"PROTECTED CONCERTED ACTIVITY" DECISIONS UNDER THE OBAMA-ERA NLRB: A LOOK AT THE POLITICAL AND ETHICAL ISSUES FACING THE NLRB IN AN ERA OF DECLINING UNION MEMBERSHIP

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I. INTRODUCTION

The National Labor Relations Board (NLRB) was created during the New Deal as part of the National Industrial Recovery Act of 1933 (NIRA).[1] Originally called the National Labor Board, it was revamped and renamed the National Labor Relations Board in 1934.[2] It is referred to as an "independent agency," which means that the five members are appointed by the President, subject to confirmation by the Senate for five-year terms of office. It went out of business when the NIRA was declared unconstitutional in 1935 in the famous *Schechter Poultry Company* decision.[3] It was reconstituted a short time later by the National Labor Relations Act (the "Wagner Act").[4] In 1946, a newly-elected Republican Congress, seeking to remove the perceived pro-labor bias of the Wagner Act, passed the Labor Management Relations Act of 1947 (The Taft-Harley Act),[5] which greatly modified the Wagner Act. One of the changes wrought by Taft-Hartley was the addition of an Office of the General Counsel designed to be independent of the NLRB when it came to the prosecution of unfair labor practice issues.[6] The General Counsel is appointed by the President, again subject to Senate

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[1] Pub. L. No. 73–67, 48 Stat. 195 (1933) (codified at 15 U.S.C. § 703).

[2] BERNARD D. MELTZER, LABOR LAW 31 (Little, Brown and Company 1970).

[3] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[4] The National Labor Relations Act of 1935, Pub. L. No. 74–198, 49 Stat. 449 (codified at 29 U.S.C. § 151–169) (named after New York Senator Robert F. Wagner).

[5] Pub. L. No. 80–101, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141-97).

[6] ARTHUR A. SLOANE & FRED WITNEY, LABOR RELATIONS 130 (Prentice-Hall, Inc. 3rd ed.1977): "The last change was made to satisfy the increasingly bitter charges (particularly from employers) that the same individuals had exercised both prosecution and judicial roles." *Id.*

confirmation, for a term of four years. The independence of an agency does not necessarily refer to its independence from politics, however.[7]

There have been decades-long political battles over the composition of the National Labor Relations Board, which has long been considered an extremely political quasi-judicial body with considerable ability to affect workplace policies. The NLRB majority changes with the administration[8] – typically former labor union lawyers in majority with Democratic administrations and management-side employment lawyers in majority in Republican administrations. The current situation is no different. The terms served by the NLRB members are staggered so that political shifts in policy are implemented incrementally.[9] The Obama board was considered particularly aggressive.[10] This paper will review that ongoing political battle over the composition of the Board and will review some of the most controversial decisions emanating from the "Obama NLRB," with specific emphasis on several decisions dealing with protected employee "concerted activities," which are of vital concern to employers even when there is no union on the horizon,[11] and efforts of the Trump Administration to reverse these actions.

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[7] It can be analogized to the difference between an employee-at-will and an employee with an employment contract that specifies a set term (i.e. time period) for the employment. The 5-year and 4-year terms for the NLRB and General Counsel, respectively, give these federal employees a great deal of independence from being fired by the whim of their boss, the President of the United States.

[8] The five-member Board *by convention* consists of three members of the President's party and two members of the opposition party and a nominally independent General Counsel. *The 1935 passage of the Wagner Act*, NLRB, https://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited May 3, 2019).

[9] In her doctoral research, Amy Semet studied over 3,000 decisions of the Clinton and Bush II administrations (1993-2007). She found that the propensity of a panel to reach a decision favoring labor increases monotonically with each additional Democrat added to the panel. Interestingly, she found that the addition of a single Democrat to an otherwise Republican panel influences the magnitude of the pro-labor vote choice more so than the addition of a Republican to an otherwise Democratic panel. Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 2 (Sept. 13, 2016).

[10] Hallie Detrick, *This New Republican Majority May Start Undoing Obama-Era Labor Laws*, FORTUNE (Sept. 26, 2017), https://www.fortune.com.

[11] Bindu R. Gross, *Section 7 of the NLRA*, ABA 101 PRACTICE SERIES (Jan. 18, 2019), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/section_7_of_the_NLRA/. "[T]he NLRA protects employees' exercise of their Section 7 rights independent of whether a union is involved. The NLRA applies to employee conduct so long as employees are engaged in 'concerted protected activity,' i.e., activity undertaken together by two or more employees, or by one on behalf of others, 'when they seek to improve terms and condition of employment or otherwise improve their lot as employees . . . .'" *Id.*

II. CONTROVERSY AT THE OBAMA-ERA NLRB

During the Obama Administration, eleven appointments to the NLRB were made, including Richard Griffin, Jr. as general counsel in 2012. Seven of these appointments were democrats whose previous experience was representation of unions and plaintiff-side labor cases.[12] In 2012, the U.S. Supreme Court nullified President Obama's recess appointments of three members as unconstitutional. The ruling invalidated every single decision – more than a hundred – that the Board handed down from January 2012 through the summer of 2013.[13] Under the Wagner Act, a five-member Board and a three-member "quorum" is required. Without the recess appointees, only two members of the Board actually had authority to act.[14]

The balance of the Obama appointees were republicans.[15] The Obama board was and continues to be surrounded by controversy. Its decisions were extremely aggressive and advanced policies far beyond what many in

