STATEMENT OF DENNIS M. DEVANEY

Before the House Committee on Education and the Workforce

Concerning

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

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

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

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

The lesson with respect to the President's recess appointments the day after the U.S. Senate met in pro forma session on Tuesday, January 3, 2012 to commence the second session of the 112th Congress and was scheduled to meet in another pro forma session on Friday, January 6, 2012 can be found in the background Office of Legal Counsel, U.S. Department of Justice memorandum provided to the NLRB in 2003 which had incorrectly opined that "if the Board delegated all of its powers to a group of three members, that group could continue to issue decisions and orders as long as a quorum of two members remained" which was rejected by the Supreme Court's in *New Process*, in Deputy Solicitor General Neal

Katyal's answer on behalf of the Obama Justice Department to Chief Justice Robert's question at oral argument in *New Process* on March 23, 2010: CHIEF JUSTICE ROBERTS: "And the recess appointment power doesn't work why?" MR. KATYAL: "The -- the recess appointment power can work in -- in a recess. I think our office has opined the recess has to be longer than 3 days", (see Exhibit 1) and in the effort to distinguish the Justice Department's three day legal position put before the Court in *New Process* in the January 6, 2012 Office of Legal Counsel Memorandum Opinion for the Counsel to the President which argues that former Solicitor General Kagan's April 26, 2010 response to the Supreme Court's April 16, 2010 Order was addressing mootness. The problem with that argument is that on March 23, 2010 when Chief Justice Roberts asked his question, President Obama had not made his recess appointments of former Member Craig Becker and of then Member and now Chairman Mark Pearce which did not take place until March 27, 2010. Thus, Katyal's answer was not given in the context of a question with respect to mootness, but rather as the Obama Justice Department's policy advice that to make a constitutionally sound recess appointment, the recess should be of at least three days in duration. Not even two years later, the Obama Justice Department rendered an opinion in which they opined that "pro forma sessions do not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause of the Constitution."

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

Parties who receive an adverse decision from the Board will have the right to appeal those decisions. Unlike typical Board decisions, the constitutional issue will not be subject to *Chevron* deference. In the meantime, the regional staff will apply the most recent decisions of the Board. Thus, the effect of the decisions will not be limited to the aggrieved party. In

fact, the decisions will extend to all parties covered by the NLRA. It takes on average more than one year for the Board to decide a case. Normally, there would be some closure once the Board decides, but under the current scenario there will most likely be legal issues for an extended period of time which will add costs for the parties and taxpayers.

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

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

(Laughter.)
JUSTICE SCALIA: When -- when -- when is one of the two's term over?
MR. KATYAL: In the absence of any further confirmations or other appointments, one of the members, Member Schaumber, will leave on August 27th of this year.
JUSTICE SCALIA: Of this year. At which point there will be some pressure on Congress, I guess, right?
MR. KATYAL: There will.
JUSTICE GINSBURG: There are -- there are two nominees, are there not?
MR. KATYAL: There are three nominees pending right now.
JUSTICE GINSBURG: Three?
MR. KATYAL: Yes. And they have been pending. They were named in July of last year. They were voted out of committee in October. One of them had a hold and had to be renominated. That renomination took place. There was a failed quorum -- a failed cloture vote in February. And so all three nominations are pending. And I think that underscores the general contentious nature of the appointment process with respect to this set of issues.

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

MR. KATYAL: The -- the recess appointment power can work in -- in a recess. I think our office has opined the recess has to be longer than 3 days. And -- and so, it is potentially available to avert the future crisis that -- that could -- that could take place with respect to the board.

If there are no other questions --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Richie, you have 3 minutes remaining.

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

MR. RICHIE: First, let me address the -- the issue of what happens if we prevail, how will the problem be fixed. There are two types of cases. There are representation cases, and then there are cases dealing with unfair labor practices.

The unfair labor practices, Mr. Chief Justice, have a limitations period to them. The -- the issues -- the issues with respect to representation have no limitations. So in response to Justice Ginsburg's comment -- I believe it was Justice Ginsburg -- there's a -- when a successor comes on board, these issues, if these -- if we prevail and

our decision is vacated, those are -- can be reheard by the board when a successor is in place.

The D.C. Circuit --

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

MR. RICHIE: That's correct.

JUSTICE SCALIA: Wouldn't the ----

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

JUSTICE SCALIA: Yes, I understand.

MR. RICHIE: -- cases.

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

MR. RICHIE: That's an argument. That's a different case. I don't know the answer. And I'm sure the litigants would argue that.

With respect to the issue of the -- whether it's three members that are required on both the board and the group, the D.C. Circuit didn't deal with that, but they did deal with the exception issue. And they said -- I'm reading from the appendix page 89 of our