United States Senate

WASHINGTON, DC 20510

19 February 2020

The Honorable Joseph R. Biden
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

We write to convey our grave concerns about the sudden dismissal of Mr. Peter Robb as General Counsel of the National Labor Relations Board on January 20, 2021, approximately ten months before his term was due to expire on November 16, 2021.

Only 23 minutes after your term began, the Director of the Office of Presidential Personnel, Cathy Russell, sent Mr. Robb an ultimatum demanding his resignation and threatening him with termination that afternoon if he did not comply. When Mr. Robb declined to step down, he was terminated. Then Mr. Robb's deputy, Alice Stock, was given a similar ultimatum, she also refused to resign, and she also was terminated. Neither Mr. Robb nor Ms. Stock was given any explanation for why they were fired.

Such nakedly political terminations of Senate-confirmed public servants, reminiscent of the 1973 Saturday Night Massacre, threaten to undermine public confidence in our governmental institutions at a time when that confidence is sorely needed. Fourteen Presidents have taken office over more than seven decades since the advent of the modern NLRB General Counsel. In that time, partisan control of the White House has changed no less than ten times. Many incoming administrations have had vastly different labor policies from their predecessors, yet none attempted to oust an NLRB General Counsel without cause. This is because the President has no legal authority to do so.

The NLRB is a quasi-judicial agency designed by Congress to be free from coercive political interference and influence. Under the 1947 Taft-Hartley Amendments, the General Counsel is nominated by the President and confirmed by the Senate for a fixed four-year term. Firmly established Supreme Court precedent leaves no doubt that for-cause removal applies to term-limited political appointees at quasi-judicial agencies, even if they perform substantively executive functions within those agencies. In fact, the very year the NLRB was established, the Supreme Court unanimously held that

> [t]he authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as

> an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.[1]

Some claim that because the National Labor Relations Act does not address how the General Counsel may be removed, it must be assumed that he or she serves at the pleasure of the President. This position is at odds with Supreme Court jurisprudence as well. When President Eisenhower removed members of a Congressionally-established War Claims Commission without cause, the Supreme Court held that he had exceeded his authority, even though the underlying statute did not speak to the question of removal. Like the NLRB General Counsel, those commissioners were also effectively term-limited, because the commission was designed to be dissolved after a finite period of time. Writing for a unanimous Court, Justice Frankfurter said,

> Judging…the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.[2]

The contrary view, that the NLRB General Counsel may be removed at the President's whim, appears to rest on a July 18, 1983 White House Counsel office memorandum drawing authority from a March 11, 1959 Office of Legal Counsel opinion that said "the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure under the rule of Myers v. United States, 272 U.S. 52."[3] This 1959 opinion is suspiciously absent from OLC's online archive, and despite repeated requests, the Department of Justice has failed to make it available.

In other words, your administration has taken the unprecedented action of terminating a Senate-confirmed NLRB General Counsel based on purported legal authority from an undiscoverable document that no one outside the executive branch has ever seen. Even if that authority was valid in 1983 (which is not at all certain), it is clearly outdated now. Five years after the White House Counsel memo was written, the Supreme Court explicitly rejected the analytical framework of the OLC opinion it relied on, stating that

> the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to

---

[1] *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

[2] *Wiener v. United States*, 357 U.S. 349, 356 (1958).

[3] Quoted in White House Couns. Mem. (July 18, 1983).

> define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[4]

The decisive question, therefore, is this: Would the inability to remove the NLRB General Counsel frustrate the President's ability to execute his constitutional duties? The answer, clearly, is no. The General Counsel's main substantive functions are to process charges of unfair labor practices, to present cases to NLRB administrative law judges, to bring enforcement actions of NLRB decisions, to defend the Board's position in legal challenges, and to supervise subordinates. These duties are performed in furtherance of the NLRB's mission as an apolitical, quasi-judicial independent agency, and as such, are fully separate from the President's responsibilities under the Constitution.

Just last year, in a case that otherwise upheld broad Presidential removal power, the Supreme Court reiterated two clear legal exceptions to that power, including "one for multimember expert agencies that do not wield substantial executive power."[5] For this reason, no one seriously argues that the President may remove National Labor Relations Board *members* without cause. The argument that the General Counsel is distinguishable from Board members in this regard either misunderstands or simply overlooks the plain language of the Court's opinion. The exception attaches to "multimember expert agencies"—i.e., to the agencies themselves, not merely to members of those agencies. The General Counsel is a political appointee to, and an essential component of, a multimember expert agency that does not "wield substantial executive power." As such, it clearly falls under this exception.

Peter Robb's termination, in defiance of more than seven decades of Supreme Court precedent and Presidential practice, undermines the ability of the National Labor Relations Board to function as the meaningfully independent entity Congress designed it to be. We therefore call on you to reinstate Mr. Robb immediately to his position as General Counsel.

Sincerely,

Rand Paul, M.D.	Tom Cotton	Rick Scott	Mike Braun
United States Senator	United States Senator	United States Senator	United States Senator

[4] *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988).

[5] *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199-200 (2020).