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## A Conversation with Members of the National Labor Relations Board and the General Counsel

### Authors

Mark Gaston Pearce, Richard F. Griffin Jr., Kent Y. Hirozawa, Harry I. Johnson III, Lauren McFerran, Philip A. Miscimarra, and Charles A. Shanor

## **A CONVERSATION WITH MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD AND THE GENERAL COUNSEL**

*Charles A. Shanor, Moderator\**  
*Mark Gaston Pearce, Chairman*  
*Richard F. Griffin, Jr., General Counsel*  
*Kent Y. Hirozawa, Member*  
*Harry I. Johnson, III, Member*  
*Lauren McFerran, Member*  
*Philip A. Miscimarra, Member*

**PROFESSOR SHANOR:** Years ago when I was a law student, law students tended to understand that the Wagner Act saved capitalism from its excesses and that it grew out of the Great Depression and the turmoil of those years. Today, I think law students have lost sight of some of that history. They've lost sight of how labor law and the traditional labor law framework was so essential to the development of the workplace in America as they now focus on individual rights in the workplace, what we now call employment law.

You know, I was lucky as a law student after my 1L year to work in New York City with a man named Murray Gordon who represented policemen, firemen, and interns and residents at city hospitals and it introduced me to this area of law as a vibrant, very vibrant field. We are wonderfully blessed today to have the entire National Labor Relations Board and the General Counsel, the six people in the country most involved in implementing the National Labor Relations Act framework, with us. We are also remarkably lucky that this is a Board that takes its job very seriously, and the General Counsel too for that matter, so seriously that I would call it a remarkable time for the National Labor Relations Board. It has injected a new activism, if you will, into the field. It has revived the labor law practices of senior lawyers for management who were seeing that the field was not a good way to make a living and now they're able to charge full rates and sometimes more for dealing with labor—

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management issues. All that, of course, has its pluses and minuses depending on whose spectacles you're using to look at things.

The Labor Board has always had a political component. Democrats and Republicans, with balance on the Board by tradition if not by statute, oftentimes see labor relations issues differently. One man's bias and ignorance is another man's even-handedness and enlightenment. And you flip the glasses around and that's just the way the world looks.

So at any rate, one thing I wanted to say about the relationship with the Board, between the Board and the courts, just to kind of illustrate what several of the academic panelists talked about, I argued a case before the Eleventh Circuit Court of Appeals when I was working with Paul, Hastings, Janofsky and Walker a number of years ago, and I arrived at the Eleventh Circuit a little bit early to hear the argument before mine.

The argument before mine involved the National Labor Relations Board. Counsel for the Board had flown down from Washington and the senior judge on the panel was an icon of my life, Frank Johnson. And Judge Johnson, when the Labor Board lawyer stood up, said, "counsel, does the Board still adhere to its doctrine of nonacquiescence in decisions made by courts of appeals, only acquiescing to Supreme Court decisions." As he had to, counsel said, "yes." And Frank Johnson said, "we understand, counsel. You may sit down. We needn't hear your argument."

(Laughter.)

So that is my story about tension between courts and the Labor Board. It happens.

Well, here's our program in a nutshell. We're going to lead off with the General Counsel of the Board. General Counsel Griffin is going to talk about issues related to wage stagnation, inequality in the workplace, and the role of the Labor Board and the General Counsel. Then we're going to follow-up. Part two is going to be with Chair Pearce and Member Miscimarra who are going to talk about the new representation rule. As you know, that's been a particularly interesting piece of what the Board has done recently. Thirdly, we're going to look to Member McFerran to talk about the relationship between Congress and the Board because she has served now in both institutions and has not yet moved to a mental institution. She has been central to both enterprises here. Fourth, we're going to have Member Hirozawa talk to us about some recent decisions focusing on recent decisions of substantial importance in the

workplace. And lastly, Member Johnson will talk to us about some pending issues that many of you may know about and many of you probably don't. And, at the end of the day, if I can keep the time moving on reasonably on schedule, we'll have some questions and answers.

So let me introduce, I'm going to introduce each of these people individually rather than collectively because I think if I do them all collectively then you'll lose your memory of who's who. And so anyway, Richard Griffin has a long, deep history of involvement with labor relations law, serving for twenty-eight years as a lawyer and ultimately General Counsel for the International Union of Operating Engineers. He's had leadership positions on the IUOE's pension fund. He was very much involved in AFL-CIO leadership. He has served not only as General Counsel, his current position, but unlike most General Counsels he's also served on the Labor Board. So he's seen the institution from both perspectives. He's a graduate of Yale University with a J.D. from Northeastern. And so, without further ado, Mr. Griffin. And, I understand these folks plan to remain seated, not use the podium.

So, please proceed.

**GENERAL COUNSEL GRIFFIN:** Thank you very much. Can everybody hear me? Okay, good. Thanks first to, I'm going to join with everyone else who has spoken in thanking Emory for sponsoring this and for thanking the *Emory Law Journal*. And, it was really a wonderful experience to sit in the audience and listen to the first panel give their presentations, and I was extremely tempted based on a number of the points that were raised to kind of ditch my prepared remarks and respond sort of seriatim to a number of the points that were made. But then I decided that that would be inappropriate and I needed to exercise some discipline. However, the most recent remark concerning nonacquiescence is making me modify my position slightly. Because for those of you who don't know, the General Counsel in addition to, it's a very interesting job, in addition to being the chief prosecutor of the unfair labor practices under the National Labor Relations Act—so there were 20,415 charges filed last year in the regional offices and the regional offices act on behalf of the General Counsel in determining merit and pursuing complaints in those unfair labor practices. Once the Board decides a case, it is the General Counsel's obligation and duty to defend the Board's position in the courts of appeals. And so the people who are the cannon fodder in front of the courts of appeals in the nonacquiescence context actually are a division of the Office of General Counsel, the appellate and Supreme Court litigation branch. In this

regard, there is a document that I don't have with me but I'm going to forward for purposes of distribution to the attendees at this conference which is a very remarkable document. It's about fifteen or eighteen years old and it's a response by the then Acting Solicitor of the Board, a fellow named Jeff Wedekind who is now one of our most distinguished administrative law judges, to the Fourth Circuit and to then-Judge Lutttig of the Fourth Circuit who wanted an explanation in writing from the Board of the nonacquiescence doctrine. And so, there is a remarkable recitation in that response that Acting Solicitor Wedekind signed of the number of occasions where it took a number of years for the Board to develop a conflict, for the conflict to get to the Supreme Court, and where the Supreme Court upheld the Board's position, even in the face occasionally of unanimous Circuit Court of Appeals disagreement with the Board's positions. It goes into the reasons for nonacquiescence, it goes into many, many, many examples of situations where courts of appeals have acknowledged the reasons for the Board's nonacquiescence doctrine and it cites example, after example, after example where the Supreme Court ultimately agreed with the position of the Board. And I'm fully confident that that's what's going to happen with respect to the Horton–Murphy Oil situation, but that's a discussion for another day.

