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January 6, 2012

Ms. Kathryn Ruemmler  
Counsel to the President  
The White House  
1600 Pennsylvania Avenue  
Washington, D.C. 20500

Dear Ms. Ruemmler:

We respectfully request documents and communications surrounding recent recess appointments of Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board (NLRB). The use of the president's recess appointment power while the United States Senate is in *pro forma* session raises serious constitutional issues. Additionally, their appointment without a hearing or vote in the United States Senate leaves questions regarding their qualifications unanswered. As members of the House Committee on Education and the Workforce, who are charged with overseeing federal labor law and the NLRB, we appreciate your timely cooperation with this congressional oversight request.

On January 4, 2012, President Obama announced the recess appointments of Sharon Block, Terence Flynn, and Richard Griffin to the NLRB. Mr. Flynn has been awaiting confirmation since January 2011. Unfortunately, Democratic leadership in the Senate failed to convene a public hearing or schedule a vote on Mr. Flynn's nomination. Ms. Block and Mr. Griffin were nominated on December 15, 2011. As noted by Senator Mike Enzi, senior Republican on the Senate Committee on Health, Education, Labor, and Pensions, neither Ms. Block nor Mr. Griffin have filed the required committee application or gone through the normal vetting process, including a background check. As with Mr. Flynn, neither Ms. Block or Mr. Griffin have participated in a public hearing. Circumventing the normal confirmation process in this manner denies Congress and the American people an opportunity to judge independently the qualifications of these individuals.

An additional concern relates to the president's constitutional authority to make recess appointments when the Senate is *pro forma* session. Article 2, section 2, clause 3 of the U.S. Constitution authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate." These appointments are temporary, expire at the end of the next session of Congress, and do not require Senate approval. Long standing interpretations of what constitutes a

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recess of the Senate have held that a recess must exceed three days.<sup>1</sup> In fact, the Department of Justice argued before the U.S. Supreme Court in 2010 that a recess must "be longer than 3 days" in order for the recess appointment power to work.<sup>2</sup> The Senate has been meeting in *pro forma* session every third day since December 16. A recess appointment made under these circumstances will taint the work of the Board and cast legal suspicions over its actions.

The policies and decisions of the Board touch upon virtually every private workplace in the country. The American people must have confidence in the legitimacy of the actions of the NLRB. Unfortunately, recent actions taken by the President will undermine confidence in the Board to the detriment of workers and employers.

To better understand the constitutional issues surrounding these appointments and the qualifications of the appointees, please provide the following no later than January 20, 2012:

1. All documents and communications relating to the recess appointment of Sharon Block, Terence Flynn, and Richard Griffin;
2. All documents and communications relating to the constitutionality of the recess appointment of Sharon Block, Terence Flynn, and Richard Griffin to the NLRB, including but not limited to any material provided by the Department of Justice's Office of Legal Counsel; and
3. All documents produced or collected as part of Sharon Block's, Terence Flynn's, and Richard Griffin's vetting process for service on the NLRB.

If you have any questions regarding this request, please contact Marvin Kaplan, House Education and the Workforce Committee, at (202) 225-7101.

Sincerely,



JOHN KLINE  
Chairman  
Education and the Workforce Committee



PHIL ROE, M.D.  
Chairman  
Subcommittee on Health, Employment, Labor  
and Pensions

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee

cc: The Honorable Robert Andrews, Senior Democratic Member, Subcommittee on Health, Employment, Labor, and Pensions

<sup>1</sup> Chu, Vivian S., *Recess Appointments: A Legal Overview*, Congressional Research Service (May 12, 2011).

<sup>2</sup> *New Process Steel, L.P. vs. NLRB* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1457.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf)