

POLITICS AND THE EFFECT ON THE NATIONAL LABOR RELATIONS BOARD'S ADJUDICATIVE AND RULEMAKING PROCESSES

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ABSTRACT

The National Labor Relations Act has never explicitly required political balance in the National Labor Relations Board's (NLRB or Board) appointment process. But the Eisenhower administration demonstrated that policy shifts could be initiated through changes in NLRB composition. The Kennedy Board shifted gears again, prompting critics to say that the Board was on a "seesaw." More pronounced polarization began to emerge in the 1980s as political party divisiveness and union decline created more adversarial relationships.

In the 1990s, divided government produced a "batching" of appointees (in contrast to annual Senate confirmation votes on each appointment as their term expired), horse trading of "interchangeable elites engaged in an insider's game" as Professor Calvin McKenzie said. Ultimately, the consequences of impasse through this process twice resulted in Supreme Court decisions interpreting the Act and the Constitution so as to alter the relationship between the President and the Senate. But the Senate, under Senator Reid, was to trump the practical effect of these holdings by eliminating the filibuster, which frequently stalled or stopped NLRB appointments. Paradoxically, however, through both oversight hearings and the Congressional Review Act of 1996, legislative interference with the work of the NLRB has never been more extensive.

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INTRODUCTION

This past year, the Supreme Court held that President Obama's appointments to the National Labor Relations Board (NLRB) were unconstitutional when made under the Recess Clause of the Constitution.¹ The Court held that the Senate's three-day recess in question was "too short a time to bring a recess within the scope of the Clause."² A 5–4 majority of the Court³ held that, while recess appointments can be made in both intersession and intrasession recesses of the Congress, historical practice dictated that the duration must be more substantial than what was involved in President Obama's appointments.⁴ The decision mirrored not simply increased political polarization in Washington, particularly during the last few decades,⁵ but also an impasse on labor policy, the culmination of which was a successful constitutional challenge to the President.

Only Senator Harry Reid's leadership initiative in producing the near total repeal of the Senate filibuster as it relates to appointments,⁶ which had stalled and stopped NLRB appointments, minimized its impact. Thus, notwithstanding the 2014 constitutional diminution of the President's authority to shape the Board through recess appointments, where the advice and consent of the Senate could not be obtained, the new Senate Rules adopted in 2013 appear to have increasingly shifted congressional attention away from the appointment process toward NLRB interpretation and administration of the law itself.

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¹ NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

² *Id.* at 2557.

³ Justice Breyer wrote the opinion of the Court, joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. Justice Scalia authored a concurring opinion, joined by Chief Justice Roberts, and Justices Thomas and Alito. *Id.* at 2550.

⁴ *Id.* at 2578.

⁵ See Joe Klein, *The Town That Ate Itself*, NEW YORKER, Nov. 23, 1998, at 79. The first visible manifestation of the labor impasse before the Supreme Court was *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), where the Court characterized the Board's actions, when it constituted fewer than three members, as without a statutory quorum, invalidating all decisions from 2007–2009.

⁶ Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1, available at <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>.

“The time of life is short” states William Shakespeare.⁷ Eighty years, though constituting a generous lifespan for most individuals on the planet Earth at this particular time, pails in significance compared with, for instance, the 800 years that have passed since the Magna Carta was first propounded.⁸ Yet eighty is considerable, doubling the existence of the California Agricultural Labor Relations Act, which, in major respects, is predicated upon the National Labor Relations Act (NLRA or Act).⁹ And, the NLRA contains a framework that, whatever its considerable imperfections,¹⁰ has proved more enduring than any of the major industrialized competitors such as Great Britain, France, Germany, Italy, and Japan.

This eightieth anniversary of the passage of the National Labor Relations Act of 1935 is more politically challenging than the previous NLRA anniversaries of say, for instance, middle age of forty, fifty, or even sixty that were celebrated earlier.¹¹ The age of eighty is traditionally associated with creakiness, some measure of lethargy, and reflective anticipation of ones reckoning or legacy, but in order for this law to withstand the political environment that has truly surrounded it from the beginning of the Act in the late 1930s,¹² the age of eighty will have to become the new fifty. The pounding

⁷ WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 5, sc. 2. I have referenced this portion of Shakespeare in William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006).

⁸ See MAGNA CARTA (David Carpenter trans., 2015); Jill Lepore, *The Rule of History: Magna Carta, the Bill of Rights, and the Hold of Time*, NEW YORKER, Apr. 20, 2015, at 83, available at <http://www.newyorker.com/magazine/2015/04/20/the-rule-of-history>. Prior to the NLRA, Samuel Gompers stated that the Clayton Antitrust Act constituted “sledge-hammer blows to the wrongs and injustice so long inflicted upon the workers,” and that this declaration “is the Industrial Magna Carta upon which the working people will rear their structure of industrial freedom.” Samuel Gompers, *The Charter of Industrial Freedom: Labor Provisions of the Clayton Antitrust Law*, 21 AM. FEDERATIONIST 957, 971–72 (1914).

⁹ See Herman M. Levy, *The Agricultural Labor Relations Act of 1975* La Esperanza de California para el Futuro, 15 SANTA CLARA LAW. 783 (1975).

¹⁰ See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993).

¹¹ Judge Abner Mikva wrote about the role of both the judicial and legislative branches at an earlier anniversary. See Abner J. Mikva, Concluding Comment, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123 (1986). I have discussed this issue as well. See William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath*, 26 BERKELEY J. EMP. & LAB. L. 309 (2005); William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937 (1986); cf. William B. Gould IV, Op-Ed., *Crippling the Right to Organize*, N.Y. TIMES, Dec. 17, 2011, at A25, available at <http://www.nytimes.com/2011/12/17/opinion/crippling-the-right-to-organize.html> [hereinafter Gould, *Crippling*]; William B. Gould IV, Op-Ed., *Mistaken Opposition to the N.L.R.B.*, N.Y. TIMES, June 20, 1985, at A27, available at <http://www.nytimes.com/1985/06/20/opinion/mistaken-opposition-to-the-nlr.html>.

¹² See 1 JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* (1974).

and scrutiny visited upon the Board and the Act during the past two decades in particular are proof positive of that necessity.

The idea of the NLRA and the NLRB was born out of judicial repression, a series of decisions employing a variety of legal techniques against trade unions.¹³ It was thought that judicial predilections about economics and politics were responsible for the continued constitutional invalidation of federal and state statutes affecting the labor market,¹⁴ until a landmark holding produced a “switch in time that saved nine” and moved the United States away from these approaches.¹⁵

All of this heralded a commitment to a better rule of law, an extension or modification of the philosophy contained in the Norris La Guardia Act of 1932 that promoted both freedom of association and the collective bargaining process, the means constituting a hands off, or laissez-faire or collective laissez-faire,¹⁶ approach to labor disputes, through which the judiciary were now kept out almost altogether.¹⁷ The Act and its creation of the Board translated into interventionism in promoting the right to organize,¹⁸ though not necessarily of collective bargaining itself—a framework designed to be an effective substitute for law,¹⁹ through a mechanism designed as an effective substitute for courts of general jurisdiction utilizing a new specialized expert

¹³ See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); ELIAS LIEBERMAN, *UNIONS BEFORE THE BAR* (1950); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1116 (1989).

¹⁴ See LIEBERMAN, *supra* note 13; see also WILLIAM B. GOULD IV, *A PRIMER ON AMERICAN LABOR LAW* (5th ed. 2013).

¹⁵ For an overview of the developments of the Board’s subsequent activity, see HARRY A. MILLIS & EMILY CLARK BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* (1950). The phrase “a switch in time that saved nine” is generally attributed to the Supreme Court’s holding in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). However, the same “switch” produced the outcome in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding the National Labor Relations Act of 1935 to be constitutional).

¹⁶ O. Kahn-Freund, *Labour Law, in LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* 215 (Morris Ginsberg ed., 1959). Kahn-Freund defined “collective laissez-faire” as follows: “It so happens that in [Great Britain] (but not by any means in other capitalist countries as well) this principle of, if you like, ‘collective laissez faire,’ came to be a preponderant characteristic of labour law in the course of the first half of our century. . . . Seen from the lawyer’s point of view, its main characteristic today is its aversion to legislative intervention, its disinclination to rely on legal sanctions, its almost passionate belief in the autonomy of industrial forces.” *Id.* at 224 (footnote omitted).

¹⁷ See *United States v. Hutcheson*, 312 U.S. 219 (1941).

¹⁸ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹⁹ See, e.g., *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477 (1960); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395 (1952).

tribunal.²⁰ Inherent in this approach was the idea of independence propounded in the Supreme Court's ruling in *Humphrey's Executor v. United States*, where the Court held that the President had no authority to remove appointees who had fixed terms prior to the expiration of their terms and were therefore regarded as independent, impartial, and free from the political process.²¹ This prompted the writers of the Senate Labor Committee's report on NLRB legislation to remove the language of the statute referring to the Board as an "independent agency in the executive department."²²

Yet, from the beginning it could not be as simple as that. The NLRB, like the other Roosevelt alphabet agencies, was a quasi-judicial agency providing for Board Members (or in the case of the other agencies, commissioners). The concept of the General Counsel as an independent prosecutor to bring cases before the policymaking Board was to come later much through the 1947 Taft-Hartley Act.²³

The Board members were given limited and staggered terms of appointment, as opposed to the life tenure possessed by the judiciary. Philosophically embedded in this idea was the ability of the President, with the advice and consent of the Senate, to influence decisions of the Board through the appointment process, an objective that can also be accomplished through judicial appointments, especially at the Supreme Court, which is the ultimate arbiter. But the big practical difference between the two different appointment processes is that each new President may produce a relatively expeditious change through administrative appointments—a difference which has led to the characterization of the Board as on a "seesaw."²⁴

²⁰ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242 (1959) ("Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . .").

²¹ 295 U.S. 602 (1935); *cf.* *Myers v. United States*, 272 U.S. 52 (1926) (holding previously that the President has exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate); James C. Miller, III, *A Reflection on the Independence of Independent Agencies*, 1988 DUKE L.J. 297, 297–98 ("Independent agencies should not be independent. . . . Of course, when agencies—-independent or otherwise—engage in *adjudicatory* functions, I believe that strict independence must be maintained."). But policy may be initiated through adjudication as well as rulemaking, and the line between the two is frequently thin. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *cf. Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).

²² WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR* 122–23 (2000) (internal quotation marks omitted).

²³ 29 U.S.C. § 153(d) (2012).

²⁴ *See* Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962).

As I develop further below, the NLRB's appointment process is a not an inconsiderable feature of the changes that have produced substantially more intersection (and frequently tension) between the political process and the role of the Board. In the early years of the NLRA,²⁵ little attention was given to the shifts in balance between labor and management representatives because, except for the appointment of one management labor lawyer, individuals did not appear to be chosen as representatives of labor and management.²⁶ In addition, labor and management did not receive any kind of formal, let alone statutory, representation on the Board.²⁷ Notwithstanding the emergence of the so-called "do nothing" 80th Congress that enacted the 1947 Taft-Hartley amendments over President Truman's veto, for the most part, Roosevelt-Truman hegemony translated into a variety of appointments—but none overtly associated with political affiliation as in recent years. For example, FDR's first two Chairmen were academics,²⁸ but this was a precedent not returned to until my appointment by President Clinton in 1993—and not renewed since then.

Since the beginning, the Act has never required any kind of balance between Democrats and Republicans—a statutory absence that contrasts with other regulatory legislation. However, for some period of time, balance has been dictated by tradition. Professor James Gross has written that the "tradition did begin with the Eisenhower Administration although even then it's not so clear that there was any compelling need to have 3–2."²⁹ Professor Gross notes that this "tradition" has emerged "essentially unthinkingly . . . over the years" and that, when the Board was expanded from three members to five as it was after the Taft-Hartley amendments, President Truman deliberately appointed one so-called liberal Senator (then to become Member) Murdock and one "management person."³⁰ But even then there was no conscious decision to reach a 3–2 balance, states Professor Gross, and he does not find any records

²⁵ See J. Warren Madden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234 (1960).

²⁶ Gerard Reilly, a management labor lawyer representative, was appointed by President Roosevelt in 1941. See *Board Members Since 1935*, NLRB, <http://www.nlrb.gov/who-we-are/board/board-members-1935> (last visited May 9, 2015).

²⁷ This contrasts with the similar statutory scheme enacted in Japan at the time of the post-World War II MacArthur Occupation. See WILLIAM B. GOULD, *JAPAN'S RESHAPING OF AMERICAN LABOR LAW* (1984).

²⁸ See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937–1947* (1981).

²⁹ E-mail from James A. Gross, Professor, Cornell Univ., to author (Jan. 7, 2015, 1:16 PM PST) (on file with author and the Emory Law Journal).

³⁰ *Id.*

or discussion of this particular policy or when it was adopted, “let alone any decision concerning the matter.”³¹

I. THE EISENHOWER ADMINISTRATION

The Eisenhower administration witnessed the first major changes in the policy direction of the Board and in labor-management relations generally.³² President Eisenhower appointed Martin Durkin as Secretary of Labor. Durkin, previously a craft-trade union leader, only served nine months, but his appointment prompted the characterization of the cabinet as “nine millionaires and a plumber.”³³ That administration expressed some interest in providing further amendments to the Taft-Hartley amendments and changes in labor policy, but, in truth, new appointments to the NLRB provided the greatest opportunity to produce a new policy. The Eisenhower administration, in its first year in Washington, 1953, realized this opportunity through three vacancies that quickly appeared, two of which were filled fairly expeditiously.³⁴

President Eisenhower’s first chairman of the Board was management labor lawyer Guy Farmer. The result of the Farmer appointment, and the appointments to follow, was a policy shift reflected in a number of doctrinal holdings involving, for instance, captive audiences and circumstances under which unions could reply to the employer’s noncoercive antiunion message³⁵—the Truman Board held that a union had a right to reply, at least under some circumstances.³⁶ The Eisenhower Board favored expansive protections of employer free speech rights, a new free speech proviso recently incorporated in the Taft-Hartley amendments, and it was most reticent in setting aside representation elections on the grounds that “the requisite laboratory conditions” were not met.³⁷ Similarly, the Eisenhower Board

³¹ *Id.*

³² See Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); W. Willard Wirtz, *The New National Labor Relations Board: Herein of “Employer Persuasion,”* 49 NW. U. L. REV. 594 (1954).

³³ *Chapter 5: Eisenhower Administration, 1953–1961*, U.S. DEP’T LAB., <http://www.dol.gov/dol/aboutdol/history/dolchp05.htm> (last viewed May 9, 2015) (internal quotation marks omitted).

³⁴ See JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994*, at 94–95 (1995).

³⁵ See *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

³⁶ See *Bonwit Teller, Inc.*, 96 N.L.R.B. 608, 615 (1951); see also *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952), *denying enforcement of* 96 N.L.R.B. 608.

³⁷ See *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

repudiated earlier Roosevelt–Truman NLRB decisions, which held that interrogation of employees during a union organizational campaign was per se coercive,³⁸ the new decision holding that the question of coercion depended upon consideration of a variety of circumstances.³⁹

The Eisenhower administration came to Washington with a belief that there was too much centralized government in the nation's capital at the expense of local government. At the Board, Chairman Farmer expressed his view that more of its authority should be ceded to state agencies.⁴⁰ Ultimately, this was to create a constitutionally mandated “no-man’s land,” which invalidated state legislation under the preemption doctrine.⁴¹ As the Board ceded jurisdiction, this led ultimately to an accommodation through which Congress froze the Board’s jurisdictional yardsticks as part of the 1959 Landrum-Griffin Act amendments⁴²—an approach that expanded federal jurisdiction and, some contended, exacerbated Board backlog problems.⁴³

Other Eisenhower Board decisions reflected a labor-policy shift in areas involving secondary activity by unions, lockouts, and refusals to bargain, as well as including the scope of bargaining.⁴⁴ With the so-called *Aiello* doctrine, the Board required unions to choose whether they would seek representation through the ballot or on the basis of signed authorization cards through unfair labor practice litigation.⁴⁵

II. THE KENNEDY ADMINISTRATION

Almost as soon as the Kennedy Board came in the door in early 1961—with the appointments and confirmation of Chairman Frank McCulloch and Member Gerald Brown⁴⁶—a third Democrat, John Fanning, initially appointed by President Eisenhower, became part of the majority.⁴⁷ Two others were to

³⁸ See *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358, 1379 (1949).

³⁹ See *Blue Flash Express, Inc.*, 109 N.L.R.B. 591, 594 (1954).

⁴⁰ GROSS, *supra* note 34, at 96.

⁴¹ *Guss v. Utah Lab. Relations Bd.*, 353 U.S. 1, 10–11 (1957).

⁴² Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531 (2012)).

⁴³ See ROBERT J. FLANAGAN, *LABOR RELATIONS AND THE LITIGATION EXPLOSION* (1987).

⁴⁴ GROSS, *supra* note 34, at 112–20.

⁴⁵ *Aiello*, 110 N.L.R.B. 1365 (1954). The Kennedy Board subsequently reversed this decision in *Bernel Foam Products Co.*, 146 N.L.R.B. 1277 (1964).

⁴⁶ Member Brown was the Regional Director in San Francisco and later served under Governor Brown in his first administrations as Chairman of the Agricultural Labor Relations Board.

⁴⁷ See GROSS, *supra* note 34, at 151.

join this group, including Howard Jenkins, Jr., a Kennedy appointee in 1963 who ultimately became one of the longest serving members next to Member Fanning. A fifth, former journalist Sam Zagoria, constituted the Board through both the Kennedy and Johnson years. In the first period of much discussion about the decline of labor law and the labor movement,⁴⁸ a number of policy issues confronted the new Board.

Thus, the election of President Kennedy in 1960 produced another shift, one that explicitly brought to prominence anew the “seesaw” comment on a whole host of issues, arguably just as contentious as the earlier Eisenhower decisions in the wake of Taft-Hartley. One issue involved appropriate unit determination in the context of the circumstances under which craftsmen, such as pipefitters, electricians, plumbers, and iron workers, could sever from a broader bargaining unit that included semiskilled and unskilled workers, as well as craftsmen—the so-called craft severance issue. The Kennedy Board, striking an intermediate position between its Roosevelt–Truman predecessors on one hand and the Eisenhower appointees on the other,⁴⁹ evoked a wide variety of considerations in determining whether severance would be granted.⁵⁰ This legal issue reflected the fight between the craft and industrial unions involving this line of authority, and it was a chapter in the struggle between some American Federation of Labor (AFL) craft unions, which have been more sympathetic to the Taft-Hartley amendments and sometimes to the Republican Party as well, and the industrial unions affiliated with the Congress of Industrial Organizations (CIO) that tended to be the one of the bedrocks of the Democratic-Party coalition.

Second, the scope of the unit was addressed in a number of contexts where unions or collective bargaining were absent. The NLRB decisions in this space, however, reflected what the Supreme Court said about the resolution of unit issues: “[V]irtually every Board decision concerning an appropriate unit—*e.g.*,

⁴⁸ See SOLOMON BARKIN, *THE DECLINE OF THE LABOR MOVEMENT: AND WHAT CAN BE DONE ABOUT IT* (1961); PAUL JACOBS, *THE STATE OF THE UNIONS* (1963); A.H. Raskin, *The Big Squeeze on Labor Unions*, *ATLANTIC MONTHLY*, Oct. 1978, at 41; A.H. Raskin, *The Squeeze on the Unions*, *ATLANTIC MONTHLY*, Apr. 1961, at 55. Some of these problems were also addressed in CLARK KERR ET AL., *INDEP. STUDY GRP., THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* (1961). These and related issues were subsequently discussed in GOULD, *supra* note 10, and Bruce Western & Jake Rosenfeld, *Workers of the World Divide: The Decline of Labor and the Future of the Middle Class*, *FOREIGN AFF.*, May–June 2012, at 88.

⁴⁹ See, *e.g.*, *Am. Potash & Chem. Corp.*, 107 N.L.R.B. 1418 (1954); *Am. Can Co.*, 13 N.L.R.B. 1252 (1939).

⁵⁰ See *Mallinckrodt Chem. Works*, 162 N.L.R.B. 387 (1966).

the proper size of the unit—favors one side of the other.”⁵¹ In a series of revisions involving the shape of an appropriate unit where collective bargaining had not been established at all, the Board created a rebuttable presumption that, where the dispute related to whether the unit would be at one facility as opposed to a multilocation unit, it would be presumed that the unit would be found appropriate at the single location.⁵² The important point made by the Kennedy Board in these cases was that an appropriate unit could exist at more than one location and that, notwithstanding the fact that a multilocation might be appropriate, a presumption could be found at the single location where the unit petitioned for by the union was there.⁵³ This was so, reasoned the Board, inasmuch as this result would favor collective bargaining because granting a multilocation unit would deny workers an election altogether, inasmuch as the union only had a requisite “showing of interest,” i.e. 30% support for an election in the unit on a single facility basis, and under most circumstances, a multilocation finding would result in a dismissal of the petition altogether because of the inadequacy of the showing of interest.

Another important related issue is the circumstances under which picketing could be regarded as prohibited conduct under the 1959 Landrum-Griffin Act. These amendments provided for injunctions against organizational picketing engaged in beyond a reasonable period of time without a demand for an election.⁵⁴ The Kennedy Board held that picketing for the objective of obtaining area-wage standards was not deemed to be organizational and thus could not be enjoined because it involved a protest against working conditions and was not an attempt to circumvent the secret ballot box provisions of the Act.⁵⁵ Similarly, the Kennedy Board addressed cases involving the issue of the duty to bargain to the point of impasse or over unilateral decisions to contract out work, holding that parties were obliged to bargain over such subject

⁵¹ NLRB v. Action Auto., Inc., 469 U.S. 490, 498 (1985).

⁵² See F.W. Woolworth Co., 173 N.L.R.B. 1146 (1968); Frisch’s Big Boy III-Mar, Inc., 147 N.L.R.B. 551 (1964), *enforcement denied*, 356 F.2d 895 (7th Cir. 1966); Dixie Belle Mills, Inc., 139 N.L.R.B. 629 (1962); Sav-On Drugs, Inc., 138 N.L.R.B. 1032 (1962). For actions subsequent to the Kennedy Board, see Bowie Hall Trucking Inc., 290 N.L.R.B. 41 (1988); Wyandotte Savs. Bank, 245 N.L.R.B. 943 (1979). Under some circumstances this presumption may be rebutted. See Prince Telecom, 347 N.L.R.B. 789 (2006).

⁵³ See NLRB v. Metro. Life Ins. Co., 380 U.S. 438 (1965) (holding that the extent of organization may still be taken into account along with other factors, notwithstanding the Taft-Hartley amendments). In this case, the Supreme Court noted that the Taft-Hartley amendments precluded a unit based upon the union’s petition as “controlling.” But the fact that the Board was establishing a presumption that could be rebutted meant that this factor was not controlling.

⁵⁴ 29 U.S.C. § 158(b)(7) (2012).

⁵⁵ Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321, 324 (1962).

matter.⁵⁶ The Supreme Court eventually resolved this issue, placing its *imprimatur* upon the Board's holding, if not the entire rationale employed by it.⁵⁷

To sum up the McCulloch Board, Professor Gross, again, has stated as follows:

[It] facilitated unionization in several important ways. It intensified regulation of employer representation election campaign speech and other actions, including the resurrection and use of the Herzog Board's *General Shoe* doctrine. It increased the use of bargaining orders based on authorization cards rather than representation elections. . . . Other Board decisions loosening restrictions on union secondary boycott activity and limiting an employer's statutory right to lockout had the potential of increasing union bargaining power.⁵⁸

III. THE NIXON, FORD, AND CARTER YEARS

The Nixon and Ford years saw not just the occasional appointment of a management lawyer as during the Roosevelt–Truman and Eisenhower administrations but now a very substantial number of them.⁵⁹ Most prominently amongst these appointments was Chairman Edward Miller, whose confirmation Senate hearing was the last one until my October 1, 1993 hearing. The Nixon Board produced some measure of doctrinal change in the mid-1970s,⁶⁰ and then President Ford, upon succeeding Nixon subsequent to his resignation, appointed Chairman Betty Murphy, another management labor lawyer and the first female Chairman of the Board.⁶¹

By the late 1970s during the Carter Administration, the beginnings of genuine political polarization began to appear on a scale unknown at the time of Eisenhower. This development occurred simultaneously with a more

⁵⁶ *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022, 1027 (1962).

⁵⁷ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). Justice Stewart's concurring opinion in the case stressed management prerogative considerations involved in these matters, *see id.* at 225–26 (Stewart, J., concurring), a theme that was to emerge anew in the Court's subsequent decision in *First National Maintenance Corp. v. NLRB*. *See* 452 U.S. 666 (1981); *infra* text accompanying note 70.

⁵⁸ *See* GROSS, *supra* note 34, at 189–90. The bargaining order stance of the Board was ultimately approved by the Warren Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁵⁹ Besides Chairman Miller, others included Peter Walther. In addition, management labor lawyer Peter Nash was named General Counsel.

⁶⁰ *See* GROSS, *supra* note 34, at 217–41.

⁶¹ Chairman Murphy insisted on being called Chairman, given that that was the word that the NLRA provided, unlike many who have wanted the title of Chair or Chairwoman.

profound rightward drift of the Republican Party than had existed during the Eisenhower–Nixon years, one which ultimately saw the demise of Republican moderates in the coastal states like New York, Massachusetts, New Jersey, and California. The consequences of this polarization in the political process inevitably affected labor-management relations and the work of the Board. In the late 1970s, two of President Carter’s nominees—William Lubbers for General Counsel and career bureaucrat John Truesdale as a Board member—were the objects of an attack by Senator Orrin Hatch. Lubbers, it was contended, attended a meeting or meetings with union officials relating to the 1977 Labor Relations Bill that provided the first serious effort for labor law reform. Lubbers was confirmed, but not before a cloture petition filed in early 1980 broke a Republican filibuster. Hatch’s attack on Truesdale appeared to be even more ideologically rooted and that nomination languished.

IV. THE REAGAN ERA DEALS FROM A NEW DECK

The divide between the parties on the Act and the Board intensified during the Reagan era. President Reagan’s first nominee as Chairman of the NLRB was John Van de Water, who had been a management consultant and was opposed by organized labor. The Senate Labor Committee rejected his nomination, and though eventually serving on a recess basis, he could not get a favorable recommendation from the Senate.⁶²

President Reagan then nominated in his place Donald L. Dotson, who was confirmed by a voice vote on February 17, 1983, having a relatively easy route to confirmation. Under Dotson, the ground was to shift in a number of respects,⁶³ perhaps more profoundly than would have been the case had Van de Water obtained Senate confirmation.

Chairman Dotson became a lightning rod for organized labor. First, the Reagan Board altered the course of case law in a number of important respects.

⁶² “In response to questions by Senator Edward Kennedy, he admitted that companies had hired him during union organizing campaigns to keep unions out.” GOULD, *supra* note 22, at 20.

⁶³ See Terry M. Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, in 2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT: AN ANNUAL 236, 272 (1987) (“Reagan imposed on the NLRB a brand of radical antiunionism that business leaders did not demand and, in fact, had long resisted. But, especially in an environment of economic adversity and union decline, some business leaders began to realize over time that the reality of an antiunion NLRB was not to be feared at all—that it proved quite consistent with their own, more confrontational approaches to unions. They were, in effect, dragged kicking and screaming into the brave new world of political antiunionism by presidential leadership, and some saw that what was clearly impossible in earlier decades was now quite possible indeed.”).

Notwithstanding judicial precedent to the contrary,⁶⁴ it foreclosed union recognition on the basis of authorization cards when massive unfair labor practices made it impossible for the union to accumulate the necessary cards to establish a majority.⁶⁵ In the wake of Supreme Court precedent holding unions had the authority to impose disciplinary fines against full members,⁶⁶ the Reagan Board established the right to refrain under the Taft-Hartley amendments meant the right to resign from union membership so as to escape union discipline.⁶⁷ The Supreme Court approved of this approach, with the deciding vote predicated upon deference to the Board's specialized expertise.⁶⁸

In a number of landmark holdings during this period, the Supreme Court narrowly interpreted the definition of "employee" under the Act so as to limit the number workers who could exercise statutory rights: in one case, it substantially excluded university professors.⁶⁹ Perhaps even more important, the Court held that a management decision to shut down its operation, or partially shut down, was not subject to the duty to bargain obligation about terms and conditions of employment, alluding to the fact that the principles of "partnership,"⁷⁰ so prominently associated with codetermination in Germany and in the Scandinavian countries, had no applicability to the United States.