So what I'm going to talk about, and this comes up in the context of, sort of, here we are at the eightieth anniversary of the National Labor Relations Act, what is the continuing relevance of the Agency? What is the continuing relevance of the work that is done by the 1,600 people who represent the Agency out in the field and in headquarters? I'm going to talk about what I consider to be, and I think it's fair to say, the sort of pressing domestic policy issue of the day and that is stagnant wages and increasing income inequality, and where the Board is with respect to those two issues.

As has been pointed out, we're not an Agency that has any independent investigatory authority. We're dependent on charges being filed. And, in response to that pressing domestic policy issue, there are movements of workers and employees that are trying to do something about that. And in one instance, you may be familiar that there is a move afoot at the Wal-Mart Corporation. There is an organization called OUR Walmart that is agitating for changing the terms and conditions of employment at Wal-Mart, that's agitating for higher wages, more regular hours, and things like that.

And so when I became the General Counsel of the National Labor Relations Board, I was confirmed notably under the old rules, incidentally,

when it was still sixty votes for cloture and I got sixty-two, thereby earning my nickname of “Landslide” and I got fifty-five votes for confirmation. It was bipartisan support. I had fifty-four democrats and Lisa Murkowski from Alaska.

I was confirmed in late October of 2013 and I took office, my commission was signed, I was sworn in November 4, 2013. And the job of the General Counsel—I had previously worked at the Board. I had started my career as counsel for Board Member John Fanning who was the longest serving Board Member in the history of the Board, served from 1956 until 1982, and then our staff when Mr. Fanning wasn’t reappointed by President Reagan, I went to work for Chairman Donald Dotson and worked for him a little while before I left to go, as was mentioned, to work for the operating engineers. And so I knew about the Board from that status and I had been a constitutionally challenged recess-appointed Board Member. I’m one of the two Board members whose status was decided in the *Noel Canning* case. But in any event, I had not really grasped the full extent of the General Counsel’s job, and when I got in it and started, I immediately realized I needed a lot of help. So I started having meetings the first day with the various Division heads and the first person who I met with was Barry Kearney, who some of you may know, who is the long-time head of the Division of Advice. And the Division of Advice is the Division that assists the regions with particularly difficult cases or momentous cases. And Barry said to me, “there’s a whole bunch of charges against Wal-Mart that have been pending for a long time and you got to do something about them because of Black Friday.”

Now, I confess right now I am not a shopper. And I didn’t know what he was talking about when he said “Black Friday.” And I’m not kidding around. I was literally ignorant of what Black Friday was. Okay? So I didn’t really focus on it. And then he came back into my office a couple of days later and he said, “you got to do something about these Wal-Mart cases because of Black Friday.” And finally, not wanting to admit my ignorance but having no other choice, I said, “what do you mean Black Friday?” He said, “it’s the day after Thanksgiving when there’s all this shopping and there’s going to be a whole bunch of stuff that happens this time because all these charges relate to the preceding Black Friday when OUR Walmart and others took a series of actions and Wal-Mart reacted and allegedly pursuant to some charges that were filed committed some unfair labor practices.”

So I said “oh, now I understand” because this was by November 8th and if we were going to do something and give some guidance we had to act very fast. So on November 18th, which was about ten days later, there was a press release that was issued by my office and that press release announced that a determination had been made to issue complaints against Wal-Mart or to find merit—excuse me—to find merit with the number of charges with respect to Wal-Mart and in other instances to find no merit. And it was just sort of a plain-vanilla summary of what the things were. And there was a period of time that resulted in attempts to settle and resolve those cases, and in January we ended up issuing a Complaint. And I’m just going to read from this Complaint and then I’m going to tell you where the cases are right now so you understand, or my point is that in this sort of crucial effort that’s going on nationally with respect to Wal-Mart that the Board is processing charges, issuing Complaints, and litigating cases with respect to unfair labor practices. So, the Complaint that was issued, which was a consolidated Complaint, alleged as follows: “During two national television news broadcasts, and in statements to employees at Wal-Mart stores in California and Texas, Wal-Mart unlawfully threatened employees with reprisal if they engaged in strikes and protests. At stores in California, Colorado, Florida, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, North Carolina, Ohio, Texas, and Washington, Wal-Mart unlawfully threatened, disciplined, and/or terminated employees for having engaged in legally protected strikes and protests. At stores in California, Florida, and Texas, Wal-Mart unlawfully threatened, surveilled, disciplined, and/or terminated employees in anticipation of, or in response to, employees other protected concerted activities.”

Now, this case presented a little bit of a logistical challenge because, as you can see, that’s a lot of places. This is a national situation. And so what we ended up doing was we bifurcated the litigation into what we call the national issues and the local issues. There is one judge. There is a consolidated national Complaint. What he’s doing is he’s going around the country and he’s trying, opening the record on the national issue and then he’s closing the record in that particular location on the national issues. Then he’s opening the record on the local issues, trying those, and then proceeding on.

And so just as an update on where it stands right now, we started with 60 alleged discriminatees in 14 different states. So far, we have tried 16 of the 18 discharges that were involved. There have been convened national hearings in Oakland, Fort Worth, New Orleans, Seattle, Los Angeles, and Miami. The local trial in Oakland was concluded. There is an ALJ decision in that trial. All



of the allegations, unfair labor practice allegations that were put forward in the Complaint, were upheld by the ALJ with one exception, which was a surveillance exception. So far we've had 28 days of hearing, over 5,600 pages of transcript, joint exhibits that number 1,321, General Counsel exhibits of 123, employer exhibits of 259, union exhibits of 15. Wal-Mart has produced over 250,000 documents that are in an electronic database that we have access to through the Justice Department, called Relativity, and the trial team is routinely pulling things out of that database for use in these trials.

So, my point here is not to tell too much of a war story. It's just to say that to the extent that there is a crucial nationally important labor dispute going on, the Labor Board is in the middle of determining, pursuing unfair labor practice cases, having adjudications over the merits of those unfair labor practices and I think that demonstrates, at least in this particular area, a certain amount of continuing relevance.

I will make this point in one other way and that is one that I'm sure no one in this room has heard anything about, and that has to do with the consolidated Complaint that has been issued against McDonald's. There is, similarly, a national campaign going on seeking to raise fast food workers' wages to \$15 an hour and to address a number of other matters. In that area, one of the targets of that campaign has been McDonald's.

When I became the General Counsel, there were a couple of hundred unfair labor practice charges that had been filed against McDonald's and the charging parties had named not just the McDonald's franchisees but had also, in a number of instances, named McDonald's corporate, the franchisor, as a joint employer. And, to make a long story short, ultimately after a lot of back and forth and having the parties in to discuss these matters, merit determinations were made with respect to a number of these cases. And, in those cases where merit was found, we also alleged that McDonald's, the corporate employer, the franchisor, is a joint employer with the franchisees.

That case involves a number of consolidated Complaints from around the country. The trial opened with some motions practice at the end of March, and the actual testimony is likely to commence in May.