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[12] Craig Becker (2010-2012) was general counsel to both the Service Employees International Union and the American Federation of Labor & Congress of Industrial Organizations; Mark Gaston Pearce (2010-2018, chairman, 2011-2017), was a founding partner of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux, where he practiced union and plaintiff side labor and employment law. Sharon Block (2012-2013), previously served as Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor and was Senior Labor and Employment Counsel for the Senate HELP Committee, where she worked for Senator Edward M. Kennedy. The other democratic slots on the NLRB appointed by President Obama were Nancy Schiffer (2013-2014), former associate general counsel of the AFL-CIO); Kent Y Hirozawa (2013-2016), who prior to working as counsel to Chairman Pearce, represented unions, workers and employee benefit funds for more than twenty years as a member of the New York City law firm of Gladstein, Reif & Meginniss LLP; and Lauren McFerran (2014-present), who is the only democrat currently serving on the NLRB. McFerran served as Chief Labor Counsel for the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) and had also served the Committee as Deputy Staff Director. She began on the HELP Committee as Senior Labor Counsel for Senator Ted Kennedy and Senator Tom Harkin in 2005 and served in that capacity until 2010. https://www.nlrb.gov/.

[13] NLRB v. Noel Canning, 573 U.S. __; 134 S. Ct. 2550 (2014).

[14] Pearce, however, was re-appointed to a second term in 2013 and served as Chairman from August 27, 2011-January 22, 2017.

[15] https://www.nlrb.gov/. Brian Hayes (2010-2012) was sworn in as a Board Member on June 29, 2010. He had most recently served as Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions. Before joining the Senate staff, Mr. Hayes was in private practice for 25 years representing management clients in labor and employment law. Terence F. Flynn was a recess appointment and only served for less than six months in 2012. Philip A. Miscimarra (named Acting Chairman of the National Labor Relations Board by President Donald J. Trump on April 24, 2017) was first nominated by President Obama in 2013. Mr. Miscimarra previously was a labor and employment law partner with Morgan Lewis & Bockius LLP in Chicago. Lastly, Harry I. Johnson, III (2013-2015) was a partner with law firm, Arent Fox LLP. In 2011 and 2013, he was recognized by The Daily Journal as one of the "Top Labor & Employment Attorneys in California". *Id.*

business consider appropriate.[16] In other words, many business leaders have expressed concern over that Board's anti-business bias. President Trump's General Counsel, Peter B. Robb,[17] issued Memorandum GC 18-02 on December 1, 2017[18] wherein he acknowledged the progressive nature of the Board during the Obama Administration.[19] He explained that cases where existing precedent was overturned and where there were dissenting opinions could be subject to "alternative analyses."[20] He also took the occasion to rescind seven memos from his Obama-appointed predecessor.[21] The Memorandum specifically referenced two Obama-Board decisions dealing with "concerted activity for mutual aid and protection" that would be subject to alternative analysis.[22]

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[16] Among the most controversial cases decided by the Obama-era NLRB were: Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011) (workers right to organize in micro bargaining units) -overturned by PCC Structurals, Inc., 365 NLRB, No. 160 (Dec. 15, 2017); Purple Communications, Inc. (2014) – (invalidating company policy prohibiting non-business use of company e-mail) – specifically mentioned in GC 18-02 as ripe for alternative analysis, but on appeal to the 9th Circuit; Browning Ferris Industries 362 NLRB No 186 (2015) – expansion of the definition of joint employer, overturned by Hy-Brand Industrial Contractors, 365 NLRB No 156 (2017); Boeing Case – 365 NLRB No 154 (2017) – allowed the Board to condemn facially neutral company policies when employees might reasonably construe the policies rule to restrict rights under the Wagner Act, overturned by Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004); American Baptist Homes of the West (2011) – Made it more difficult for employers to permanently replace economic strikers based on the employer's motive; Cooper Tire & Rubber Co., 363 NLRB No. 194 (2016) – racist comments by picketers protected so long as they were not direct threats; Fry's Food Stores, 361 NLRB No. 140 (2015) – expanding Weingarten rights dealing with permissible conduct of union representatives representing members in investigations.

[17] *See Trump Nominee Peter Robb Confirmed as NLRB General Counsel*, NAT'L L. REV. (Nov. 17, 2017), https://www.natlawreview.com/article/trump-nominee-peter-robb-confirmed-nlrb-general-counsel. "The Senate has confirmed Peter B. Robb as the next General Counsel of the National Labor Relations Board ("NLRB" or "Board"). Mr. Robb, a management side labor lawyer perhaps best known for his representation of the FAA during the 1981 air traffic controllers' strike." *Id.*

[18] *General Counsel Memos*, NLRB, https://www.nlrb.gov/news-publications/nlrb-memoranda/general-counsel-memos (last visited May 3, 2019).

[19] GC 18-02 (Dec. 1, 2017), https://www.employerlaborrelations.com/wp-content/uploads/sites/220/2017/12/GC-18-mandatory-advice.pdf. "As you know, the last eight years have seen many changes in precedent, often with vigorous dissents. The Board has two new members who have not yet revealed their views on many issues. Over the years, I have developed some of my own thoughts. I think it is our responsibility to make sure that the Board has our best analysis of the issues." *Id.*

[20] *Id*.

