Senator Lamar Alexander's Questions for the Record for NLRB Nominees

Questions for Nancy Schiffer

1. In 2007, while you were employed as Associate General Counsel with the AFL-CIO, your employer hosted a rally and march to "close the NLRB." AFL-CIO National Organizing Director Stewart Acuff said "the Labor Board should be closed for renovations until a new governing board could be appointed by a new President," and the AFL-CIO Director of the Voice at Work Campaign said "It's time to shut the board down and close it for renovation." Please answer each question.

    - As a senior AFL-CIO official at the time, did you agree that the NLRB should be shut down because Republicans were in the majority?

      In 2007, I was working as Associate General Counsel for the AFL-CIO and my role was to advocate for the union and its positions. I recognized then and continue to recognize the vital role the National Labor Relations Board plays in enforcing the rights of employers, unions and employees. Further, I am fully aware of the differences between working as an adjudicator and an advocate. If confirmed, I would take my role as a neutral adjudicator of the law very seriously.

    - Do you believe now or did you believe then that it is the role of the NLRB to reward particular special interests?

      No, I do not believe it is the role of the NLRB to reward special interests.

    - In fact, the NLRB did dwindle to 2 Board members at the end of 2007 and the Senate did not confirm any new members until June 2010. The Supreme Court ruled that the Board did not have a quorum to issue valid decisions during that time. Was this the outcome the AFL-CIO sought?

      No, it was not the outcome the AFL-CIO sought. When the Supreme Court issued its decision in *New Process Steel,* the AFL-CIO issued a statement expressing disappointment. I believe in the Act and in the mission of the Agency. I believe that a fully functioning Board of five confirmed Members is in the best interests of the Act and its mission. I do not believe that the National Labor Relations Board should be shut down or reward special

interests. I do not believe the decision of the Supreme Court referenced in your question was anticipated.

2. At today's hearing, you said that you believe in the National Labor Relations Act and hope to be viewed as "pro-Act." But in recent past statements, it is clear that you had very strong negative feelings about the ability of the NLRB to carry out its mission, particularly in the conduct of secret ballot elections. You've said: "The union election process is broken," "NLRB elections are conducted in an inherently coercive environment—the workplace," and called it "the delay-ridden, divisive, coercive representation election process." Yet, unions have won 63% of all secret ballot elections over the last 5 years, reaching historic highs. In FY2012, 93.9% of all initial union elections were held within 56 days of the petition's filing, and in each of the past three years (FY2010-2012), the median time period between petition filing and union election has been 38 days, a timeframe which Acting General Counsel Lafe Solomon touted as "well below our target median of 42 days."

   - Have you changed your views?

     I testified as an advocate representing the positions of the AFL-CIO. I fully understand the differences in the role of an advocate and a neutral arbiter of the law. In testimony I gave in 2004, I referenced a specific case in which an election was conducted soon after a petition for representation was filed and in which approximately 500 workers chose union representation by an almost 100 vote margin. Yet those workers were not able to be represented or engage in collective bargaining for six and one half years because of post-election litigation brought by the employer. That case was recounted in my testimony for the purpose of illustrating that, in that case, conducting an election within the Board's targeted median timeframe that resulted in the selection of union representation did not insure that the election process was not fraught with delays. Whether the election process is fair depends on the circumstances in which the process is conducted.

   - If you still believe the secret ballot election process is broken, do you have plans to try to make changes to the ballet election process if confirmed as a Board Member?

     If I am confirmed as a Member of the National Labor Relations Board, I will apply the law impartially to all parties that come before the Board and make

sure that cases are decided in a fair and expeditious manner. I have no preconceived agenda. If confirmed, I will consider each issue before the Board with an open mind and make my decision based on the facts of the particular case and in consultation with my colleagues and career Board staff and with due consideration to the positions of the parties and the facts of the case.

3. You have an extensive history with cases and parties that will be coming before the NLRB during your tenure, if you are confirmed.

    - Will you recuse yourself from all cases involving your former employer, the AFL-CIO, and their affiliate unions? Please explain in detail your answer.

    I take my ethical obligations very seriously. This includes any obligation that I may have to recuse myself from a specific case. I will fully comply with the ethics agreement I have entered into with the NLRB and with the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490. If any case brought before me raises a question about my ethical obligations, I would consult with the Designated Agency Ethics Official (DAEO) at the National Labor Relations Board. It is my understanding that if I am confirmed to the Board, before I am sworn in, I will be fully briefed on all of applicable ethical guidelines. I pledge that I will make every effort to fully comply with all of them.

4. The National Labor Relations Act states that employees have the right to organize a union and bargain with their employer, and they "also have the right to refrain from any or all such activities," except that they can be forced to pay dues in order to work at a unionized employer in non-Right to Work states.

    - Do you agree that all employees should have a right to refrain from joining or assisting a labor organization?