The theory that is being advanced by the General Counsel in this case with respect to the joint employer's status is based on initially the current state of the law. I have been asked, on I think four separate occasions, by congressional oversight committees what the theory that's being advanced is and have

responded in each instance that the theory that's being advanced is that we can prove joint employer status under the current state of the law. We are also arguing in the alternative that under a test we have proposed to the Board in a case where the Board sought briefing on the joint employer issue, a case called *Browning-Ferris*, where we argued that the Board should return to its old traditional joint-employer standard, that we can make out joint-employer status under that standard as well. But we are not proceeding in either McDonald's or in any other case where there's an outstanding Complaint against anyone on a joint employer theory solely on the theory that was advanced in the *Browning-Ferris* amicus brief that we filed, advocating for a different joint-employer standard.

And, just so we're clear about that, we're also joined in that regard by the EEOC, which also filed a brief in the *Browning-Ferris* case arguing that the Board's current joint-employer standard is not consistent with the joint-employer standard that the EEOC applies or that applies in Title VII cases, and that the Board should revise its standard to be in compliance with other labor laws.

So the McDonald's case is a very high profile matter. The International Franchise Association and other groups are concerned that the theory that's being advanced will do damage to the franchise model, which is a very important part of the economic, which has generated an enormous amount of economic growth and job opportunities. And my response to that is in the *Browning-Ferris* brief we were very clear that there are cases that established, under the Board's old standard that we're asking them to return to, that if a franchisor and a franchisee's relationship involved a situation where the franchisor was indirectly affecting terms and conditions of employment of the franchisee employees in order to protect the uniformity and the quality of its brand or product, the Board had held in these old cases that doesn't amount to joint-employer status. And in the *Browning-Ferris* brief, we have specifically said, and I have specifically said in response to all of these congressional oversight inquiries, that we are not seeking to overturn those cases.

So if the franchisor-franchisee relationship is focused on protecting the uniformity of the brand or product that doesn't give rise to us wanting to seek joint-employer status. But there are situations where the franchisor goes well beyond that, gets involved in determining or codetermining terms and conditions of employment in a way that goes beyond protecting the uniformity of the brand or product and those are cases where we're looking if the charges

are brought, if the joint employer status is asserted, we're looking to proceed on the joint employer theory with respect to those employers.

So those are two examples where I think what we're up to demonstrates that the Labor Board still has a very important role to play with respect to crucial issues in the American workplace.

I'm going to conclude, because I just got the high sign and I really want to hear what the colleagues on the Board have to say and I want to make sure you get an opportunity to hear it, by just telling one story that I think epitomizes why I am so proud to be, and humbled to be, in this job, and to be working with the people who do this work for the National Labor Relations Board around the country. We had a case in Ohio, in Cleveland, that involved an organizing campaign in a hospital where there were, the nurses in the hospital were trying to organize and the employer's response involved a number of alleged unfair labor practices including firing a long-term nurse who was the lead organizer. And we have available to us, and former Chairman Gould mentioned this section of the Act in his remarks, Section 10(j) which allows for the Board to seek interim injunctive relief in the federal district courts where there is a possibility that if we wait for the Board's administrative process to take place there will be remedial failure, there will be some irreparable harm that can't be addressed by the ultimate Board Order. And so, we have a very active 10(j) program, which if I had more time I would spend some time discussing, but in this instance what we did was the General Counsel, there was a decision to issue Complaint by the Regional Director in Cleveland, authorization was sought for 10(j) relief, the Board approved seeking 10(j) relief, and a successful request for an injunction was litigated with the federal district court.

And part of the remedy that was awarded was a Notice reading, and this was a very organized group of nurses and they showed up and made kind of a ceremony at the point where the Notice was read in the workplace. And the woman who read the Notice was the lead attorney in the Board case, and the person who was discharged, her husband came up to the lead attorney right after she read the Notice and the husband said "you know, I got cancer right when my wife was fired and therefore I was not able to be there for her during this bad time when she was fired, and I want to thank you so much for being there for my wife during this very difficult time."

And I'm—and you can tell I'm getting emotional again. Every time I tell this story I get emotional. That's the kind of work that's being done around the

country by representatives of the National Labor Relations Board. And I would submit that that still continues to be extremely important and relevant work.

**PROFESSOR SHANOR:** It is certainly very important and very relevant work. And the next two presenters are going to talk about a very wide-ranging and interesting development at the Labor Board which has to do with the rules concerning representation. Mark Pearce is the Chair of the National Labor Relations Board. He was a founding partner of a Buffalo law firm that practiced on the union and employee side. He worked with the National Labor Relations Board as a junior attorney many years ago. He has taught at Cornell School of Industrial and Labor Relations Extension. He's a Fellow at the College of Labor and Employment Lawyers. Very long term, again, involvement with the field of labor and employment law. And our second presenter, they're going to do this as a package, concerning the representation rules is Philip Miscimarra who came to the Labor Board after a number of years with Morgan, Lewis & Bockius and management side practice with several other firms including Seyfarth Shaw, Ogletree Deakins, and so on, and he has authored a number of books concerning labor law issues including one involving the NLRB and managerial discretion and NLRB and secondary boycotts. So I will turn it over without ado to Chairman Pearce and Member Miscimarra.

**CHAIRMAN PEARCE:** Thank you very much, Professor. I would, before I start out, I'd like to greet everybody and recognize one thing. Our General Counsel has been doing pretty marvelous work, and you can see from his presentation his commitment to the mission and purpose of the Act. There's one thing that he could say that illustrates how strong the pulse is of the National Labor Relations Board. Fiscal year 2014, \$44 million in backpay awarded and just under 3,000 unlawfully terminated people put back to work. So for the little-agency-that-could, we're still doing a little bit of work here.

I'd like to thank Professor Shanor and Professor Green for their invitation and assistance in this regard, and of course the sponsoring law firm of Ford & Harrison. And I'd like to congratulate you on your lawsuit against that actor in Star Wars who stole your name.

(Laughter.)

I had the opportunity to chat with two of the partners last night of the firm and we had a very scintillating conversation despite the alcohol. We talked about the importance of having programs like this and how great these kind of

programs are. I told them that I agreed and that I related to them my conversation with Professor Green a year prior where he talked about trying to put something like this together, and I said well, you know, this is the eightieth anniversary of this nation's labor law and it has its basis of recognition throughout the country. And despite these notions of it being cabined in particular sections of the country I felt, and I think my colleagues agreed, that it would be important that we acknowledge that we kick this off by appearing here in the South. And we're very glad to be here and we appreciate the invitation.

Now, the final rule amending the representation case handling procedure of the NLRB was published on December 15, 2014, and will be effective April 14, 2015. Phil Miscimarra and I will give a brief commentary on the rule from the perspective of majority and dissent. We already had our fisticuffs behind closed doors so we will be very polite. By way of background, this final rule marks the completion of a long-delayed project of examining and revising procedural rules for representation cases. While there were efforts in this regard in 2011, this is a more comprehensive statement that was produced with the participation of a full five-member Board. At every stage of the rule's development, the Board's work has been marked by full and earnest engagement of each of the Board's members and the frank and open discussion of ideas among them. Additionally, the input from the detailed and insightful commentary from the public has resulted in the production of remarkably thorough and thoughtfully considered amendments to the representation procedure.

