

Senator Orrin Hatch's Questions for the Record for NLRB Nominees

Questions for Nancy Schiffer

1. In early 2012, you gave a presentation for the American Bar Association criticizing Congress's oversight of the NLRB. In that paper, you listed what you called the "Top Ten Attacks on the National Labor Relations Board." Taking the top spot on your list were actions taken by Members of Congress to, among other things, "create a construct to prevent the President from exercising his Constitutional power to make recess appointments." You wrote this less than two months *after* the President unlawfully appointed two nominees to the Board.

It seems evident that you were implying that the President was justified in making these two appointments. That certainly would have been in line with statements made by other officials at the AFL-CIO, your former employer. But, I want to make sure your views are clear on the matter.

In your view, did the "construct" created by Senate Republicans justify the President's decision to make those unconstitutional appointments?

The question of the January 2012 recess appointments is currently pending before the Supreme Court. Only the Supreme Court can answer that question, and it is not within my purview.

2. In the same 2012 presentation, you argued that several pieces of legislation constituted "attacks" on the NLRB. Among others, your list included bills that would mandate secret ballot representation elections, create a national right to work, and exercise Congress's prerogatives under the Congressional Review Act to block administrative regulations.

Is it still your opinion that these and other bills amending U.S. labor policy constitute unfair "attacks" on the NLRB?

The Constitution grants Congress the authority to amend statutes including the National Labor Relations Act. My presentation did not state otherwise. I believe Congress has the right to amend statutes.

In my presentation at the Midwinter meeting of the ABA Committee on Practice & Procedure before the National Labor Relations Board, I highlighted actions by Congress which sought to change, influence, and affect the National Labor Relations Act and the National Labor Relations Board, in connection with my role as an advocate on behalf of the AFL-CIO. The purpose of my presentation was to provide a thorough list of Congressional actions relating to the National Labor Relations Board since the Agency is the subject matter of the ABA Committee on Practice & Procedure before the National Labor Relations Board and the primary practice area of its members,

including management and union representatives as well as neutrals. I understand that such measures are within the legitimate authority of Congress and respect Congress' right to take such actions.

3. One of the most high-profile actions taken by the Board in recent years was the decision by the Acting General Counsel to file a complaint against Boeing for building a new plant to perform new work in South Carolina, a right-to-work state.

In your 2012 ABA presentation, you publicly criticized members of Congress who took issue with the Boeing Complaint, saying that, with the complaint, "Republicans had an issue they believed they could ride all the way to the 2012 elections." In addition, leaders at the AFL-CIO, your former employer, cheered the Boeing Complaint and expressed a hope that similar complaints would be filed elsewhere.

- a. What are your personal legal views on the merits of the Boeing Complaint?

I was not privy to the deliberations that led to the issuance of the Boeing Complaint. It is the role of the General Counsel to make determinations regarding charges brought before him and to refer such cases for hearing and adjudication on the merits. The General Counsel's determination is not a final determination on the merits on the case. I have no view on the ultimate merits of the case. Since no hearing was ever completed in connection with the Boeing Complaint, there is no public record of testimony and documents; and no publicly available briefs were filed. It is my understanding that the matter was resolved to the satisfaction of the parties and that the complaint was therefore withdrawn.

- b. Is it still your opinion that congressional inquiries into the Acting General Counsel's decision-making process with regard to the Boeing Complaint constituted personal and unfair attacks?

I believe in the right and obligation of Congress to engage in oversight. In my ABA presentation, I also listed certain rhetoric, some of which was directed personally at the Acting General Counsel and career staff and was not attributed to Members of Congress or linked to any specific Congressional action. If confirmed, I pledge to cooperate with Congressional inquiries and oversight.

4. In your 2012 ABA presentation, you also listed ten hearings in the House of Representatives in 2011 and 2012 examining the NLRB's actions and processes. These hearings were among the "attacks" on the NLRB discussed throughout your presentation.

- a. Is it still your opinion that these oversight hearings constituted unfair attacks on the Board?

The Constitution grants Congress the authority to conduct oversight over federal agency activities. My presentation did not state otherwise. I believe Congress has the right to consider such matters. Again, if confirmed, I pledge to cooperate with Congressional inquiries and oversight.

- b. In your view, is Congress entitled to hold hearings to examine activities by the NLRB that it finds questionable?

Congress is entitled to hold oversight hearings regarding the National Labor Relations Board.

5. You have written and spoken very extensively in support of the so-called Employee Free Choice Act. Specifically, you've made a number of public statements praising the "card check" process for unionization and disparaging secret ballot votes in union representation elections.

