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“The NLRB Recess Appointments: Implications for America’s Workers and Employers”

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

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

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

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

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

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

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

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

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

³ NLRB Annual Reports: <http://nlrb.gov/annual-reports>.

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

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

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

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

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

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

To deny the Board the ability to function by disabling the President’s ability to appoint Board members would eviscerate workers’ rights under the National Labor Relations Act and the public interest in the administration of our nation’s laws. Not only would workers lose rights and protections they desperately need, but both workers and employers would lose the guidance and decision-making finality that a Board decision brings. A majority of workers who voted for union representation in a secret ballot election, for example, would not be able to enjoy the benefits of collective bargaining because there would be no election finality. Workers who sought to decertify a certified representative would face the same lack of finality. Unions and employers would both lack the ability to secure rulings that protect their rights, and the public interest, in being free from unfair labor practices in their relationships. Administrative law judge decisions finding that an employer committed an unfair labor practice by discharging a worker for engaging in union activity, something that occurs in one out of four organizing campaigns, would have no finality. Decisions finding that a union engaged in an unfair labor practice would face the same fate. In short, the institutional paralysis that would result from a quorumless Board—something that has not lasted for more than a few days in the 75-year history of the Board⁷—would irreparably harm workers and employers alike.

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

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

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

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

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

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

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

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

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

When the Senate recessed on December 17, 2011, it agreed to “adjourn and convene for *pro forma* sessions only, with no business conducted,” every Tuesday and Friday between December 17, 2011 and January 23, 2012.¹² The OLC determined that the Senate was forced to conduct these so-called *pro forma* sessions every three days because the House of Representatives had refused to consent to the Senate recessing¹³ and, under Article I, §5 of the Constitution, “[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.” The House attempted to prevent the Senate from recessing with the express purpose of blocking the President’s exercise of his constitutional

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

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

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

¹² OLC memo, at 1.

¹³ *Id.* at 2.

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

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

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

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 13-16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²³ *Dana Corp.*, 351 NLRB 434 (2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion:

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