Aspects of the amendments are summarized as follows: The final rule was designed to update and modernize representation case procedures, address some inefficiencies and inconsistencies in the way in which we process these cases and generally increase transparency by providing earlier and more complete information to parties and prospective voters to the election. And we're not just talking about unions and employers. We're also talking about petitioners who might be filing decertification petitions and the like.

Modernizing includes electronic filing of petitions and other documents consistent with contemporary litigation practice. The rule updates the fifty-year-old voter list disclosure requirement. The *Excelsior* list will, to the extent that the employer has the information, include personal contact information most commonly utilized in this day and age, i.e., personal email

addresses and phone numbers of the voters. It streamlines the process by reducing and eliminating unnecessary litigation and delay.

For example, hearings, eligibility issues, will in the discretion of the Regional Director be addressed postelection where it only affects a small percentage of the unit employees, and depending on the results of the election that issue may be rendered moot.

Requests for reviews of Regional Director decisions can be made before or after the election, also leaving the possibility that the election results may render that question moot.

The final rule eliminates the twenty-five day automatic stay of an election that occurs after the Regional Director issues a decision. Parties may still request that an election be stayed in the particular circumstances of their case and the Regional Director of the Board may stay an election if appropriate.

*The enhancement of transparency.* Voters and parties will receive early and more detailed information about the filing of the petition including how the petition was processed, their rights and obligations, the voting process, and issues in dispute.

*The prehearing statement of position.* This form will narrow the issues to be litigated at the representation hearing and avoid surprise and delay.

*Consistency and uniformity.* Now, practitioners will attest that depending on the region you see a different set of local standards and practices relative to representation processes. Under the final rule, parties will be able to argue orally in support of their positions at the close of a preelection hearing. That means post-hearing briefs will be allowed only if the Regional Director determines that they are necessary, consistent with the briefing practices we now follow in post-election hearings; for example, objections and challenges hearings.

Appeals to the Board of the Regional Director's post-election rulings will be at the Board's discretion, just like preelection RD decisions are now. Representation hearings will be eight days after the filing of the petition, unless the Regional Director is presented with a case with complex issues or special or extraordinary circumstances have been shown. This is not much different than the 7-to-14 days that is currently in effect in different regions around the country, except now you have some consistency.

In the event of a blocking charge, the final rule requires that an offer of proof be submitted with that charge and that the charging party make its witnesses available promptly, which will help expedite the investigation and prevent meritless or abusive charges from unnecessarily blocking an election.

*The reaction to the final rule.* The rule was praised by Richard Trumka, President of the AFL-CIO, as one of the NLRB's modest but important reforms to the representation election process. He noted that too often, lengthy and unnecessary litigation over minor issues bogs down the election process and prevents workers from getting the vote they want.

The U.S. Chamber of Commerce's reaction was more succinct. They sued us, as did a few other business organizations in D.C. and in the Fifth Circuit respectively, asserting among other things that the Board's rule changes conflict with the NLRA by striving for quickie elections (and I hadn't heard that term before), which would result in curtailment of robust debate and free speech.

A resolution of disapproval, as was mentioned, was passed in both houses of Congress under the Congressional Review Act, which if put into effect absent a veto of the President would prevent the rule from taking effect. On March 31, 2015, President Obama exercised only his fourth veto since his presidency, by signing a memorandum of disapproval of the resolution.

Now my observation in this regard is such: The final rule is a great achievement. It differs from the proposed rule contained in the Notice of Proposed Rulemaking that we issued in many ways, both large and small, and in virtually every key aspect of the rule. Most of these departures from the original proposal were prompted by criticisms and concerns raised by our dissenting colleagues as well as the public comments. The rule has been greatly improved as a result.

While there was agreement among all the Board that the representation procedures relating to the Board's core functions, rather they relate to the Board's core functions, we disagreed on how it could be improved. The majority sought to address discrete problems with targeted solutions while maintaining the essential elements of the existing process.

Much of the dissent, by contrast, focuses on the time line from petition to election and the possible effect of each amendment on that time line. Indeed, the dissent proposed the creation of a mandatory time line for scheduling of elections. A mandatory time line is something that over the nearly eighty years

of the Act's existence both Congress and the Board have declined to set. Because of the commonly diverse bargaining unit characteristics and circumstances that define the American workforce, we declined to do so as well.

The view that the elections should be scheduled for the earliest date practicable is the standard that predates these amendments and the standard that should remain. It provides the Regional Directors with the appropriate discretion and it is reflected in the current case handling manual and similar manuals dating back to the 1970s. We wish that the Board could have been unanimous as to every amendment contained in the final rule. We accept that, given the broad range of differing experiences and the viewpoints represented on the Board, even with our best efforts a full consensus as to every issue was not likely to be achieved. It is, however, noteworthy that all Board members agree that our representation procedures are important and they agree on many objectives underlying the rule. And as Phil will point out, there are many common views. Even more importantly, the deliberations, discussions, and exchanges of ideas among Board members have proved the value of having a diversity of perspectives and backgrounds of the Board.

In conclusion, I believe that the final rule has accomplished the long-delayed objective of the Board to modernize, simplify, and clarify the representation case process. And it is to the benefit of all parties that this was accomplished. With these changes, the Board strives to ensure that its representation process remains a model of fairness and efficiency for all.

I'll turn this over to Phil now.

**MEMBER MISCIMARRA:** It's also great being here. And I was struck when Professor Shanor indicated that Mark and I would be presenting some comments about our representation rule as a package. I thought how appropriate considering that that's how we were confirmed, along with Member Johnson and Member Hirozawa. And to complete the picture, Member McFerran was significantly involved in our confirmation, since at the time she played a very important role on the Senate labor committee. So, I'm happy to be here in many different respects.

With respect to the final representation rule, Mark and I agreed that we would not go issue by issue through the rule, which is probably a good thing since the original released version was 733 pages long. I recommend that



everyone start on page 494, which is where the dissenting views start that were expressed by Member Johnson and myself.

(Laughter.)

I'll comment on one particular issue, I agree with Mark that there are many views that all of the participating members, all five of us, had in common. Also, the rule did not want for any lack of attention within the Board, and there's a reason for that. All of the Board members think our representation procedures are very important.

When you go through the various opinions, you can see that all Board members think our representation elections should be as effective as possible. All Board members oppose lengthy delays from the time that a petition is filed until the time that an election occurs. Member Johnson and I expressed support for having elections occur between thirty and thirty-five days after a petition is filed. We expressed support for our own internal procedures so nearly every election could take place within sixty days after the election petition is filed.

The thought might occur to many people given these views why were we unable to forge a consensus path having unanimous support across the Board. As Member Johnson and I expressed in our dissenting views, had we been able to achieve a unanimous rule we anticipate it would also have had substantial support among employers and unions and advocates for employees. Four areas help explain why we were unable to forge a consensus path that would have had unanimous support among all Board members.