Meanwhile, the most vexatious problem of the 1980s involved the Board's procedural handling of cases—or more precisely, its *failure* to handle the cases at all. Under the statute—which is deeply intertwined with the maxim that "justice delayed is justice denied"—the greatest administrative backlog of cases began to emerge and with it, of course, a considerable delay in its wake in resolving cases from beginning to end. This translated itself into the first boycott of the Board by organized labor (another was to come in the early 2000s in the second Bush administration), with then AFL-CIO leader Lane Kirkland opining that perhaps it was best for the parties to resolve their

⁶⁴ See *United Dairy Farmers Coop. Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980); see also William B. Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 14 U.C. DAVIS L. REV. 497 (1981) (discussing *United Dairy Farmers*); Jay R. Bloom, Comment, *United Dairy Farmers Cooperative Association: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*, 80 COLUM. L. REV. 840 (1980).

⁶⁵ *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

⁶⁶ See *NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

⁶⁷ *Machinists Local 1327*, 263 N.L.R.B. 984 (1982).

⁶⁸ *Pattern Makers' League v. NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring).

⁶⁹ *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

⁷⁰ *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674–78 (1981).

differences “mano-a-mano” rather than through the administrative process or rule of law.

As the Reagan era drew down, it became clear that Chairman Dotson was not to be reappointed. In his place came Chairman Jim Stephens, a congressional staffer with Senator Hatch, appointed by the first President Bush, who had promised a “kinder gentler administration.”⁷¹ The new Board attempted to pull back from some of the excesses of the Reagan predecessor with a more balanced approach. But the big issue confronting this Board, involving union politics and law, was just emerging in the form of the Supreme Court’s 1988 decision in *Communications Workers of America v. Beck*, which held that, under the NLRA, unions had a duty of fair representation obligation not to expend union-security-agreement-obtained-dues payments non-germane to collective bargaining.⁷² The Court also held that limited or financial core members who were dissidents could object to payments sought and made.⁷³ This was the “third rail” of labor law adjudication, which Republican appointees in particular, dared not approach.

A whole host of issues emerged in the wake of *Beck*, not the least of which related to issues regarding which union dues were to be defined as germane or non-germane through collective bargaining itself. Inasmuch as not one single one of them had been decided for six years after *Beck*, all of them were waiting for the new Clinton Board to resolve subsequent to the President’s appointment of me as Chairman of the Board in 1993. This was the situation at the time that I took office in the spring of 1994, subsequent to the Senate’s confirmation vote.⁷⁴

V. THE CLINTON BOARD

The so-called Gingrich Revolution, which brought the Republicans to power in both houses in Congress and cast the House of Representatives with a particularly rightward slant, brought increased scrutiny of the Board to a level exceeded only by the late 1930s and the Dies committee.⁷⁵ But beyond initial urgings by Republicans to the Board to produce decisions, there were

⁷¹ William B. Gould IV, *Bush: More Tolerance with Labor?*, SACRAMENTO BEE, Jan. 17, 1989, at B13.

⁷² See 487 U.S. 735 (1988).

⁷³ See *id.*; see also *Chi. Teachers Union v. Hudson*, 475 U.S. 292 (1986) (establishing procedures for *Beck* litigation).

⁷⁴ GOULD, *supra* note 22, at 33–50.

⁷⁵ GROSS, *supra* note 12.

relatively few criticisms or scrutiny of the actual implementation of the *Beck* decision itself.⁷⁶ However, there were questions constantly put to us by Congress from 1995 onward as to when we would produce the decisions that languished for half-a-dozen years. Ultimately, production began to dip considerably.⁷⁷

The Clinton Board initiatives attracted the attention of the Congress and produced oversight through both oversight committees, as well as the appropriations process.⁷⁸ Some of the more stressful and contentious conflicts emerged in connection with interrogation about the Board's decisions and expression of displeasure with them.⁷⁹ Indeed, so paralytic was congressional scrutiny upon Board members, one case, involving whether teaching assistants were employees within the meaning of the Act, could not be released until the Board saw the page proofs of my writing that expressed displeasure with NLRB somnolence⁸⁰ subsequent to my departure.

The most profound change emerged through the increased use of Section 10(j) of the Act, under which the Board is authorized to seek discretionary injunctive relief prior to the completion of the administrative process.⁸¹ One particular company, Overnite, which was headed by the first President Bush's Secretary of Commerce, against which injunctive relief was sought, produced criticism from Senator Arlen Specter of Pennsylvania⁸² to Republican Conference Chair John Boehner (today considered a middle-of-the-road Republican in his capacity of the Speaker of the House), who complained that the Board was attempting to "greatly handcuff" the company "in continuing to effectively communicate with their employees."⁸³

⁷⁶ GOULD, *supra* note 22, at 272–74. Of course, the Republicans were dissatisfied with the *Beck* decision as well. *See id.* (noting the commentary of California governor Pete Wilson and Republican members of Congress).

⁷⁷ William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 478 tbls.1 & 2 (2007).

⁷⁸ *See* GOULD, *supra* note 22, at 179–81.

⁷⁹ *Id.* 154–75, 178–82.

⁸⁰ I made this point earlier. *See* William B. Gould IV, *The Labor Board's Ever Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505 (1999); *see also* GOULD, *supra* note 22, at 285 ("[T]here were other cases I very much wanted to push out. They involved the employee status of graduate students working as teaching assistants at universities and residents, interns, and fellows on the house staffs of hospitals.").

⁸¹ 29 U.S.C. § 160(j) (2012).

⁸² GOULD, *supra* note 22, at 164–65.

⁸³ *Id.* at 180 (internal quotation marks omitted).

Congressman Bonilla said of our use of Section 10(j), generally: “It appears to some of us that the Board’s activities toward Overnite are unjust.”⁸⁴

No legislation emerged here, though the number of requests we received from the General Counsel to authorize injunctive relief diminished appreciably. “During my Chairmanship, we authorized 83 and 104 cases to go to federal district court in the first two years, respectively. The number declined to 53 in 1996 and 1997 and 45 in 1998 as the General Counsel requested fewer authorizations in the teeth of congressional hostility.”⁸⁵ With the same objective of expediting the process, the Board devised bench decisions for administrative law judges—“decisions issued from the bench or within seventy-two hours from the close of the hearing.”⁸⁶ Again, these were designed for a purpose—to expedite cases.

When the Board took a first pass at expediting the election machinery through rulemaking regarding the circumstances under which the presumption in favor a single location unit would be deemed appropriate,⁸⁷ congressional Republicans, speaking on behalf of the National Restaurant Association, saw this rule as a vehicle for workers to vote for unionization. Congresswoman Northrup of Kentucky questioned me about this aggressively.⁸⁸ Moreover, the *Wall Street Journal* ran an article attacking the rule and suggested that readers should get my telephone number and contact me about it.⁸⁹ At a hearing conducted by then-Congressman (later Senator) James Talent of Missouri, he said, “You’re saying . . . there have been flip-flops in the past. In the name of stability, under your rule from now on, it’s only going to be flop. . . . There won’t be any flips.”⁹⁰ The result here was a congressional appropriations rider that precluded the Board from expending funds on any rulemaking of this

⁸⁴ *Id.* at 179.

⁸⁵ Gould, *supra* note 77, at 481.

⁸⁶ *Id.*; see also *NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13 (1st Cir. 1999) (permitting an administrative law judge to make an oral bench decision without affording the parties the opportunity to submit written briefs did not violate the NLRA); Lamont Stallworth, Arup Varma & John T. Delaney, *The NLRB’s Unfair Labor Practice Settlement Program: An Empirical Analysis of Participant Satisfaction*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 22.

⁸⁷ See *supra* note 52 and accompanying text.

⁸⁸ GOULD, *supra* note 22, at 232.