[21] *Id.* Specifically, this memorandum rescinded GC 17-01, GC 16-03, GC 15-04, GC 13-02, GC 12-01, GC 11-04, and OM 17-02. *Id.* at 5.

[22] *Id*. at 2. The two cases noted by the General Counsel dealing with "concerted activity for mutual aid and protection" were: 1) Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (2014), "[f]inding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome – individual sexual harassment claim) and 2) Pier Sixty, LLC,

III. EXPANSION OF PROTECTED CONCERTED ACTIVITIES BY THE OBAMA-NLRB

The heart of the Wagner Act, both before and after the changes made by Taft-Hartley, is Section 7, which states:

> Employees 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 or all 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).[23]

As discussed above, the presence of a union is unnecessary for the application of Section 7, there only must be "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This phrase has become more important as the percentage of workers represented by unions has greatly eroded over the years.[24] As the role of unions in our economy diminishes, so does the mission of the NLRB as it relates to regulating the conflicts between unions and employers. To stay relevant and grow in importance, it would seem that the best avenue would be to assert more control over the growing non-unionized workforce by expanding its interpretation and use of the "concerted activities" clause in Section 7.

Several cases before the Obama-NLRB greatly expanded the scope of concerted activities in ways that inhibit the ability of employers to make and enforce rules in the workplace, particularly as they relate to maintaining discipline and respect for authority. The following two cases were specifically addressed by President Trump's appointee as General Counsel to the NLRB as being cases that would be subject to "alternative analyses."[25]

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362 NLRB No. 59 (2015), "[f]inding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct." *Id.*

[23] Sec. 7. [§ 157].

[24] Ana Swanson, *The incredible decline of American unions, in one animated map*, WASH. POST (Feb. 24, 2015). "Union membership has plummeted in the U.S., from nearly one-third of workers 50 years ago to one in 10 American workers today." *Id.*

[25] GC 18-02, *supra* note 19.

A. *Fresh & Easy Neighborhood Market, Inc. (2014)*[26] – *Issue: Whether an employee was engaged in "concerted activity" when she sought assistance from coworkers in raising a sexual harassment complaint to her employer.*

In the case of Fresh & Easy neighborhood Market, a female employee, Ms. Elias, left a note on a board at work. Someone altered it in a crude fashion that rightfully offended her. She asked other employees to sign a hand written copy of the altered note as witnesses, since she was not allowed to have a camera at work. According to the ALJ and the Board she did not intend that statement to be a joint complaint, but believed that the other female employees were offended as well. After the other employees had acknowledged her copy to be accurate, she added some additional language to the copy, which offended one of the witnesses, who filed a complaint of her own against Elias for the alteration and for bullying her to be a witness. Another witness stated she felt intimidated into signing the paper, and she did so only to end the very heated discussion that occurred in front of customers. One witness did state that "she would not have liked the whiteboard alteration if it had happened to her and thought that management should have been notified in some way so that disciplinary action could be taken." According to a dissenting Board member: "These facts render implausible any suggestion that Elias was acting in 'concert' with anyone else, and it is likewise clear that co-employees Yates and Giro were not acting in 'concert' with Elias."[27]

The part of the holding that most concerned some and excited other commentators dealt with the sexual harassment aspect of the case, where the majority stated: "an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection . . . she approached her coworkers with a concern implicating the terms and conditions of their employment, and sought their help in pursuing it."[28] The majority, wishing to invoke the "solidarity principle" was hindered by the existing Board precedent, the Holling Press case,[29] which "effectively nullifies the solidarity principle when it comes to claims of sexual harassment involving conduct directed at only one employee."[30] The Board overruled Holling Press, stating "The solicited employees have an interest in helping the aggrieved individual – even if the

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[26] 361 N.L.R.B. No. 12, p. 151-185 (Aug. 11, 2014), https://www.nlrb.gov/case/28-CA-064411.
[27] *Id*. at 166.
[28] *Id*. at 157.
[29] 343 NLRB 301 (2004).
[30] *Fresh & Easy*, *infra* note 35, at 157.

individual alone has an immediate stake in the outcome – because "next time it could be one of them that is the victim."[31] According to the Board: "An injury to one is an injury to all" is one of the oldest maxims in the American labor lexicon.[32]

The case was closed, the company officially apologized and promised not to interfere with Section 7 rights again. The NLRB Web site includes all the relevant documents as well as an Order granting bankruptcy protection for the employer. Perhaps the company had other problems to resolve that were more pressing than this case.

Member Miscimarra, an outspoken Republican appointee, dissented. For a variety of reasons, he attacked the holding that this was concerted activity. Also, the mere fact that a statutory right was implicated (i.e. sexual harassment under Title VII) did not, under Board precedent, justify automatic concerted activity, the way an issue under the collective bargaining agreement might: "I am concerned that the majority's holding may be the source of an unprecedented expansion in Section 7 coverage that nobody can presently anticipate."[33] The expansion has, arguably, already occurred, since the esteemed textbook, Contemporary Employment Law by C. Kerry Fields and Henry R. Cheeseman sets out the black letter law on NLRB jurisdiction: "The Board does not enforce federal laws within the jurisdiction of other federal agencies. Areas of interest outside the jurisdiction of the Board include: … Matters under the jurisdiction of the Equal Employment Opportunity Commission."[34]

The Harvard Law Review Online was excited about the majority's holding and unimpressed with the dissents:

> [The dissenters] opinions share three flaws: First, they ignore Supreme Court precedent that has reduced the efficacy of individual employment law claims as a means of regulation. Second, they fail to see how labor law might add value to employment law by bolstering employee leverage and providing employees an additional avenue to assert greater voice in company policies. Finally, they overstate possible negative effects created by applying NLRA restrictions in a Title VII context. … Given the dilution of Title VII's individual-rights protections, the ability of

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[31] *Id*. at 156.
[32] *Id*.
[33] *Id*. at 170.
[34] C. KERRY FIELDS & HENRY R. CHEESEMAN, CONTEMPORARY EMPLOYMENT Law 466 (2017).

> workers to use the two statutes in combination has become increasingly important.[35]

It is interesting to note that nowhere in the various opinions or in the Harvard Law Review note does anyone look for support from the part of Section 7 that grants that employees "shall also have the right to refrain from any or all such activities."[36] Given the unwillingness of the "witnesses" to have anything to do with Ms. Elias and her complaints, it would seem at least arguable that these other employees impliedly expressed a desire to refrain from such activity in this case. This seems to raise an issue of just how an employee could effectively register such an intention to refrain.[37]

B. Pier Sixty, LLC (2015)[38] *– Issue: Whether Obscene, Vulgar, or Other Highly Inappropriate Conduct Can Qualify as Concerted Activity for Mutual Aid and Protection.*

In the case of *Pier Sixty, LLC* a catering company had a contentious labor/management relationship and the employees were circulating cards in an attempt to vote in a union. During one particularly tense catered event, a wedding, one employee, Mr. Perez, got angry and on a break posted an inflammatory post on Facebook.[39] According to the opinion of the ALJ:

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[35] *Fresh & Easy Neighborhood Market, Inc.,* HARV. L. REV. (May 18, 2019), https://harvardlawreview.org/2014/12/fresh-easy-neighborhood-market-inc/.

[36] *Id*. Member Miscimarra does note that extending Section 7 into other statutory areas, such as sexual harassment or OSHA claims may result in the invocation of the right to refrain from such collective activities in negative ways: "If particular conduct is 'protected,' Section 7 affirmatively protects the right of employees to 'engage in' the conduct and to 'refrain from 'engaging in the conduct. Thus, if an employee's individual complaint involves 'protected' conduct, the complaining employee or co-employee witnesses may invoke an NLRA-protected 'right' to 'refrain from' answering questions and providing relevant information, even if the relevant claim involves a sexual assault associated with a sex harassment complaint, for example or a work-related injury or fatality implicated in an OSHA complaint." *Fresh & Easy*, *supra* note 35, at 170-71.

[37] Would a signed and notarized document in the following format be effective to waive a claim of concerted activity if signed by all employees other than the one filing the individual complaint? With respect to the incident reported on Exhibit "A" attached hereto (the incident), I _____ hereby assert that I have not engaged in any "concerted activity" with _____. Furthermore, I hereby waive any rights accruing under Section 7 of the NLRA (the Act) pertaining to the incident. In addition, I invoke my rights under Section 7 of the Act to "refrain from _____." I make this waiver of my own free will, without being subject to coercion or promise of any benefit from my employer with respect to my signing this document. I have been afforded an opportunity to take this document to my attorney. (An employer would be wise to provide a legal protection plan benefit).

[38] Pier Sixty, LLC, 362 N.L.R.B. No. 59 (2015), https://www.nlrb.gov/case/02-CA-068612.

[39] ALJ Decision, Pier Sixty, LLC (April 18. 2013), https://www.nlrb.gov/case/02-CA-068612.

Perez testified that he felt mistreated and harassed, and needed a break to calm down, so he went to the kitchen and informed one of the captains that he was going to take a break. After using the bathroom, Perez went outside of the building to the apron area. Very angry, he got out his iPhone, went onto his personal Facebook page, and posted, "Bob is such a NASTY M*****F***** don't know how to talk to people!!!!! F*** his mother and his entire f****** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" (Edited for content). The ALJ and ultimately the Board felt that Mr. Perez's postings were protected concerted activities.[40]

The incident occurred during the pendency of a union election at the employer. Since employer disrespect for employees was an important reason the union was desired, this incident was not a totally unrelated "frolic" by Mr. Perez. He was probably wise to include the phrase: "Vote YES for the Union!!!!!!!" in this rant.[41] The employer became aware of the vulgar Facebook postings the day before the union election and, upon consulting with the company attorney, took no action against Mr. Perez until after the election was completed.[42] The General Counsel had argued that the employer's supervisor had provoked Mr. Perez on the night in question.[43] The ALJ spent more than a page discussing the use of the "F" word and its variants.[44] The ALJ pointed out that members of management routinely used the word, permitted the use at work, and was aimed at the complaint of a supervisor, and not really at his family members.[45] Also, in the context in which it was made, on Facebook, it was not directly threatening.[46] Alternatively, the employer had argued that statements posted on Facebook to the effect that a supervisor had an affair with a waitress were either

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[40] *Id*. at 35: Overall the Atlantic Steel factors engender the conclusion that Perez's Facebook posting did not lose the protection of the Act. Therefore, by discharging Perez because of his Facebook posting, Respondent violated Sections 8(a)(1) and (3) of the Act." *Id.*

[41] Pier Sixty, LLC, 362 N.L.R.B. No. 59 at 506 (2015), https://www.nlrb.gov/case/02-CA-068612. "We agree with the judge that Perez' Facebook comments, directed at McSweeney's asserted mistreatment of employees, and seeking redress through the upcoming union election, constituted protected, concerted activity and union activity." *Id*. at 526: "The General Counsel also contends that the posting constituted activity on behalf of the EGU, in that it explicitly stated, "Vote Yes for the Union." According to the ALJ: "Perez' comments also referred to the upcoming union election, and did not constitute a threat." *Id.* at 531.