One area, which Mark has already alluded to, is the bulk and the expanse of the rule, which itself represented a significant area of disagreement, Member Johnson and I referred to the rule as the Mt. Everest of regulations: massive in scale, and unforgiving in its effect. I'm not sure that anybody can fully anticipate how the expanse of the changes addressed in the final rule will actually play out in practice. And the expanse alone—the bulk associated with the rule—increased the difficulty of coming to an agreement on all of the various moving parts.

The second area involved a fundamental disagreement about how much room our statute left for the Board to make a number of changes. One of the principal objectives underlying the majority's approach was to eliminate unnecessary litigation. And all five Board members oppose any manipulation of the Board's processes by one party or the other for an unfair advantage. Yet, at two different times in the Act's history, Congress contemplated the

possibility of having some elections occur before an election-related hearing was conducted. And both in 1947 and 1959, Congress rejected the possibility of having elections take place without a preelection hearing. However, the final rule significantly cuts back on the scope of the preelection hearing. Member Johnson and I believe some changes dispense with what Congress regarded as necessary elements of the preelection hearing.

The third area relates to fundamental disagreements about some changes that Member Johnson and I believe will be very difficult for our Agency to administer or are likely to cause fundamental unfairness, either to one side or the other, or to the employees whose interests are in the balance in our representation election cases.

And the fourth area of disagreement related to whether the Board should provide guidance directly addressing the question of speed. As Mark indicated, the central focus of the rule is for elections to take place as soon as practicable after a petition is filed. Even if one applies that standard, Member Johnson and I thought it made sense to ask, how long is too long and how short is too short for parties to exercise their rights and engage in protected speech? The Board, throughout its recent history, has consistently applied a target of forty-two days between petition filing and the election. We thought that it would be helpful and important for the Board to address this speed issue directly. If so, Member Johnson and I believe this would have permitted the other procedural changes to be addressed on their own merits.

One point I'll make in closing is that the rule is a procedural rule changes the process by which our representation elections are conducted. However, the statute has not changed. We are still applying the same Act. The Board has the same responsibility in our representation elections, which is to decide election-related issues in a way that gives effect to the statute adopted by Congress. That is something we are going to continue to address in future representation election cases.

**PROFESSOR SHANOR:** Thank you very much, we appreciate it. We've talked here on the panels today about the relationship between the courts and the National Labor Relations Board. We've talked about the General Counsel's role. We've talked about representation rules. And what we haven't yet addressed is the issue of the relationship, at least not in great depth, the relationship of the Agency to Congress, and the newest Member of the Board sworn in December 17, 2014, Lauren McFerran, is the perfect person to talk about those issues. She is a graduate from my alma mater, Rice University, and

then went to one of my favorite law schools, Yale, because my older daughter went there, still is there actually, and anyway Lauren served as Chief Labor Counsel for the Senate Committee on Health, Education, Labor and Pensions and she worked extensively with senior labor—well, with Senator Ted Kennedy for whom she served as Senior Labor Counsel and with Senator Tom Harkin. Before that, she was a labor lawyer at Bredhoff & Kaiser, one of the preeminent labor law firms in the country, and clerked for Judge Carolyn King on the U.S. Court of Appeals for the Fifth Circuit.

So thank you, Member McFerran, for sharing your thoughts with us.

**MEMBER MCFERRAN:** Thank you very much. And I wanted to extend my thanks as well to the folks at Emory and the students who put this together for hosting this important symposium. This is actually one of the first of these panels that I have done so you'll have to forgive my inexperience. I'm used to sitting in back of important people and handing them note cards when they say things that are wrong.

(Laughter.)

**MEMBER JOHNSON:** It will happen, at some point when she hands me a note card.

**MEMBER MISCIMARRA:** I got three note cards during my comments.

(Laughter.)

**MEMBER MCFERRAN:** But, even from the back row, for the last ten years I've had a front row seat at a football game where the NLRB has been the football. And so I've been asked to speak about some of that experience.

Why is the Board such a political football? Well, some of it comes back to, I think, basic political science. When we all started, many of us in the room were probably political science majors once we discovered that we couldn't do math and wouldn't go to med school. So we read a book called *The Logic of Collective Action* that says that when you have an issue that a few people care about a whole lot, then you have another issue that a lot of people care about but not really all that strongly, the political system is going to give attention to the issue that a few people care about a whole lot. And the thing about the Board and its issues is that, on both sides of the debate, there is a circumscribed population of people who care about it very, very much and that's an issue that is designed to get heightened political attention.

There are key political constituencies for both major parties for whom the NLRB's issues are litmus test issues.

When I was working on the Hill, I actually heard a representative of one of the major business trade associations thank us for our work on the Employee Free Choice Act because he said it was the best fundraising tool that they had ever had. And while I'm sure he was speaking in jest, there is some truth to the comment, and I'm sure that someone on the other side might have said the same thing.

The challenge that we face in the legislative branch with the National Labor Relations Act is that, as a practical matter, as a political matter, we can't touch the statute itself. In a divided very partisan atmosphere like the Hill is right now, there's two ways that you can actually get legislation accomplished. I give great credit to my former bosses, both Senator Kennedy and Senator Harkin, in that they passed an incredible amount of important legislation in a bipartisan manner in a very tense political environment. But there's basically two ways that you do that, you can either compromise or you can horse trade. You can say, "look on this education bill we think the states should have ninety percent of the money and the federal government should have ten." "No, we think that it should be ninety percent the other way and ten the other way." And so you compromise on fifty-fifty and that bill passes. Or, you have a pension bill where the Boy Scouts need a pensions fix, and the rural electric co-ops need a pensions fix, and so well then you have a bill—something one side wants and something the other side wants.

The problem with the National Labor Relations Act is in the current very hyper-partisan political environment you've got two sides that don't necessarily agree on the goal. So it's very hard to actually do the work that we're supposed to be doing, which is legislating. You can sit in a room and say that "I think workers should have X, Y, and Z rights" and somebody on the other side of the table says, "I don't think they should," and you're kind of done with the conversation.

So as a result, the NLRA issues tend to play out in what I consider to be the biggest arenas of political theater; that is, the confirmation process, oversight, appropriations riders, most recently the Congressional Review Act, and one of my personal favorites, meaningless budget amendments. We have this whole process on the Hill where we have tons and tons of amendments to the budget that are basically meaningless. They create what's called reserve funds. What you are essentially saying is, "if this budget were to pass we could conceivably

with this budget fund X, Y, or Z thing” and you get to the point where you start to be able to craft these things pretty creatively. So the Democrats could, say, “create a reserve fund so that every Member of the National Labor Relations Board should get their salary doubled,” and then the Republicans would come back and have a reserve fund so that we would all be dragged out and shot. And these would be the amendments that we would vote on and it would be nice political theater.

But in that environment, the rhetoric just gets pretty extreme. The National Labor Relations Act is either going to destroy American capitalism as we know it or single-handedly save the American middle class, and I have heard both arguments in many various forms.