⁸⁹ *Id.*

⁹⁰ *Id.* at 170 (alterations in original) (quoting Barbara Yuill, *NLRB: House Small Business Subcommittee Grills NLRB’s Gould on Proposed Rule*, DAILY LABOR REP., Mar. 8, 1996) (internal quotation marks omitted).

type—though the Board had been criticized in the past for failing to explore this avenue.⁹¹

Finally, beyond *Overnite* itself, the Clinton Board drew attention for its willingness to obtain injunctive relief against other employers, including Caterpillar⁹² and the Detroit newspapers, which were in a bitter strike during my Board's term of office.⁹³ Sometimes, in the context of then-Senator Ashcroft's rather critical questioning of a decided case, other members of the Senate like Senator Edward Kennedy stated that the Committee should at least notify Board witnesses about an intent to question them on particular cases.⁹⁴ This issue had been raised at least a half-century ago by Senator Wayne Morris.⁹⁵ The interrogation and scrutiny reached what appeared to have been unparalleled heights during the Clinton Era. Many believed that business was "winning its war with the NLRB."⁹⁶ The Board took a battering of congressional inquiry—in amounts virtually unprecedented since the 1930s and 1950s. From 1994–1997, not one single appointment could be made to the Board, other than through the recess route—a practice that would today be condemned by the Supreme Court. At the conclusion of the Clinton Board's tenure, Aaron Bernstein noted that the number of injunction requests to the Board had declined appreciably in 1996, 1997, and 1998 and claimed that the Board had "blinked and bowed to the political pressure" of Republicans.⁹⁷ He concluded that my own proposals for labor law reform had gone "largely . . . unheeded. After years of grousing about that tiny agency with the huge influence, Corporate America finally seems to have the NLRB in check."⁹⁸ Whatever one's view, the Clinton Board⁹⁹ paid a price for its commitment to procedures that would fulfill the promise of the Act.

⁹¹ See Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedures Act*, 79 YALE L.J. 571 (1970); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); cf. *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991).

⁹² GOULD, *supra* note 22, at 260–61.

⁹³ *Id.* at 242–44.

⁹⁴ *Id.* at 155.

⁹⁵ *Id.* at 155–56.

⁹⁶ Aaron Bernstein, *How Business Is Winning Its War with the NLRB*, BUSINESSWEEK, Oct. 27, 1997, at 59 [hereinafter Bernstein, *How Business Is Winning*]; see also Aaron Bernstein, *The Long Knives Are Out for Bill Gould's NLRB*, BUSINESSWEEK, Sept. 25, 1995, at 61.

⁹⁷ Bernstein, *How Business Is Winning*, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ The Board's adjudicatory record—though modest in doctrinal shifts compared with what has been described above—also influenced the Republican Congress's response and, in some instances, retaliation. See, e.g., *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1148–49 (1998) (Gould, Chairman, concurring) (holding that

VI. THE SECOND BUSH BOARD

The Bush administration that followed in 2001 received little, if no, attention regarding its failure to utilize the injunction machinery contained in Section 10(j) or the period of time that the agency took to cope with unfair labor practices.¹⁰⁰ But an outcry against a series of decisions that reversed prior authority, tilting substantially towards management, which came to be known as the September Massacre,¹⁰¹ produced an appointment stalemate discussed below.

Democrats, in control of the Senate after the 2006 elections, refused to confirm any NLRB nominees, and thus the policy of “batching,” now a little more than a decade old, ceased. As a result, all appointments came to an end. President Bush, who was advised that he could keep the Board afloat on the basis of recess appointees, as had President Clinton,¹⁰² refused to make appointments, and the Board declined below three members—traditionally regarded as a requisite quorum to issue a decision. Ultimately, the Supreme Court held that the Board could not function at any point where there were fewer than three members, even though a three-member Board had delegated authority to function to the remaining members.¹⁰³

postal ballots are appropriate in some circumstances); *Kalin Constr. Co.*, 321 N.L.R.B. 649 (1996) (holding that because last minute campaign speeches, electioneering, changes in the paycheck process have an unsettling impact on employees and disturb the laboratory conditions which are a prerequisite for a fair election, a change in the paycheck, paycheck distribution, the location or method of the paycheck distribution would be a basis for setting the election aside); *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624 (1996) (holding that a union’s litigation on behalf of organizing employees was not a “benefit” which interfered with the conduct of the election); *Painters & Allied Trades Dist. Council No. 51*, 321 N.L.R.B. 158 (1996) (holding that the anti-dual-shop clause sought by the union had a primary objective and thus did not violate the secondary prohibitions in the Act); *McClatchy Newspapers, Inc.*, 321 N.L.R.B. 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997) (holding that an employer could not unilaterally implement merit pay proposals even when bargaining had taken place to the point of impasse); *Mgmt. Training Corp.*, 317 N.L.R.B. 1355 (1995) (holding that private employers, whether government contractors or not, are within its jurisdiction).

¹⁰⁰ From FY 2001 to FY 2008, the NLRB authorized an average of 21 injunctions per year under Section 10(j) of the Act. *Litigation Injunction*, NLRB, <http://www.nlr.gov/news-outreach/graphs-data/litigations/litigation-injunction> (last visited May 9, 2015). Since then, the Board has averaged 43 injunctions per year. *Id.* For comparison, from FY 1994 to FY 2001, the Board authorized an average of 58 injunctions per year. *Id.*

¹⁰¹ GOULD, *supra* note 14, at 246–47.

¹⁰² *Cf. Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc) (upholding President Bush’s recess appointment of Judge William Pryor to the U.S. Court of Appeals for the Eleventh Circuit).

¹⁰³ *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

VII. ENTER THE OBAMA BOARD: MORE CONFLICT BETWEEN CONGRESS AND THE BOARD

The first line of dispute between the Obama White House and the Senate in 2009¹⁰⁴ arose out of the conflict regarding the appointment of Craig Becker, a union lawyer, to whom Senator John McCain objected vociferously. Though serving for two years as a recess appointee, Becker's appointment was not confirmed by the Senate. However, this period stands in contrast to the Clinton Board in the 1990s and was one when Democrats controlled both chambers of Congress, and, as a result, at least until the end of 2011, the Obama Board was able to function reasonably free from legislative interference.¹⁰⁵ The Clinton Board experienced exactly the opposite, given the uninterrupted control of both houses by Republicans from 1995 onward.

When Republicans took the House in the 2010 elections, matters began to heat up. Since then, the House has convened approximately twenty times to discuss the activities of the Board, most of them involving hearings before the House Committee on Education and the Workforce.¹⁰⁶ In the summer of 2011, the full House Committee convened to debate proposed NLRB rulemaking to expedite election procedures.¹⁰⁷ Subsequently, legislation was introduced, promoted by Congressman Kline, to remedy what the House characterized as the "ambush election rule."¹⁰⁸ This bill assured, for the first time, that there would be delays in the election process, in that the bill assured that the Board would not be able to hold an election in less than thirty days.¹⁰⁹

¹⁰⁴ See William B. Gould, IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1 (2009); William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291 (2008).

¹⁰⁵ See Gould, *Crippling*, *supra* note 11.

¹⁰⁶ See *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the Subcomm. of Health, Emp., Lab., & Pensions of the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014) (statement of Rep. Mark Pocan), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/9.14-PocanOpening-JointEmployerHearing.pdf> ("As we turn the corner on 17-plus NLRB hearings and mark-ups, it seems that we should move our discussion to something more productive and recognize the realities facing today's workforce.").