    Section 7 of the National Labor Relations Board provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of

employment as authorized in section 8(a)(3)." If confirmed as a Member of the National Labor Relations Board, I will enforce these rights.

5. In August 2011, the Board issued the *Specialty Healthcare* decision, which dramatically lowered the standard used to determine the size and scope of a bargaining unit. This decision allows unions to essentially gerrymander a bargaining unit among its supporters at a worksite. The result will be to further fracture employees' relationships with the employer, and their fellow employees. A key component of every secret ballot election, including our own as Senators, is that the majority rules.

   - Does the decision in *Specialty Healthcare* preserve the notion of "majority rule" in determining whether employees want to join a union?

   The decision in *Specialty Healthcare* preserves majority rule as a majority of employees must select or designate the union in order to have union representation. It is my understanding that *Specialty Healthcare* adopted a single description for the standard to be applied in cases where an employer challenges a proposed bargaining unit on the particular ground that other employees share such a strong community of interest that they must be included as well, and that the description adopted there was taken from a D.C. Circuit opinion by Judge Douglas Ginsberg, who explained its basis in prior NLRB decisions. If I am confirmed as a Member of the National Labor Relations Board, I will consider any such positions and arguments with an open mind and carefully consider the facts of the case, the viewpoints of my colleagues, career Board staff and the parties, and apply the law in a fair and honest manner.

   - Does *Specialty Healthcare* conflict with the Congressional intent that the Board not rely on the extent of organizing when determining the appropriate bargaining unit?

   No. The decision in *Specialty Healthcare* does not give any more weight to the extent of organizing than prior decisions and does not conflict with Congressional intent.

Questions For Kent Hirozawa

1. At today's hearing you testified that you spent "a great deal of time working on the NLRB's two regulatory efforts. In Aug. 2011, the Board issued a new rule requiring employers to post a biased employee rights poster in the workplace. Two separate Federal courts have struck the rule down. In Dec. 2011, the Board issued a new rule shortening the time in which a union election is held, otherwise known as the "ambush" or "quickie" elections rule. The DC Circuit struck down the rule on the grounds it lacked a quorum.

    - What percentage of your time was devoted to these regulatory efforts?

    I am not required to maintain the sort of detailed time records that would be necessary for me to accurately determine what percentage of my time was spent on work related to rulemaking. As a general matter, the clear majority of my work time was spent on other matters, primarily case adjudication.

    - If confirmed, will you continue to pursue continued or new regulatory initiatives at the NLRB? Please describe the efforts you would support.

    I support the Board's rulemaking authority, as reflected in Section 6 of the National Labor Relations Act. I believe that the Board should exercise that authority judiciously and consistent with all legal requirements. What, if any, further rulemaking the Board should undertake is an issue which, if confirmed, I would have to carefully consider with all of my colleagues on the Board and with the Board's professional staff.

    - You also testified that there were lessons to be learned from the Board's experience with the two rulemakings. What specifically were those lessons you learned?

    The lessons to be learned from recent rulemaking include the importance of seeking broad public participation in the process, which I believe that the Board successfully achieved by holding public hearings and by accepting public comments electronically, as well as the importance of carefully considering and addressing the public comments received, which I believe that the Board did.

    If I become a Board member, I would favor a discussion with all of my colleagues concerning the conclusions to be drawn from the litigation.

2. The Board has shown a specific interest in reversing prior precedent regarding whether graduate teaching assistants may organize. In 2004, the Board ruled in *Brown University* that graduate teaching and research assistants are students rather than employees. Last year, the Board took the first step in reversing *Brown* by saying they would review that decision. If the Board decides to reverse the 2004 decision, this would be the third time in 12 years the Board has changed its policy in this area. Besides the practical effect a reversal has on universities, I think there could be a larger effect on the credibility of the Board in the eyes of the courts and the public.

    - Do you think a reversal will have a detrimental effect on universities' academic relationships with their graduate students?
    - Does another reversal undermine the concept of impartiality and instead shift to whoever makes up the current majority?
    - What do you suggest the Board do to stop this negative trend of constant reversals?

    Because pending cases before the Board raise the issue addressed in *Brown University*, I do not believe it would be appropriate for me to address the potential effects of any particular outcome. I would approach those cases with an open mind, and, if confirmed, look forward to discussing them with my colleagues.

    As a historical matter, reversals of precedent by the Board are relatively rare. In the great majority of cases, the Board follows prior precedent. I believe that norm should continue.

3. In August 2011, the Board issued the *Specialty Healthcare* decision, which dramatically lowered the standard used to determine the size and scope of a bargaining unit. This decision allows unions to essentially gerrymander a bargaining unit among its supporters at a worksite. The result will be to further fracture employees' relationships with the employer, and their fellow employees. A key component of every secret ballot election, including our own as Senators, is that the majority rules.

    - Does the decision in *Specialty Healthcare* preserve the notion of "majority rule" in determining whether employees want to join a union?