So it was a little bit surprising to me in coming to the Board how very Actnon-partisan the environment is, and how different than I expected. I often joke with my Republican colleagues, it came as a surprise to me, they do not actually sit in their offices and throw darts at oppressed workers; not even at pictures of workers.

(Laughter.)

The nice thing about the Board is that we do agree on the goal. We don’t necessarily agree on how to interpret the Act, but we agree on the goal, which is that the National Labor Relations Act is important and we should be doing our very best to do our job and interpret it faithfully and true to its intentions. And we certainly can do actual work, and find a way to “get to yes” a lot of the time. So the environment is not at all like the discussion of these issues that I was familiar with on the Hill. We are extremely fortunate right now to have a very functional and collegial group that is dedicated to public service and to doing the business of the Board. We do have significant disagreements, as Phil pointed out, but we agree much more often than you’d think in the routine cases. Plus we benefit from the work of the incredibly dedicated and talented career staff who work tirelessly to make sure that the day-to-day business of the Act is getting done. It is not about rhetoric. It is about trying to find a way to get to yes, and usually when we can’t get to yes it’s because of principled disagreements about how to interpret the statute. It might have been a surprise to me in my previous job, but I don’t think anyone at this table is in any way, shape, or form outcome-driven. No one is thinking about whether the union is winning or the employer is winning. I sometimes don’t even know who the parties in a case are when I’m reading about the issues. I don’t pay attention because that’s not my job.

We do face really tough issues. And I really have been impressed to watch all of these dedicated and thoughtful people grappling with issues that the framers of the National Labor Relations Act could never have contemplated involving social media, leased employment relationships and other complex questions of the modern economy. These were things that were not contemplated in the 1940s, and they're difficult and challenging issues.

The one perhaps and most important lesson that I've learned that I would preach to all of you and I will preach to every crowd I get the opportunity to speak with is why it is so important for the political process to let the Board do its job. Mine was probably the smoothest transition for a new Board Member in decades. There were no recess appointments. There were no extended vacancies. There were no long periods of time where there was a gap in the seat. We didn't have to bring four new Board members, or three new Board members, or even two new Board members on at a time. The statute was designed to have one new Board Member transition in at a time, and that makes for a very smooth transition where the Board can keep doing its job. Because while I was certainly, and certainly am still, at a huge uphill battle of the learning curve of learning how to do this job, the Agency is functioning beautifully. My onboarding process has not slowed us down at all and the Agency's business keeps going. Nancy Schiffer walked out the door one day, and I walked in the door the next day. I promptly killed all of her plants, and for that I apologize, but it was a smooth transition and the Board was allowed to do its job. So I really hope that can become the new normal for the Board, that regardless of the nature of the issues that we work with, the Agency, I hope, is allowed to do its job and that we are allowed to have these more orderly transitions of power so that the basic operability of the Board is never affected. That's about all I have to say.

**PROFESSOR SHANOR:** I loved your presentation because it mirrored so much my own experience as General Counsel of EEOC where I would tell people, "I'm just enforcing the law," and some people wouldn't like that. And also, your notion of political theater I think was a very good political science encapsulation. My favorite political theater was where Congress suspended funding for three years for a rule that we had had the temerity to suggest and then after three years of funding holdups they passed a statute that enacted our rule basically with a couple of little add-ons. So, at any rate, Washington is Washington. So be it.

I am delighted to present to you our next Board Member, Kent Hirozawa, and he is going to talk about issues related to Board decisions that are of substantial importance in the American workplace. The Board's work, for everybody who knows it, is divided largely into matters that have to do with representation and matters that have to do with unfair labor practices. And I think he's going to focus on the unfair labor practice decisions of the Board recently.

Mr. Hirozawa served as Chief Counsel to NLRB Member and current Chair, Mark Pearce. For a while he worked as a field attorney for many years for the NLRB in Region Two. He clerked for the U.S. Court of Appeals for the Second Circuit, practiced law with a New York City labor law firm, earned his B.A. from Yale University, and J.D. from NYU. And I'll turn it right over to you. Thank you.

**MEMBER HIROZAWA:** Thank you, Professor Shanor. Let me add my thanks to the editors and staff of the *Emory Law Journal* and Professor Michael Green for organizing this fabulous event. I just have to say how much I've enjoyed the program so far, and it is a real honor to be on the same program with legends of the labor law academy: Professor Getman, whose writings I've been reading for many decades and learned so much from; Professor St. Antoine, from whose work I have also benefited for many years. I still have your case book from my basic labor law class. I think that was many editions ago.

And of course Professor Gould who, in addition to his contributions to the scholarship in the field, served a distinguished term as the Chairman of the Labor Board at a critical time. And I particularly appreciated Professor Garden's insightful analysis of the Board's most recent experience with rulemaking. I agree with all of your conclusions, based on the excellent points that you make in your paper and also on my own personal experience with rulemaking, especially the hundreds of hours spent on both iterations of our representation-case procedure rule.

In the time that I have, I can't do more than scratch the surface of the many cases that the Board has decided that are significant in some way. What I'll do is point out several different areas in which I think that the Board has done something significant, and I think that most of it has to do with the Board catching up with changes in the economy and society over the most recent period of the Act's lengthy history.

Perhaps the most significant decision in the Board's most recent period, just in terms of how many employees and employers are affected, is the *D.R. Horton* decision, which the current Board reaffirmed in the *Murphy Oil* case. On the nonacquiescence question, I should add that in addition to the Wedekind letter mentioned by General Counsel Griffin, the most detailed treatment of the nonacquiescence doctrine that I'm familiar with is the article that was published in the *Yale Law Journal* by Professor Sam Estreicher, who is here and is on the afternoon panel, along with Professor and former Dean of the NYU law school, Richard Revesz. So to anyone who wants to learn more about that, I would commend that article to you.

When I say that these decisions respond to changes in employment practices, there have been a lot of questions raised about why it took the Board so long to get to this question—the Act's been around since 1935, yet *D.R. Horton* wasn't published until January 2012—and I think that ultimately the answer is pretty obvious. It's that in 1935, or even when I was working non-lawyer jobs, we didn't have these kinds of agreements being required of workers as a condition of employment. Meanwhile, if you look at the cases under *D.R. Horton* that we have pending before the Board today, it's practically any kind of job that you could imagine. One of the leading cases that is pending is *Domino's Pizza*. And I don't think that twenty years ago there was any pizza shop that was requiring its employees to sign an arbitration agreement.

So I think that this is really just a matter of the Board having to respond to changes in the economy and society. We have similar kinds of issues being addressed in the cases that talk about who is an employee for purposes of the Act. The most recent significant decision in that area, I think, would be the decision last year in *FedEx Home Delivery* addressing the independent contractor issue, an area in which the D.C. Circuit had asked the Board to better explain its position. And of course, there are cases pending before the Board that Harry will be talking about, like the *Browning-Ferris* case in which the Board has requested briefing from the public.