¹⁰⁷ *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: Hearing Before the H. Comm. on Educ. & the Workforce*, 112th Cong. (2011).

¹⁰⁸ Workforce Democracy and Fairness Act, H.R. 4320, 113th Cong. (2014); see *Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014).

¹⁰⁹ H.R. 4320.

In 2015, the Senate, utilizing the Congressional Review Act passed by the Congress during the Clinton Administration,¹¹⁰ voted to disapprove the Board's election rule, which was designed to expedite elections by allowing the eligibility of employee voters to be resolved after the vote had been conducted and the ballots counted if the number of employees in dispute would affect the outcome of the election.¹¹¹ The House soon followed suite.¹¹² This statute has brought the Congress into direct and unprecedented conflict with the rulemaking authority of the Board and its policies.

Additionally, two lines of case law emanating from the Board have attracted the attention of the House in particular. The first is the Board's 2011 decision holding that the employees constituting a smaller group than the facility in total can be appropriate.¹¹³ The second area of interest stems from the NLRB Chicago Regional Director's decision in *Northwestern*, holding that college student athletes are employees within the meaning of the Act.¹¹⁴ Now Chairman Kline argued that the *Northwestern* decision "takes a fundamentally different approach that could make it harder for some students to access a quality education" and that he "strongly urge[s] the Obama board to change course and encourage key stakeholders to get to work."¹¹⁵

¹¹⁰ Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009). See generally MORON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE (2008), available at http://assets.opencrs.com/rpts/RL30116_20080508.pdf (assessing the nuances, effectiveness, and impact of the Congressional Review Act). As Professor Balla has said,

The act provides Congress with 60 days during which expedited procedures are available for disapproval of newly promulgated regulations. A resolution of disapproval introduced during this period receives numerous advantages, including a lower threshold for discharging the committee of jurisdiction, a prohibition on the offering of amendments, and a limit on floor debate. A regulation is prevented from taking effect when a resolution is passed by both chambers and signed by the president, or when Congress overrides a presidential veto of a resolution.

Steven J. Balla, *Legislative Organization and Congressional Review of Agency Regulations*, 16 J.L. ECON. & ORG. 424, 426–27 (2000) (footnotes omitted).

¹¹¹ S.J. Res. 8, 114th Cong. (vetoed Mar. 31, 2015). For the Senate debate regarding this resolution, see 161 CONG. REC. S1229–35 (daily ed. Mar. 3, 2015); 161 CONG. REC. S1264–66 (daily ed. Mar. 4, 2015).

¹¹² The House debate regarding the same resolution is contained at 161 CONG. REC. H1782–88 (daily ed. Mar 19, 2015).

¹¹³ See Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. No. 83, 2011 WL 3916077 (2011).

¹¹⁴ Decision and Direction of Election, *Northwestern Univ.*, Case No. 13-RC-121359 (NLRB Region 13, Mar. 26, 2014). For a discussion of this case, and issues related to it, see William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014).

¹¹⁵ *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014) (statement of Rep. John Kline,

Probably no area attracted more congressional attention than the *Boeing* matter, where the company was unsuccessful in negotiations to obtain what it deemed to be adequate safeguards at its Seattle, Washington facilities and thus made a plan to produce the Dreamliner in South Carolina. The General Counsel issued a complaint against Boeing in 2011,¹¹⁶ and during the 2012 Presidential campaign, Governor Mitt Romney attacked the Board.¹¹⁷ Even before this, Senator Lindsey Graham led the charge in attacking the Board, or more precisely in this case, the General Counsel, about the decision to charge Boeing.¹¹⁸ A major dispute also broke out between Representative Darrell Issa as to whether the General Counsel would testify at hearings in South Carolina on the eve of an unfair labor practice hearing about the Boeing case.¹¹⁹ Other Republicans in the Senate levied criticism about the charge against Boeing,¹²⁰ while Democrats expressed support for both the legal process and the General Counsel's independence.¹²¹

VIII. THE CHANGE IN THE APPOINTMENTS PROCESS

As noted above, the polarization first identified in the 1980s resulted in the "batching" of appointments in 1994 during the Clinton administration—the first since the Taft-Hartley amendments when the Board was expanded. During the Carter administration, before this trend had begun to set a pattern, the so-called Republican nominee, Don Zimmerman, previously of Senator Javits's staff, was apparently not even a registered Republican, though he filled a Republican seat. During the Clinton administration, Senator Kassebaum

Chairman of H. Comm. on Educ. & the Workforce), available at <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=379217>.

¹¹⁶ Complaint and Notice of Hearing, Boeing Co., Case No. 19-CA-32431 (NLRB Region 19, Apr. 20, 2011), available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3310/cpt_19-ca-032431_boeing_4-20-2011_complaint_and_not_hrg.pdf.

¹¹⁷ Jon Greenberg, *Mitt Romney Attack [sic] Barack Obama over Boeing Plan Question*, POLITIFACT.COM (Oct. 14, 2011, 1:52 PM), <http://www.politifact.com/truth-o-meter/statements/2011/oct/14/mitt-romney/mitt-romney-attack-barack-obama-over-boeing-plant/>.

¹¹⁸ Kevin Bogardus, *Senator Threatened Labor Board Before Boeing Complaint*, HILL (Nov. 9, 2011, 10:17 PM EST), <http://thehill.com/business-a-lobbying/192737-sen-graham-threatened-labor-board-before-boeing-complaint-was-filed>.

¹¹⁹ E.g., Letter from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to Rep. Darrell Issa (June 3, 2011), available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/june3.pdf>.

¹²⁰ Letter from Sens. Michael B. Enzi et al., to Lafe E. Solomon, Acting Gen. Counsel, NLRB (May 3, 2011), available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/may_3_2011_letter_from_senator_michael_b_enzi_and_others.pdf.

¹²¹ Letter from Sens. Tom Harkin et al. to Lafe E. Solomon, Acting Gen. Counsel, NLRB (May 19, 2011), available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3348/may_19_2011_letter_from_senator_tom_harkin_and_others.pdf.

insisted that no appointment be made for the so-called Republican seat unless assurances were received that the nominee would dissent from my opinions, should they represent a majority on the Board. Those who could not give such assurances could not make the cut. Senator Lott named the Republican nominees in 1997 and expressed great interest in those coming from Democratic side, so great was Republican congressional influence.

Professor Calvin Mackenzie, in a significant work, noted that this produced an administrative process that was “little more than the sum of a set of disjointed political calculations,”¹²² given the fact that the Senate “often delays confirmation until several nominations to the same agency accumulate, thus allowing it to require that the president include some nominees who are effectively designated by powerful senators.”¹²³ Professor Mackenzie continued, as follows:

The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, noncareer managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president’s team would assume its place and impose the people’s wishes on the great agencies of government. Not infrequently, it actually worked that way.

But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the street: interchangeable public elites, engaged in an insider’s game.¹²⁴

* * *

During George W. Bush’s presidency, the batching process witnessed in both 1994 and 1997 solidified and was disrupted only when the above-noted September Massacre convinced Democratic leadership that further cooperation with President Bush and the appointments process was futile. This created the first of two major constitutional crises affecting the Board with a Supreme Court holding that less than three members could not constitute a quorum and

¹²² G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997*, at 31 (1998).

