreach. Also, giving information to any individual outside the Board that would be withheld from a Congressional oversight process is not appropriate. We are not aware of any legitimate Federal purpose that is served by giving former Member Schaumber advance notice of how a case is going to be decided, when a vote is going to take place, or the priorities of the Board.

We find that Mr. Flynn violated Federal regulations when he sent former Member Schaumber electronic documents that were draft dissents in the cases *Richie's Installations, Inc., New York University*, and *Mastec Direct TV*. Given Mr. Flynn's years of experience at the Board, he must understand the deliberative process -- particularly in light of the fact that he edited decisions and recorded votes on decisions for former Member Schaumber. In that light, he had to know or should have known that the decision in *Richie's Installations, Inc.* was not issued because the final Board Member had not "noted off" -- information that was available to him in the Board's case processing system. With regard to *New York University*, the e-mail transmitting the draft dissent to the Board was sent at 12:40 p.m. on October 6, 2010, and then sent by Mr. Flynn to former Member Schaumber 1 hour and 43 minutes later. Mr. Flynn had to know that a final decision had not been issued in such a short period of

time. The draft dissent in *Mastec Direct TV* that was sent by Mr. Flynn to former Member Schaumber on January 20, 2011, was circulated in the case processing system on January 5, 2011. Electronic copies of that document were sent to Mr. Flynn, and other staff members, by the Deputy Chief Counsel on January 5 and 19, 2011. On February 14, 2011, a revised Board majority decision was circulated in the case processing system. A revised draft dissent was also circulated on February 17, 2011. Mr. Flynn was also receiving e-mail notifications from the case processing system. As with *Richie's Installations, Inc.*, Mr. Flynn knew or should have known that the *Mastec Direct TV* decision had not issued.

With regard to the draft majority decision in *Albertson's LLC*, the e-mail message that Mr. Flynn received clearly states that the document is a draft decision and that the panel Members had not yet voted. The memorandum stating Member Hayes' position on electronic notice posting was not yet in a draft decision format. That document is clearly a statement of Member Hayes' position on the law and what his vote will be. These documents represent the beginning of the Board's deliberative process in their respective cases, a fact that was apparent in the e-mail messages received by Mr. Flynn with the documents.

We also find that drafting of the editorial on *Specialty Healthcare* was improper. When interviewed, Mr. Flynn acknowledged that he participated in the deliberations. That participation gave him access to the thoughts of the Board Members and their staffs. His assistance in redrafting former Member Schaumber's article was an abuse of his discretion and violated the policy of the Board. Despite Mr. Flynn's assertion during the interview that he was never a staff counsel and he was not aware of the *Guide for Staff Counsel of the National Labor Relations Board,* his e-mail message to former Member Schaumber on March 2, 2011, clearly demonstrates that he knew it was an ethical violation to publicly discuss a pending case. His lack of candor, when responding to then-Chairman Liebman, further demonstrates that he knew his conduct was improper. It is also noteworthy that Mr. Flynn deferred answering questions from the staff of the Senate's Health, Education, Labor, and Pension Committee on the grounds that the issue could come before him as a Board Member.

Mr. Flynn's release of information regarding the position of then-Chairman Liebman to decide *New York University* with a certain outcome, the priority of cases before the Board, and information pertaining to the vote on *Kroger Limited Partnership* was also improper. As explained in the first report, such information is considered deliberative, pre-decisional information that has been protected from disclosure and considered by the NLRB to be the most confidential of Agency information. Although Mr. Flynn raised the motion for recusal of then-Chairman Liebman in *New York University* as evidence that her position in that case was known, it was not filed until 11 months after Mr. Flynn sent the e-mail message to former Member Schaumber. The assertion by Mr. Flynn during the interview that information regarding the votes of the Board is made available in the Federal Register is incorrect. The Federal Register notice does not provide any case-specific information.

We also find that Mr. Flynn's conduct is evidence that he violated the general principle that "[p]ublic service is a public trust, requiring employees to place loyalty to the

Constitution, the laws and ethical principles above private gain" and "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards . . .." 5 C.F.R. 2535.101(b)(1) and (14). Mr. Flynn's concern that the Wall Street Journal opinion piece would hurt his nomination is evidence that he was more concerned about being appointed as a Board Member than following the ethical standards. The e-mail messages between Mr. Flynn and former Member Schaumber show that former Member Schaumber was involved in Mr. Flynn's nomination and that former Member Schaumber clearly claimed credit for Mr. Flynn's nomination as a Board Member. That situation gives rise to the appearance that Mr. Flynn's disclosure of deliberative information and assistance to former Member Schaumber was in return for former Member Schaumber's lobbying on behalf of Mr. Flynn's nomination. Given his knowledge of former Member Schaumber's participation in the nomination process, Mr. Flynn had a duty to conform his conduct to avoid the appearance of a quid pro quo situation. This finding is in part the result of Mr. Flynn's lack of candor during the interview in acknowledging former Member Schaumber's participation in Mr. Flynn's nomination.

We conclude that the issues identified in this report, and those of the prior report, evidence a serious threat to the Board's decisional due process. We recommend that the Board review these facts to determine appropriate action.

[Whereupon, at 11:25 a.m., the subcommittee was adjourned.]

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