The Board has also been catching up with changes in communications technology. There was the decision last year in *Purple Communications* in which the Board held that as a general rule, absent special circumstances, an employer that gives its employees access to its e-mail system can't prohibit the use of that system for protected communications as long as they're done on nonworking time.



And I should say that the Board found very helpful in addressing that issue the article published by Professor Jeff Hirsch, who is also on this afternoon's panel, pointing out what was wrong with the Board's *Register-Guard* decision.

Similarly in *Triple Play Sports Bar*, the Board addressed protected communications in the area of social media. In that case, it involved employees who were disciplined for posts that they had put on Facebook.

There have also been cases coming before the Board that relate, at least in part, to changes in organization of particular industries. One that might be of particular interest to this audience is the higher education industry and in *Pacific Lutheran University*, again issued last year, the Board addressed the managerial employee issue in the context of developments that have been taking place in higher education over the last couple of decades, and also the *Catholic Bishop* issue.

One other category in which the Board has spent some significant time over the last several years is in the area that I would describe as cleaning up our own house. The biggest event, at least in terms of the amount of time and effort that it took, was the revision of our case procedures and, as discussed earlier, there were many long overdue changes just to make the process more efficient.

Also in that category would be the line of cases starting with *Specialty Health Care*. That was an area in which, despite the long-standing principle that all that's needed for an election to be directed is an appropriate unit, not the most appropriate unit but any appropriate unit, there had been this thicket of law that had grown-up around that question. So you have *Specialty Health Care*, then the department store matching set of *Macy's* and *Bergdorf Goodman*, and I'm hopeful that those decisions will go a long way toward making the litigation in that area closer to as simple as it was intended to be under the statute.

Let me leave at that. I'm sure you want to hear about all the interesting issues that are currently pending before the Board and we want to leave time for questions as well. Thank you very much.

**PROFESSOR SHANOR:** Thank you very much. That's quite a list of very important cases and issues that the Board's been dealing with. We have some pending issues before the Board that will be addressed by Member Harry Johnson who was a partner with Arent Fox before coming to the Labor Board. Prior to that he worked for a number of years with the Jones Day firm where he was a partner, was recognized by the *Daily Journal* as one of the top labor

and employment attorneys in California and is, has a background from Johns Hopkins, Tufts, and Harvard Law School. He's been a dissenter in a number of cases. If time permits, he might want to say something in dissent to one case but maybe it ought to be just all future cases.

**MEMBER JOHNSON:** Before I get into sort of the preplanned topic, I would of course like to thank everybody here. I'd like to thank Professor Shanor and Dean Schapiro and Emory Law School and, of course, Han Solo's favorite law firm, Ford & Harrison, for generously sponsoring this.

(Laughter.)

It is a great honor and privilege to be a Member of this public body. It is not something that I feel like I was entitled to in any way or was due for any particular expertise or case or showing that I made in my earlier career. So, when I wake up in the morning, I walk into work and think you have to earn this every day.

I think that the statute is of vital importance to the United States, as does probably everybody else in this room. I'd like to focus on what Chairman Gould had mentioned in his talk, and this had completely gone by me but, you know, it is the 800th anniversary of the Magna Carta, which was the first delineation of the idea that you have rights that counterbalance power and you have responsibility that counterbalances rights, and this is where we all started trying to sort these things out. And 800 years later, the promise of some industrial democracy is shown in the National Labor Relations Act. And the reason why I think it is of vital importance is I believe very strongly in the free enterprise system. I believe very strongly that that is the best and brightest path to ensuring the greatest moral and material happiness for the largest number of people.

The one issue, though, in modern capitalism: there is no inherent operating code in there, in other words any sort of moral operating code that guarantees that an employer is not going to treat employees badly.

The National Labor Relations Act at least provides a process for those employees to become involved in discussing their own terms and conditions of employment. And I think that that is a very good thing because at the end of the day we don't want to wake up and live in a United States of America that looks like late-stage Imperial Rome where you have a bunch of oligarchic plutocrats on the one hand and serfs on the other hand and that's it. Because at that point nobody has any stake in society and we're not America anymore.

So I do think the National Labor Relations Act is an inherent part of the national fabric, especially at this point. And I do love the institution. It is a bit of a tough love as is shown in some of my dissents, which I'll get into, because although the titular topic that I have is pending issues, you can't talk about pending issues without dovetailing to what Kent just talked about which are cases that have been decided. Because, of course, cases have been decided, but not all parts of them have been decided. So they're coming back to us. In fact, for the *Noel Canning* cases we have to in effect "re-decide" with a new group of people.

So this is going to be a little bit of a running commentary that is interspersed with some pending issues. Just as Kent pointed out, although the statute's been around for eighty years, there are a lot of basic questions that we still wrestle with all the time. And two of the pending issues that we have, one is "who is an employee?" and the other is "who is an employer?" So I'll start with who is an employee first. *FedEx Home Delivery*, as Kent mentioned, somewhat resolved that distinction between an independent contractor and an employee. And the reason why this is all important is, of course, the modern workplace is no different than the workplace back in 1935 in the sense that there are a group of people who are producing the goods and services, who we call employees, which are regulated by our Act, and then there are all these different subdivisions of other people, for example, some of whom work as independent contractors who are not covered by the Act, and supervisors who supervise workers and who are also not covered by the Act. And these distinctions have come about and been crafted over many years and they serve the policy purposes behind the Act. And you would think that we would have resolved all this long ago, but the National Labor Relations Act is infinitely applicable, and also fairly adaptable considering any particular technical or cultural way that the economy happens to be changing.

One of our big challenges, of course, you will see, for those of you who travel around a lot and use Uber. Uber is one example of what, I would say, is the task-based economy. We have an economy where you have technically an entity, call it "the employer," or "the contractor," or whatnot, that engages hundreds of people, maybe thousands of people, essentially on a piecework basis to do one task at a time. And one of the challenges the Act is going to have to resolve is going to be how the National Labor Relations Act adapts its employee doctrines, how it adapts its casual employee doctrines, and how it adapts its independent contractor doctrines to that pending development in the economy. So, we have that.

But the case that most people have on their mind, especially in the college and university environment, is *Northwestern University*, where the immediate question is, are grant in aid scholarship student recipients, also known as student athletes, known as students who play football and who are on a football scholarship, are they employees under the Act? That case is actively pending in front of us. There are more than twenty amicus briefs that have been filed.

And, just to touch on something that Professor Garden mentioned, concerning representation case procedure, since I had to live through it, a rulemaking is a much better vehicle to solve a massive, comprehensive suite of changes to a large set of regulations because you couldn't really do that on a case-by-case basis.

And I'm not really sure how far rulemaking extends, where you have very discrete and specific issues—even if they're of general application—once we get into student athletes in particular. But one thing that I would encourage you all to consider, to encourage the Board to consider, is the increased use of oral argument for pending issues. Because, in fact, I think that—and Kent deserves 99% of the credit for this—in organizing the discussion for the rulemaking, allowing commenters to make substantive, interactive oral presentations was a great stroke of connecting the public and real live human beings with what we were trying to do. And many of those people, in my view, offered very valuable perspectives.

