Congress of the United States
Washington, DC 20515

February 13, 2013

The Honorable Mark G. Pearce
Chairman
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Chairman Pearce:

We insist the Board immediately cease all activity until the U.S. Supreme Court rules on the constitutionality of President Obama's January 2012 recess appointments or all members of the Board are confirmed with the advice and consent of the U.S. Senate in a number sufficient to constitute a quorum.

On January 4, 2012, President Obama recess appointed Terence Flynn, Sharon Block, and Richard Griffin to the Board while the Senate was regularly meeting in *pro forma* session purportedly pursuant to the Recess Appointments Clause of the Constitution. On January 25, 2013, in *Noel Canning v. NLRB*, the U.S. Court of Appeals for the District of Columbia held unanimously that President Obama's January 2012 recess appointments to the Board were constitutionally invalid.

Immediately following the issuance of the court's decision, you released the following statement:

> "The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.
>
> In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions."[1]

While the court's decision "applies to only one specific case," the Board cannot ignore the special role the U.S. Court of Appeals for the District of Columbia plays with respect to National Labor Relations Board (NLRB) jurisprudence, the significance of this decision, the cost of additional litigation, or its responsibility to foster certainty and predictability. Accordingly, it is essential for the Board to cease all activity immediately.

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[1] *Statement by Chairman Pearce on recess appointment ruling,* NLRB (January 25, 2013), available at http://www.nlrb.gov/news/statement-chairman-pearce-recess-appointment-ruling.

As you know, "any person aggrieved by a final order of the Board…may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or…*in the United State Court of Appeals for the District of Columbia* [emphasis added]."[2] In other words, unlike other courts of appeals, aggrieved parties can always appeal a Board order to the U.S. Court of Appeals for the District of Columbia.

The holding in *Noel Canning v. NLRB* is now controlling in the U.S. Court of Appeals for the District of Columbia. The U.S. Court of Appeals for the District of Columbia is "bound to follow circuit precedent until it is either overruled by an en banc court or the [U.S] Supreme Court."[3] Given that any Board order may be appealed to the U.S. Court of Appeals for the District of Columbia and the fact that the holding in *Noel Canning v. NLRB* is controlling in that circuit, all prior and future orders issued by a Board that relied on intrasession appointments to constitute a quorum could be overturned. Employees, unions, and employers will be forced to endure costly litigation to overturn the Board's orders, and taxpayer funds will be wasted in the defense of the Board's orders.

As you noted, parties deserve "careful consideration" and the "resolution of their cases." However, the Board must not abandon its fundamental responsibility to foster certainty and predictability for employees, unions, and employers. As the U.S. Supreme Court has recognized, achieving stability of labor relations was the "primary objective of Congress in enacting the National Labor Relations Act."[4] The Board's continued operation in the wake of *Noel Canning v. NLRB* will only perpetuate confusion and completely frustrate the stability of labor relations. There is no better example of this than the instability that resulted from a U.S. Supreme Court decision issued just three years ago.

In *New Process Steel, L.P. v. NLRB*,[5] the Supreme Court ruled that three Board members are necessary to constitute a quorum. The Court's decision invalidated nearly 600 Board decisions that were largely noncontroversial. This has certainly not been the practice of the Board over the past year. In fact, many of its decisions are highly controversial and have in some cases overturned longstanding Board precedent. Given the recent ruling, any decision issued by the current Board will be in doubt.

Only three things are certain if the current Board continues to issue decisions: those decisions cannot be relied upon, every losing party will be justified in filing an appeal, and no prevailing party can be assured they will ever benefit from any Board-ordered remedy. This uncertainty is not what the law anticipates and cannot be permitted.

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[2] 29 U.S.C. 160(f).

[3] *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005). See also *Brewster v. Commissioner*, 607 F.2d 1369, 1373 (D.C.Cir.1979).

[4] *Colgate-Palmolive-Peet Co. v. NLRB,* 338 U.S. 355, 362-3 (1949).

[5] 130 S.Ct. 2635 (2010).

Given the uncertainty surrounding Board orders and the costs associated with such orders, we insist the Board immediately cease all activity until the U.S. Supreme Court determines the constitutionality of President Obama's January 2012 recess appointments or all members of the Board are confirmed with the advice and consent of the U.S. Senate in a number sufficient to constitute a quorum under the National Labor Relations Act (NLRA). Our demand is limited to activity that requires authorization by not less than a quorum of the members of the Board. It does not preclude the NLRB from continuing to function pursuant to the authority appropriately delegated by the Board or codified in the NLRA. However, it is essential the Board do no more harm by continuing to issue decisions and rules that are likely to be overturned pursuant to the holding in *Noel Canning v. NLRB*, and provide the certainty critical to the success of America's workers, employers, and unions.

Sincerely,

JOHN A. BOEHNER
Speaker
U.S. House of Representatives

ERIC CANTOR
Majority Leader
U.S. House of Representatives

KEVIN MCCARTHY
Majority Whip
U.S. House of Representatives

CATHY MCMORRIS RODGERS
Republican Conference Chairman
U.S. House of Representatives

JOHN KLINE
Chairman
Committee on Education and the Workforce
U.S. House of Representatives

DAVID P. ROE
Chairman
Subcommittee on Health, Employment, Labor and Pensions
U.S. House of Representatives