

Congress of the United States
Washington, DC 20515

February 13, 2013

The Honorable Barack Obama
President
The White House
1600 Pennsylvania Ave
Washington, D.C. 20500

Dear Mr. President:

We respectfully urge you to nominate four qualified individuals for the National Labor Relations Board (NLRB) immediately, and work with the Senate to confirm them. Until a constitutionally appointed Board is seated, uncertainty will reign in labor-management relations to the detriment of America's workers, employers, and unions. Your immediate action is necessary to restore faith in the Board and the Constitution's appointment process.

On January 4, 2012, you recess appointed Terence Flynn, Sharon Block, and Richard Griffin to the NLRB while the Senate was regularly meeting in pro forma session, purportedly pursuant to the Recess Appointments Clause of the Constitution. On January 24, 2013, in *Noel Canning v. NLRB* (*Noel Canning*), a panel of the U.S. Court of Appeals for the District of Columbia (U.S. Court of Appeals for D.C.) held unanimously that your January 2012 recess appointments to the Board were constitutionally invalid.

The holding in *Noel Canning* is now controlling in the U.S. Court of Appeals for D.C.¹ Additionally, unlike other courts of appeals, aggrieved parties can always appeal a Board order to the U.S. Court of Appeals for D.C.² Therefore, 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 defense of the Board's orders.

It is the Board's 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."³ One need only look back three years to understand the instability that can result from the Board issuing orders without a quorum.

In *New Process Steel, L.P. v. NLRB*,⁴ 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

¹ *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).

² 29 U.S.C. 160(f).

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

⁴ 130 S.Ct. 2635 (2010).

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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: decisions issued by the current Board 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 a Board-ordered remedy. This uncertainty is not what the law anticipates and cannot be permitted.

While we do not always agree with Board's holdings, a functional, constitutionally appointed Board is an essential part of labor-management relations. In fiscal year 2012, the Board issued 341 decisions, of which 277 involved charges of unfair labor practices and 64 involved elections and questions of representation.⁵ Parties are generally prohibited under the National Labor Relations Act (NLRA) from appealing decisions to federal court without a Board order.⁶ Without a properly functioning Board, injured parties cannot obtain relief and aggrieved parties cannot appeal. Employees, unions, and employers are left in limbo.

Should you fail to work with the Senate to confirm a constitutionally confirmed quorum, the resulting uncertainty will cause serious harm to employers and their workers at a time our country can least afford it. The authority of the Board governs virtually every private workplace across the country, affecting the lives of hundreds of millions of workers and employers. Recently, the Department of Labor announced that the national unemployment rate increased, leaving more than 12 million Americans searching for work. Greater uncertainty would only exacerbate the jobs crisis plaguing the nation.

Upon announcing these unconstitutional recess appointments, you stated the "American people deserve to have qualified public servants fighting for them every day..."⁷ With unemployment remaining unacceptably high, we could not agree more. We look forward to your immediate nomination of four qualified individuals and collaboration with Senators from both parties to confirm them expeditiously.

Sincerely,



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



ERIC CANTOR
Majority Leader
U.S. House of Representatives

⁵ *Board Decisions Issued*, NLRB, available at <http://www.nlr.gov/news-outreach/graphs-data/decisions/board-decisions-issued> (last visited on February 1, 2013).

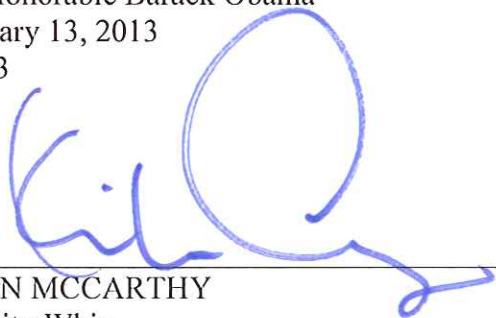
⁶ 29 U.S.C. 160(e).

⁷ *President Obama Announces Recess Appointments to Key Administration Posts*, The White House, available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts> (last visited on February 1, 2013).

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