¹²³ *Id.*

¹²⁴ *Id.* at 39–40.

thus invalidated the decisions that followed.¹²⁵ Prior to the September Massacre, presidents had dealt with the problem of absence of three members through recess appointments. For instance, in 1997, I was the only one of three Board members confirmed by the Senate, while the other two served as recess appointees, and, had the recess appointment process not been employed, the Board would not have possessed what the Supreme Court ultimately found to be the requisite quorum.¹²⁶

Again, President Bush, in contrast to both Presidents Clinton and Obama, refused to make recess appointments when confronted with an obstinate Senate. It is never as important to Republican administrations to keep the NLRB operating as it is under Democratic administrations, given that such a substantial portion of the Republican Party today opposes the statute authorizing its creation (though such concerns subsided during the Bush era) and has only been constrained by the sure veto by Presidents Clinton and Obama of legislation providing for repeal of the law. The Congressional Review Act, now used for the first time regarding the rulemaking authority of the National Labor Relations Board, has circumvented this requirement by providing a kind of surrogate for repeal. It, too, has run up against an Obama-veto roadblock.¹²⁷

During the Obama administration, faced with opposition to his nominees, President Obama began to make recess appointments, and this led to the most serious constitutional challenge in *NLRB v. Noel Canning*.¹²⁸ The problem of recess appointments had grown considerably in this period, given a greater willingness of congressional Republicans to utilize the filibuster over these appointments.¹²⁹ Ironically, however, in 2013, the Senate eliminated the filibuster for all appointments except those to the United States Supreme Court.¹³⁰ This development promoted by then-Senate Majority Leader, Harry Reid of Nevada, constitutes a significant reform that both limits the practical

¹²⁵ *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

¹²⁶ *See id.*

¹²⁷ Memorandum of Disapproval, 2015 DAILY COMP. PRES. DOC. 216 (Mar. 31, 2015); *see also* Peter Baker, *Obama Rebuffs Congress on New Union Rules*, N.Y. TIMES, Apr. 1, 2015, at A16, available at <http://www.nytimes.com/2015/04/01/us/obama-rejects-republican-effort-to-tighten-union-rules.html>.

¹²⁸ 134 S. Ct. 2550 (2014).

¹²⁹ That does not mean that the filibuster was unknown prior to the Obama administration—just that it was rarely used. Senator Edward Kennedy wrote to me after I was confirmed on March 2, 1994: “It’s a good thing the Republicans decided not to filibuster!” GOULD, *supra* note 22, at 49 (internal quotation marks omitted).

¹³⁰ Peters, *supra* note 6.

significance of *Noel Canning*, as well as diminishes the previous Senate dominance of both the Clinton and Obama eras. This, in turn, appears to have at least partially shifted Republican focus away from NLRB appointments and the pernicious “batching” of nominations toward the law’s interpretation and administration.

CONCLUSION

Under assault from the beginning of the Act itself, the Board has never lived in an environment free from the political process. James Landis recognized that regulatory policies are more permanent, consistent, and professional when they are not “too closely identified with particular presidential administrations.”¹³¹ Contrarily, former SEC Chairman William Cary of Columbia Law School points out that although a basis purpose of independence

is to free commissions from the insidious influences of politics. . . . there are effects which are extremely serious. Cut loose from presidential leadership and protection, the agencies must formulate policy in a political vacuum. Into this vacuum may move the regulated interests themselves, and by infiltration overcome the weak regulatory defense to become the strongest influences upon the regulators.¹³²

In a sense, the idea of staggered terms and the informal consensus that seems to have emerged around a 3–2 split between the party that controls the White House and the party in opposition reflects that reality. But political parties, beginning in the 1980s, have become increasingly polarized, and a disproportionate amount of the consequent acrimony affects labor–management relations and regulation of the labor market. Though the very divisions that produced this make it difficult to establish a labor court that allows for life tenure of the kind enjoyed by the federal judiciary, nonetheless, something better than the “batching” process is in order.¹³³

¹³¹ GOULD, *supra* note 22, at 123 (citing MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 140 (1955)) (internal quotation marks omitted); *see also* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

¹³² GOULD, *supra* note 56, at 123 (alterations in original) (citing William Cary, *The Federal Regulatory Commissions*, Lecture at Princeton University (Apr. 4, 1952)); *see also* WILLIAM L. CARY, *POLITICS AND THE REGULATORY AGENCIES* (1967).

¹³³ I advocated a prohibition against reappointment, a modest first step toward depoliticizing the Board and other quasi-judicial administrative agencies. GOULD, *supra* note 22, at 125–26.

The status quo since the 1980s (and ratified in the 1990s) has led, as Professor Mackenzie has written, to the appointment of Washington insiders disproportionately from congressional staffs rather than from disparate, diverse portions of the country with backgrounds reflecting such. Beginning with 1994, this produced the “batching” of nominees, which, over at least the most recent twenty-year period, frequently means the lowest common denominator. Yet, it must be noted that the present Obama Board represents something of a departure from the past three decades with four of its five members hailing from outside the Washington “beltway.” The appointment process should reflect an attempt to obtain the very best people, who wish to serve for the best possible reasons. Notwithstanding the appointment of some very capable people, this has not been the case generally in recent years.

The amount and extent of political interference has increased substantially since the 1990s and promises to do so again given the composition of Congress in 2015 and beyond. Congress, now encouraged and prompted by the Congressional Review Act, seems now to be almost obsessed with the view that it is the expert, not the Board,¹³⁴ and that its role is to instruct the Board about what to do. This tendency may well be more pronounced as the filibuster’s demise diminishes Senate power over nominees. (At the same time, it is noteworthy that since 2010, Republicans in both houses have failed to use congressional “riders” as a rulemaking checkmate, and the failure to do so in its dealings with the Board is puzzling given any president’s general unwillingness to veto an appropriations bill over a single item, rider or not.)¹³⁵

Absent legislative reform or modification (always the prerogative of Congress and the president), this view is as fundamentally flawed and inconsistent with the both the rule of law and the idea of independent regulatory agencies, as would be the case if instructions were given from the White House to the Board. The rule of law dictates that only the Supreme Court is the ultimate arbiter.¹³⁶

One way to insulate appointees from the political process is to both provide appointments over a more substantial period of time—such as seven or eight

¹³⁴ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242–43 (1959) (noting that the Board provides “centralized administration of specially designed procedures . . . to obtain uniform application of substantive rules” on the basis of its “specialized knowledge and cumulative experience” (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953))).

¹³⁵ This was well demonstrated when the “rider” weapon was used against Clinton Board rulemaking. *See* GOULD, *supra* note 22, at 172–73. Is Republican opposition today therefore more theater than substance?

¹³⁶ *See* Schmidt, 58 N.L.R.B. 1342 (1944).

years—and to simultaneously preclude reappointments. In the 1990s, I thought the decrease in case production and reluctance to face some of the hard issues was directly attributable to fear of political retribution. With the second term out of the way, conduct based upon that kind of exposure became more akin to a judicial process itself.

But these kinds of measures are palliatives rather than remedies. In conservative eras, there is less tension, given the unimportance of labor policy to such administrations. When the pendulum swings the other way, conflict and tension are inevitable. The Board, or any other mechanism designed to take its place, will reflect the divide. Perhaps, even if arguably the sun is now setting on Senate regulation of the appointment process such as that engaged in by Senator Trent Lott in the 1990s—and all the undesirable horse-trading and “batching” which go with it—it is and will be the work of the Board itself that will be the object of intensified legislative combat in the near future.