And so, I only have five minutes. So, my discussion of the remaining pending issues will be curtailed.

(Laughter.)

But—the other side of the employee coin is this *Browning-Ferris* case that Kent mentioned, which is of course our joint employer case, which we have many, many pleadings and filings. In fact, concerning the McDonald's version of issue, I had to look at something in that file on Friday and there are over a thousand pleadings in that case already. Now, some of them are pretty mild stuff such as a notice of appearance. But, there are a lot of motions of some heft in there and we're going to have to decide all those, and that is going to pose a challenge in terms of the many pending issues that spool out of this overarching pending issue, which is “who is an employer?”

And the fact is, is that there have been doctrines and they have been somewhat malleable, and they have shifted somewhat in terms of what the test is for, besides the technical and obvious employer, who might be another

employer and how does that interact with our policy of collective bargaining because, as several of the prior speakers mentioned, we're supposed to promote collective bargaining.

And the question then becomes what sort of definition of employer is going to actually do that? I mean how far can one "socialize" collective bargaining among all these different entities whose decisions have some sort of impact on the technical employing entity and its workforce before bargaining loses its force or purpose, or is there really any limit at all?

So, there is a lot of interesting foundational stuff that is worked into the question of "who is an employer?" And so, we have those two basic questions of employee and employer, which are pending issues.

We have a lot of other pending issues that derive from some issues that have already been decided. I'll give you two other relatively obvious and pressing examples. For example, the *D.R. Horton* case and the *Murphy Oil* case were discussed and there are many subsets of arbitration agreement issues like how we're going to deal with opt-outs, how we're going to deal with, for example, arbitration agreements that have a specific carve out not just for National Labor Relations Act charges but for the whole National Labor Relations Act process that basically state that the arbitration agreement is not intended to interfere with that process.

Now, just in case you were wondering what I think of *D.R. Horton* and *Murphy Oil*, there have been a number of commentators that have said it's the great decision, or the best decision, we've ever made. Well, if you take the words "great" and "best" and replace them with the word "worst" that would probably be my view, unfortunately, because I was in the dissent on that case. And you can read it—my portion of the dissent would have been approximately sixty pages long in double-spaced twelve-point font. I think we had some severe problems harmonizing the National Labor Relations Act with the Federal Arbitration Act, the Rules Enabling Act, Section 216(b) of the Fair Labor Standards Act, several other acts which I won't get into now, and some other issues. But since I only have sixty seconds left, I'm not going to cover the sixty pages of that dissent.

(Laughter.)

What I will do is just get to our last pending issue and this is pending in a number of cases, it's what is going to be the follow on to *Purple Communications*. Because there are many other electronic communication

networks than e-mail, and *Purple Communications* is essentially a case about e-mail and it states that it's about nothing else.

So we have a lot of cases where employers have electronic resources policies of one kind or another or social media communications policies of one kind or another and employers basically say we're going to try and regulate what you can say as an employee on those networks. As we all know, it's a very electronically wired society, so this is of vital importance to the modern worker in the modern workplace. All of those different variants of cases and technological systems are coming to us. There are some that are pending before us, there are some that are obviously going to be pending in the next four or five years. And I think that that is, the electronic frontier is going to be a very fertile frontier in terms of the development of modern American labor law and I'm happy to have played my small part in that. Thank you for allowing me to be here.

**PROFESSOR SHANOR:** This has been a really remarkable panel, open, candid, thorough, circumspect, and divergent sometimes of views. We have kept pretty close to our schedule. I've been the time Nazi, but we really would like to have a few questions at least before we break for lunch. We're running a little bit behind but we started a little bit behind. So if anyone has a question, please go to the microphone and we'll take you in order of grabbing the mic. Proceed.

**AUDIENCE MEMBER:** Yes. So this is really a question for the whole Board but it's something specific to what Board Member McFerran stated. She commended the Board for while not always agreeing on the interpretation, they do agree on the end goal. I guess my question is how much of that goal is shaped by Washington and the Administration of the time?

**CHAIRMAN PEARCE:** Well, I have to say that the one pleasure I have of serving as Chairman of this august Board is that they all have extreme integrity. I have the advantage of chairing a Board that has subject matter expertise and, in that respect, when we discuss and debate the issues, our perspectives come from viewpoints that lie within the nature of the labor-management relationship and little has to do with the political climate. We might talk about political climate with respect to what might happen when it gets into the courts but that does not affect our decision. Our decisions are law based.

The divergent viewpoints create a situation where the majority has to have its act together because it has to respond to very good arguments on the dissent side. Likewise, the dissents have to be void of intellectual dishonesty because the majority is going to call them on that. And, to the credit of my colleagues, we don't have to waste a lot of time with that.

**MEMBER MISCIMARRA:** I just want to concur that once I commenced serving on the Board, after having been in private practice for many years, essentially everyone stopped talking to me. And, we all have chief counsel, deputy chief counsel, and staff attorneys who are extremely talented, almost all of whom have had long careers within the Agency. And the focus of our own decisionmaking, is the statute that Congress gave us in 1935 and amended in 1947, 1959, and 1974. That is the framework that governs our decisionmaking. In many of the decisions that we render, people often talk about the majority and the dissent like those are unitary terms, but we have many unanimous decisions. We have many decisions in which the Republican members find employer violations. We have Democratic members that find violations that relate to unions. This aspect of the Board is not as publicly visible but it should provide some confidence that our process involves integrity within the Agency.

**GENERAL COUNSEL GRIFFIN:** And if I could supplement, even though it wasn't addressed to the General Counsel, one thing you got to remember is there were 20,400 charges filed last year. Of the 20,400, actually 20,415 charges filed last year, of those charges, about 64% no merit was found and that was a decision made at the regions and they were either dismissed or withdrawn. Of the 34% or so charges where there was merit found, 93.4% of those cases were settled at the regional level.

So the stuff that is the work of the Agency that comes to be decided by the Board is very much the tip of the iceberg and so the vast majority of things are pretty straightforward, routine, well-established matters and the vast, vast, vast majority of merit determinations are settled.

**MEMBER JOHNSON:** And if I could jump in on top of everybody else, we are an independent Agency. We have tried to act as an independent Agency from the Board members and the General Counsel on down. As far as I can tell, we are trying, I mean there are obviously vast philosophical differences among the people who are up here, and that does express itself from time to time in dissent. If you broke down all the cases into all their subcomponent issues, though, you would probably find that somewhere between sixty and eighty percent of the votes on issues would be unanimous. The stuff that gets

the press, though, is obviously when, because of our deep philosophical differences, a case happens to hit that fault line.

The problem with us being an independent Agency is that even though we are our own bosses, we should never start acting like a law review that has no deadlines. In other words, we can write whatever we want, but we have no statutory deadline to get it out which sometimes becomes a problem, because these are real cases involving real people who have real problems that we're supposed to resolve. And so another big challenge for us is just simply getting through the cases and getting them out in the most effective way possible.

**PROFESSOR SHANOR:** Well, I think I'm going to have to call time on the program because it's time for a lunch break.