For example, in Congressional testimony you gave in 2004, you said that "the NLRB representation process has become really a confrontational mechanism that forces workers through this sort of endurance process in order to be able to form a union," and that "the process has become so gamed by employers as to create delay." In 2007, you testified before Congress that the NLRB election process "has become perverted. It now acts as a sword which is used by employers to frustrate employee freedom of choice and deny them their right to collective bargaining." You also said that the election process "provides a virtually insurmountable series of practical, procedural, and legal obstacles."

With these and other statements, you seem to be describing a world that doesn't exist in our current reality. The truth is this: the average time between the filing of union petition and a representation election is 38 days. That hardly seems like a system fraught with undue delays. And, over the last five years, unions have been successful in 63 percent of secret ballot representation elections. That hardly sounds like union supporters face insurmountable obstacles.

- a. Given these realities, what is the basis for your outspoken support of the Employee Free Choice Act?

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 38 days (i.e., within the 38 day statistic) that resulted in the selection of union representation (i.e., within the 63% statistic) did not insure that the election process was not fraught with delays.

- b. Is it still your opinion that the current NLRB election process is inherently unfair?

Whether the election process is fair depends on the circumstances in which the process is conducted.

- c. Can you cite anything beyond anecdotal evidence to support that opinion?

As discussed in my answer to question three, the specific case I discussed in my 2004 testimony provides an example of election certification delays.

One of the key functions of the NLRB is to oversee the conduct of representation elections and to assure, so far as possible, that employees are able to make a free and un-coerced choice as to whether they want union representation. 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 to change the election process. If presented with such positions, I will consider them 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.

Regarding the Employee Free Choice Act specifically, I believe that the changes it set forth could be achieved only through legislative action by Congress.

6. In 2009, you gave a presentation at the Tulane Law School Multistate Labor and Employment Law Seminar about the Employee Rights Act. In that presentation, you wrote

that “those who decry the loss of secret ballots must recognize that the democracy they advocate is the ‘democracy’ of Saddam Hussein – he had secret ballot elections, but no one thinks of his regime as democratic.”

Does this statement accurately reflect your current views of those who oppose “card check” union certifications and support secret ballot union representation elections?

In my 2009 presentation at the Tulane Law School Multistate Labor and Employment Law Seminar about the Employee Rights Act, the purpose of the statement cited was to illustrate that just because an election process results in the use of secret ballots doesn’t mean that the process is fair. Fairness depends on the facts, circumstances and procedures involved in the election process. When I was a Board Agent at the NLRB’s Detroit Regional Office, I conducted secret ballot elections in workplaces and was inspired by the demonstration of workplace democracy I had the opportunity to experience. But I also had experiences where the process was not fair, as determined after adjudication and a decision on the merits. What is essential is that voters be able to exercise their right to vote free from coercion, intimidation or other interference from either the employer or the union. This is true with respect to political elections, here and around the world, and it is also true with respect to the election process of the National Labor Relations Board.

7. As was discussed during the hearing, in the history of the NLRB, only two other members were appointed to the Board directly after working in-house for a labor union, but neither was confirmed by the Senate. If confirmed, you would be the first such member. As you may know, the first union lawyer appointed to the Board made numerous commitments to the committee to recuse himself in matters involving his former employer. Yet, during his time on the Board, he never fully recused himself.

What standard will you use in determining whether to recuse yourself in matters before the Board that involve your former employers?

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 raised 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. Further, I pledge that I will make every effort to fully comply with all of them.

Question for Kent Hirozawa

1. As a result of the D.C. Circuit's decision in *Noel Canning*, a number of the Board's past decisions will likely be up for reconsideration. As Chief Counsel to NLRB Chairman Pearce, you likely wrote many of the decisions that will likely be reconsidered by the Board.

Given your close connection to these decisions, how can we believe that you will give these decisions a fair and independent review if you are confirmed?

If confirmed, I would take my role as a neutral adjudicator of the law very seriously. I pledge to carry out my duties as a Board member fairly, impartially, and in strict accordance with the law.

It has been my privilege to serve as Chairman Pearce's chief counsel at the Board for the past few years. I will use that experience, along my experience as a field attorney in the Manhattan regional office of the National Labor Relations Board, and my twenty years of experience working with labor law issues in the private sector to inform my decisions as a Board member. I fully understand, however, that my role as a Board member would be to exercise independent judgment as a neutral adjudicator. I would evaluate each case with an open mind.