      Yes. Most Board elections are conducted in the units agreed to by the parties. Where the parties are unable to reach agreement, the appropriate

unit is determined by the Board or a Board regional director. The Union is certified only upon winning a majority of the votes cast.

- Does *Specialty Healthcare* conflict with the Congressional intent that the Board not rely on the extent of organizing when determining the appropriate bargaining unit?

  Because the Board's obligation is to choose an appropriate unit, not the most appropriate unit, it has always begun the appropriate unit inquiry in a particular case by considering the petitioned-for unit. That practice is not in conflict with Section 9(c)(5) of the National Labor Relations Act.

4. On several occasions over the last few years, the Board has taken a case which presents a narrow question of law and used it as a platform to overrule precedent and institute major changes to our understanding of labor law. The *Specialty Healthcare* decision is one example of this trend.

   - Do you think it is appropriate for the Board to reach out and decide issues and address arguments not raised by the parties?

     As a general rule, it is preferable for the Board not to reach out and decide issues not raised by the parties, unless required to do so. With respect, I do not believe that the Board did so in *Specialty Healthcare*.

   - If so, are you concerned that this practice violates the parties' due process rights? Please explain.

     Concerns about the parties' due process rights are one reason why it is generally not advisable for the Board to reach out and decide issues not raised by the parties.

   - During the hearing, you claimed that *Specialty Healthcare*, which overruled decades of precedent, is the law and that the Board should respect it as precedent. Don't you think the Board in *Specialty Healthcare* should have respected the previous decades of precedent instead of significantly changing the law?

In deciding *Specialty Healthcare*, the Board expressly adopted the standard enunciated by the United States Court of Appeals for the District of Columbia Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421-423 (2008), a case that raised the same issue in a non-healthcare context. That standard was already in use in cases not involving non-acute healthcare facilities, and in *Specialty Healthcare*, the Board explained that it had simply "return[ed] to the application of [its] traditional community of interest approach" in that one set of cases. My ethical obligation to maintain confidentiality concerning advice I gave to then-Member Pearce at the time the Board was considering *Specialty Healthcare* prohibits me from commenting further on the decision. That obligation is discussed in more detail below in my response to question 6.

5. Several of the Board's recent decisions overruling decades of precedent were not applied to the parties before it. Rather, the Board decided to apply the new rules only prospectively.

   - In your view, does this approach violate the Administrative Procedure Act inasmuch as the Board has effectively promulgated rules not used to adjudicate the cases before it without following the APA's notice and comment procedures?

     Where the Board has determined to apply a new legal rule, established in a case adjudication, only prospectively, it has followed longstanding Board precedent on the issue of retroactivity. I am not presently aware of any judicial decision concluding that the Board's precedent was contrary to the Administrative Procedure Act.

   - If confirmed, would you work to end this practice of exclusive prospective application of Board precedents?

     The Board does not have a "practice of exclusive prospective application of Board precedents."

6. You testified at the hearing that the current Board has made a tremendous effort to build consensus and collaboration Board decisions. You also spoke about the importance of having a diversity of viewpoints.

   - Did you support the decision to finalize the Representation Case Procedures rule on December 22, 2011, without a written dissent by the minority member?

- If confirmed, what will you do to ensure that the minority members will be afforded the opportunity to voice their dissent when a decision or rule is issued?

As I explained at the Committee's July 23, 2013 hearing, I believe that it would be inappropriate for me to discuss my views with respect to Board actions or decisions that Chairman Pearce joined during my tenure as his Chief Counsel.

In my role as Chief Counsel, I provided legal advice to the Chairman concerning the rulemaking that is the subject of your question and I participated, as a staff member, in the Board's related deliberations. Discussing my views publicly would be inconsistent with the confidential professional relationship that I have had with the Chairman. It would also be contrary to the required confidentiality of the Board's deliberative process. Confidentiality is maintained to promote sound decision-making by ensuring the full and free discussion of legal issues.

Section 18020 of the Guide for Staff Counsel of the National Labor Relations Board (Sept. 1994) provides that "[s]taff counsel are confidential employees of the Board Member for whom they work" and that staff counsel are generally prohibited from disclosing information about Board cases, whether before or after a case has issued.

In addition, such disclosures might in certain circumstances violate both the Standards of Ethical Conduct for Employees of the Executive Branch and the state ethical rules that apply to attorneys, such as Rule 1.6 of the New York Rules of Professional Conduct (2009).

On March 19, 2012, the Board's Inspector General issued a Report of Investigation (OIG-I-468) with respect to public disclosures of deliberative information by a prior Chief Counsel, who served another Board Member. The Inspector General's report addresses the standards that govern this area, and I am guided by that report.

I do believe that the representation of diverse viewpoints is very beneficial to the deliberative process. If I am confirmed to serve as a Board Member, I will strive to allow and encourage all Members participating in a case or rule to express their views both in deliberations and in written decisions, concurrences, or dissents.