[42] *Id*. at 519: "Because the union election was imminent they took no further action at that time." *Id.*

[43] *Id.* at 527.

[44] *Id*. at 529-30.

[45] *Id*.

[46] *Id*. at 529. "[I]n addition, Perez' Facebook comments were not made directly to McSweeney, and did not involve any insubordination, or physically threatening or intimidating conduct." *Id.*

defamation or harassment. The ALJ noted that no evidence was presented as to defamation and that there was no legal basis for harassment.[47]

One of the dissenters in *Fresh & Easy,* Member Johnson, also dissented in *Pier Sixty*:

> Contrary to my colleagues, I find that Hernan Perez' vulgar and obscene Facebook comments lost the Act's protection. Therefore, I would dismiss the allegation that Perez' discharge violated Section 8(a)(3) and (1)…. In my view, under the totality of the circumstances, the Respondent was entitled to discipline Perez for posting this rant, and the General Counsel did not establish that Perez was terminated for union or protected activity. … In condoning Perez' offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act's protection.[48]

The *Fresh & Easy* and *Pier Sixty* decisions are both subject to the General Counsel's alternate analysis approach, unless politics once again intervenes.[49] The General Counsel's Memorandum specifically refers to the use of extreme vulgarity,[50] something that apparently also bothered the NLRB majority, but not enough to support the employee's discharge.[51]

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[47] *Id*. at 519.

[48] *Id*. at 508-09.

[49] "Examples of Board decisions that might support issuance of complaint, but where we also might want to provide the Board with an alternative analysis, include:

- Concerted activity for mutual aid and protection
  - Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome (e.g., Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (2014) – individual sexual harassment claim)
  - Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct (e.g., Pier Sixty, LLC, 362 NLRB No. 59 (2015))."

GC 18-02, supra note 19.

[50] *See* GC 18-02*, supra* note 19, at 2. "Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct." *Id.*

[51] Pier Sixty, LLC, 362 N.L.R.B. No. 59 at 508 (2015): "Although we do not condone Perez' use of obscene and vulgar language in his online statements about his manager, we agree with the judge that the particular facts and circumstances presented in this case weigh in favor of finding that Perez' conduct did not lose the Act's protection."

IV. ERASING THE LEGACY OF THE OBAMA-ERA BOARD

So, while the General Counsel is poised to retract some of the most controversial decisions of the Obama-era Board with a call for alternate analysis, President Trump has made three significant appointments in the first year of his administration that will certainly reverse the direction of the political philosophy of that Board's decisions, which are viewed by the business as excessively anti-employer. Understandably, these appointees all have pro-employer backgrounds, but many of the early decisions have been fraught with allegations of conflict of interests and unethical procedures in overturning prior decisions.

Currently, the NLRB has four members with one vacancy. Mark Pearce, the former chair from 2011-17, was re-nominated for a Democratic slot, but his confirmation was held up in the Senate because he was the chairman of the Obama board and seen as a major pusher of the policies that the business community hated.[52] With the lapse of his nomination, it is not clear who will be nominated on the next round for the open Democratic seat. Lauren McFerran, whose term ends in December of 2019, is the sole Democrat remaining on the board. There is some eyebrow raising of the overturning of major precedent with four-member boards, but no official rules exist on that issue.[53]

The Trump appointees are Marvin E. Kaplan (2017-present),[54] William J. Emanuel (2017-present)[55] and John F. Ring (chair, 2018-present).[56]

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[52] *Re-nomination of Mark Gaston Pearce Would be Bad for Independent Workers' Rights*, *Federalist Society* (Mar. 1, 2018), https://fedsoc.org/commentary/blog-posts/renomination-of-nlrb-member-mark-gaston-pearce-would-be-bad-for-independent-workers-rights. While the NLRB had a 3-2 Republican majority right in 2017, business groups and free market organizations were raising red flags about Trump's apparent plan to keep Pearce on the NLRB. Groups including the Competitive Enterprise Institute, the Club For Growth, and Freedom Works say "all stakeholders governed by the NLRB – workers, employers, and unions – deserve better than an NLRB member who ignores facts and issues decisions that are legally unsupportable." Eric Boehm, *Are Schumer and Trump Teaming Up to give an Obama NLRB Appointee another Term?,* REASON (Aug. 23, 2018), https://reason.com/blog/2018/08/23/trump-nlrb-obama-nominee-pearce.

[53] Erin Mulvaney, *Ethics Conflict at NLRB Pushes Agency into "Uncharted Territory*,*"* NAT'L L.J. (Feb. 22, 2018).

[54] Prior to his appointment to the NLRB, Marvin Kaplan served as Chief Counsel to the Chairman of the Occupational Safety and Health Review Commission and for several committees in the House of Representatives. https://www.nlrb.gov/.

[55] William Emanuel was a shareholder at Littler Mendelson before his appointment and he practiced management labor law at several other firms, including Jones Day and Morgan, Lewis & Bockius. *Id.*

[56] John Ring, appointed chair of the NLRB in April 2018, was a partner at Morgan Lewis and has represented client interests in collective bargaining, employee benefits, litigation, counseling, and litigation avoidance strategies. He has an extensive background negotiating

Immediately following the confirmation of William Emanuel, giving the NLRB a Republican majority, there was concern among the Democrats that Obama-era labor laws would begin to unravel.[57] Of course, this is the history and tradition of the how the NLRB has always operated. But, some of the machinations employed by the new appointees in reversing Obama-era decisions have brought to light the politicization of the process and raised questions about the ethics of accomplishing political goals. Some of the rulings of the Trump board have given rise to ethics investigations over conflict-of-interest and improper procedure.

In one very controversial case decided in 2015, the Obama NLRB expanded the definition of a joint employer.[58] On appeal to the Circuit Court for the D.C. Circuit, the key holding dealing with the applicability of the new joint employer standard was upheld.[59] The case was highly contentious well before it reached the appellate court.[60] After the appointments of Emanuel

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and administering collective bargaining agreements, most notably in the context of workforce restructuring and multiemployer bargaining. https://www.nlrb.gov/.

[57] Hallie Detrick, *This New Republican Majority May Start Undoing Obama-Era Labor Laws*, FORTUNE (Sept. 26, 2017). Senators Elizabeth Warren (D-Mass) and Patty Murray (D-Wash) worried that he would favor industry over workers. However, Senate Majority Leader Mitch McConnell (R-Ky) said the board had become too activist under Obama and held that the board should act neutrally in the resolution of labor disputes. He "expressed hope that Emanuel could return it to impartiality." *Id.*

[58] Browning-Ferris Industries of California, Inc. v. NLRB No. 16-1028 (Dec. 28, 2018). "Today, in the most sweeping of recent major decisions, the Board majority rewrites the decades-old test for determining who the "employer" is. More specifically, the majority redefines and expands the test that makes two separate and independent entities a "joint employer" of certain employees. This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing." Hallie Detrick, *This New Republican Majority May Start Undoing Obama-Era Labor Laws*, FORTUNE (Sept. 26, 2017).

[59] Browning-Ferris Industries of California, Inc. v. NLRB No. 16-1028 (Dec. 28, 2018). FindLaw is currently processing this opinion. "We hold that the right-to-control element of the Board's joint-employer standard has deep roots in the common law. The common law also permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment. Accordingly, we affirm the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment. But because the Board did not confine its consideration of indirect control consistently with common-law limitations, we grant the petition for review in part, deny the cross-application for enforcement, dismiss without prejudice the application for enforcement as to Leadpoint, and remand for further proceedings consistent with this opinion." *Id.*

[60] Corporations and their allies viewed the decision as exceedingly pro-labor and a shocking expansion of the NLRB's mandate. At the time, pro-business attorneys called the decision "an extreme departure from established precedent." Ian MacDougall, *NLRB Member is Under Investigation for a Conflict of Interest*, PROPUBLICA (Feb. 27, 2018),

and Ring, the Trump (Republican majority) Board overruled the BFI joint employer decision in Hy-Brand Industrial Contractors, LTD. and Brandt Construction Co., finding that the Obama Board had misinterpreted the law.

> We find that the Browning-Ferris standard is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations. Accordingly, we overrule Browning-Ferris and return to the principles governing joint-employer status that existed prior to that decision.[61]

However, a February 9, 2018 Memorandum from David Berry the Inspector General for the NLRB declared that Member Emanuel had a conflict of interest related to his former law firm's participation in Hy-Brand and that he should have recused himself.[62] This report reinforced the concerns of union attorneys and Democratic senators that Trump-appointed member William Emanuel should not have voted in the Hy-Brand Industrial Contractors case because his former firm represented Browning-Ferris Industries. Calling Emanuel's vote an example of a "serious and flagrant" ethics problem at the agency, the report questioned the validity of the prominent business-friendly decision the Republican majority pushed through.[63] Eventually, the NLRB voted to nullify its decision in Hy-Brand.[64]

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https://www.propublica.org/article/william-emauel-nlrb-member-is-under-investigation-for-a-conflict-of-interest.

[61] "In Browning-Ferris, the Board majority held that, even when two entities have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control, or based on indirect control or control that is "limited and routine." https://www.nlrb.gov/sites/default/files/attachements/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.

[62] "The wholesale incorporation of the dissent in Browning-Ferris into the Hy-Brand majority decision consolidated the two cases into the same "particular matter involving specific parties." The dissent in Browning-Ferris resulted from the Board's deliberative process following the adjudication of the facts and determination of law at the Regional level and the submission of briefs by the parties, including Member Emanuel's former law firm, and amici providing legal arguments for the Board's consideration. Because of the level of the incorporation of the Browning-Ferris dissent into what became the Board's decision in Hy-Brand, it is now impossible to separate the two deliberative processes. Rather, the Board's deliberation in Hy-Brand, for all intents and purposes, was a continuation of the Board's deliberative process in Browning-Ferris." *Id.*

[63] Erin Mulvaney, *Ethics Conflict at NLRB Pushes Agency into "Uncharted Territory"*, NAT'L L.J. (Feb. 22, 2018).

This move restores the Obama-era decision giving workers and unions greater power to hold corporations responsible when their franchisees violate labor laws.[65]

The significance of Member William Emanuel and Chair John Ring's backgrounds with big management-side firms is that they have had to recuse themselves from hundreds of labor disputes because of their law firms' ties to the cases. Board members, like other administration officials, are covered by an ethics pledge requiring them to sit out matters involving their previous employers or their own former clients for two years after taking a government job.[66] From September 2017 to January 2018, Emanuel recused himself in 48 cases that involved his former law firm.[67]

Recent ethics investigations, however, focus on cases in which a member's former firm has worked behind the scenes or a client may benefit indirectly from a decision, despite the fact that the board member has recused himself from the case. The Trump-era Board has been criticized for allegedly side-stepping conflicts of interest by raising and overruling precedents not at issue in the case they were voting on. For example, Member Emanuel voted with the Republican majority to make it harder for workers to show that ostensibly neutral workplace rules interfere in practice with their right to organize. This vote overturned a 13 year old precedent – one that none of the parties had attempted to end.[68] But clients of his former law firm have urged

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[64] Ian MacDougall, *Trump NLRB Appointee Finds a Way Around Conflict of Interest Rules*, PROPUBLICA (Jan. 23, 2018), https://www.propublica.org/article/william-emauel-nlrb-member-is-under-investigation-for-a-conflict-of-interest.

[65] *Id*.

[66] Chris Opfer, *Trump Labor Board Lawyers' Former Lives Tangle McDonald's Case*, BLOOMBERG L. (Jan. 29, 2019), https://news.bloomberglaw.com/daily-labor-report/trump-labor-board-lawyers-former-lives-tangle-mcdonalds-case.

[67] Ian MacDougall, *Trump NLRB Appointee Finds a Way Around Conflict of Interest Rules*, PROPUBLICA (Jan. 23, 2018), https://www.propublica.org/article/william-emauel-nlrb-member-is-under-investigation-for-a-conflict-of-interest.

[68] In 2011, Boeing announced that it would move the production of an airplane from Washington State to South Carolina. The NLRB objected, because Washington requires the payment of dues by all employees in a bargaining unit, while South Carolina is a right-to-work state which does not. Conservatives reacted with extreme hostility as exemplified by the comments of South Carolina Sen. Jim DeMint: "The NLRB's dismissal of charges against Boeing only after union approval of their new contract only confirms the charges were a politically-motivated negotiation tactic, not a serious complaint based on merit," DeMint said in a statement. "Unfortunately, real and serious damage to America's competitiveness has already been done. A precedent has been set by the NLRB that they will attack businesses in forced-unionism states that try to create jobs in right-to-work states." Keith Laing, *NLRB withdraws Boeing complaint*, THE HILL (Dec. 9, 2011), https://thehill.com/policy/transportation/198399-labor-board-withdraws-boeing-complaint.

the Board to overturn that precedent in cases in which Emanuel has recused himself.[69]

Another example of alleged unethical behind-the-scene side-stepping is the case of FedEx Home Delivery, where company responsibility for labor law violations of its franchise holders and contractors, expanded under the Obama NLRB, was overturned.[70] No party had asked the NLRB to overrule the precedents, and the board never asked the parties or the public to address the question.[71] The NLRB, its ethics official, and the Office of Government Ethics are working on new rules detailing when a member should recuse himself from a case.[72]

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[69] Robert Faturechi et al., *Trump Has Secretive Teams to Roll Back Regulations, Led by Hires with Deep Industry Ties*, N.Y. TIMES (July 11, 2017), https://www.propublica.org/article/trump-has-secretive-teams-to-roll-back-regulations-led-by-hires-with-deep-industry-ties. Emanuel's former law firm asked an appeals court to reject the Obama NLRB's joint employer rule in the Browning Ferris case; and, as noted above, Emanuel and his fellow Republican board members overruled the Obama joint-employer rule in a second case they decided, though no party had asked them to do so. *Id.*

[70] The Board returned to an issue from yesteryear, the definition of an employee for purposes of coverage under the National Labor Relations Act of 1935. This was a major issue after the after the 1941 decision the Board's Hearst case when it was decided that the definition of employee for purposes of the Act was broader than the traditional common law test, which is based on the employer's control over the employee and performance of the job. In the Matter of Hearst Publications, Inc., Cases Nos. C-2023 and C-2024, respectively. Decided March 1942. This case was upheld by the Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). When the Wagner Act was amended by the Taft-Hartley Act in 1947, a definition of employee based on the common law test was inserted, effectively denying coverage to independent contractors. FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc. and International Brotherhood of Teamsters, Local Union No. 671. Cases 34-CA-012735 and 34-RC-0022015: "Section 2(3) of the Act, as amended by the Taft-Hartley Act in 1947, excludes from the definition of a covered 'employee 'any individual having the status of an independent contractor.'" 29 U.S.C. Section 152(3).

[71] The last remaining Democrat on the NLRB, Lauren McFerran, accused the Republican majority of overruling precedent "entirely on its own initiative," a move she called "suspect." Ian MacDougall, *Trump NLRB Appointee Finds a Way around Conflict of Interest Rules*, PROPUBLICA (Jan. 23, 2018), https://www.propublica.org/article/william-emauel-nlrb-member-is-under-investigation-for-a-conflict-of-interest. Some former NLRB members claimed it "looks like a rush to judgment, the absence of a deliberative process, and a purely results-driven process". Emmanuel had asked for this relief for his clients in previous cases. "It creates a huge appearance problem", according to former Obama NLRB member Sharon Block. "Deciding a case in a way the parties didn't ask you to decide …inevitably raises the question: Why are you doing this?" Id. "It seems everyone recognizes there was a serious breach of conflict of interest rules. But the question is, what is the remedy?" said William Gould, a former NLRB chairman who is now a Stanford Law School professor. "So far as I can ascertain, that's uncharted territory." *Id.*

[72] *Id*.

In addition, the current four-person NLRB has been criticized for engaging in rulemaking in order to avoid conflict of interest concerns.[73] In a letter to NLRB chair John Ring, concerns were expressed that the agency is issuing a regulation on joint employer standards "in order to evade the ethical restrictions that apply to adjudications."[74]

V. CONCLUSION

It is a debate as old as the nation: are judges swayed by their political views or are they independent thinkers? Polls indicate that large majorities of the public believe it is the former.[75] On the eve of Thanksgiving, 2018, President Donald Trump and the Chief Justice of the Supreme Court, John Roberts, engaged in an extraordinary war of words concerning this very issue. The President had criticized a federal judge who ruled against his administration's refugee asylum policy for being a partisan Democrat "Obama judge."[76] Judges have usually shown considerable restraint when it comes to firing back at politicians in public and have been praised for doing so.[77] The press release from the Chief Justice, however, was surprisingly blunt: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.

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[73] Trey Kovacs, *Democratic Senators Criticize Labor Rulemaking on Joint Employment*, COMPETITIVE ENTERPRISE INST. *(June 1, 2018), cei.org/blog/democratic-senators-criticize-labor-rulemaking-joint-employment. A letter sent to chairman, John Ring, expressed concerns that the agency is issuing a regulation …"in order to evade the ethical restrictions that apply to adjudications." Id.*

[74] *Id*.

[75] Eric Hamilton, *Politicizing the Supreme Court*, STAN. L. REV. 35 (Aug. 2012), https://www.stanfordlawreview.org/.../politicizing-the-supreme-court/. "To state the obvious, Americans do not trust the federal government, and that includes the Supreme Court. Americans believe politics played 'too great a role' in the recent health care cases by a greater than two-to-one margin." *Id.*

[76] Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks "Obama Judge"*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

[77] Hamilton, *supra* note 75. Congress and the President have belittled the Court. President Obama told the public at the 2010 State of the Union address that "the Supreme Court reversed a century of law" with its Citizens United decision and suggested that the Court opposed honest elections. The ensuing image was even more damaging. With 48 million Americans watching, the camera panned to a cadre of expressionless Supreme Court Justices sitting in the front row while lawmakers sitting next to them rose to their feet and applauded. . . . Judges would risk their credibility if they shouted back at the President, appeared on the Sunday morning talk shows, or held a press conference after a decision." *Id.*

That independent judiciary is something we should all be thankful for."[78] The President was not particularly chastened by the rebuke, firing back on Twitter that the Ninth Circuit Court of Appeals is a "disgrace." The President was not alone in his reaction to the Chief Justice's remarks.[79]

As discussed above, this highly politicized "independent" agency is presiding over a declining unionized workforce. The relevance and importance of the NLRB depends on increasing its sway over the much larger and growing private sector workplace. In doing so through novel and controversial interpretations of concerted activities is resulting in collisions with the EEOC, something the Harvard Law Review Online applauds. The current Administration and its appointees to the NLRB and General Counsel are under constant criticism and scrutiny for the alleged unethical manner in which they are attempting to rein in the NLRB. As is usually the case, whether current rulings are overturned is ultimately dependent on the results of future elections.

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[78] Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks "Obama Judge"*, N.Y. TIMES, (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

[79] Marc A. Thiessen, *Chief Justice Roberts is wrong. We do have Obama judges and Trump judges*, WASH. POST (Nov. 23, 2018), https://www.washingtonpost.com/opinions/chief-justice-roberts-is-wrong-we-do-have-obama-judges-and-trump-judges/2018/11/23/ee8de9a2-ef2c-11e8-8679-934a2b33be52_story.html?noredirect=on&utm_term=.4b81b74c2c95. "Roberts was not only wrong to speak out, but also his claim that there are no Obama judges or Trump judges was wrong. If we do not have Obama judges or Trump judges, then why did Senate Republicans block President Barack Obama's nomination of Merrick Garland to replace the late Justice Antonin Scalia in the final year of Obama's term? And why did Democrats filibuster Trump's nominee, Neil M. Gorsuch, to fill Scalia's seat? Even Roberts's fellow justices know there is a difference. If there were no Obama judges or Trump judges, then why did Anthony M. Kennedy wait for Trump's election to announce his retirement? And why doesn't Justice Ruth Bader Ginsburg just retire now and let Trump nominate her replacement? Because they both want a president who would appoint a successor who shares their judicial philosophy. (And, lo and behold, Trump appointed a former Kennedy clerk, Brett M. Kavanaugh, to succeed him).

The American people know that Roberts is wrong. In the 2016 election, exit polls showed that 70 percent of voters said Supreme Court appointments were either the most important or an important factor in deciding their vote. And polls show that Republicans expanded their Senate majority in 2018 in large part because conservative voters were angered over the left's brutal campaign of character assassination against Kavanaugh." *Id.*