

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**NATIONAL NURSES ORGANIZING  
COMMITTEE-TEXAS/NATIONAL NURSES  
UNITED (BAY AREA HEALTHCARE GROUP,  
LTD. D/B/A CORPUS CHRISTI MEDICAL  
CENTER AN INDIRECT SUBSIDIARY OF HCA  
HOLDINGS, INC.)**

**Respondent**

**and**

**Case 16-CB-225123**

**ESTHER MARISSA ZAMORA, an Individual**

**Charging Party**

**ACTING GENERAL COUNSEL'S REPLY TO THE CHARGING PARTY'S  
RESPONSE IN OPPOSITION TO THE ACTING GENERAL COUNSEL'S MOTION TO  
REMAND OR, ALTERNATIVELY, TO DISMISS THE COMPLAINT**

In her opposition to the Acting General Counsel's motion to remand, Charging Party Esther Marissa Zamora raises three contentions. The first, a strawman, is that given the stage of these proceedings, the Board, not the Acting General Counsel, has the authority to dismiss the complaint. (Opp. at 3-7.) No one contends otherwise; hence, that is why the Acting General Counsel has filed a motion to remand or dismiss. Second, she alleges that President Biden removed former General Counsel Peter B. Robb improperly. But under the National Labor Relations Act, the President may remove a General Counsel at any time, even without giving a reason. And third, she asserts that Acting General Counsel Peter Ohr could not constitutionally perform the duties of the General Counsel in an acting capacity. This argument flies in the face of both Supreme Court precedent and Senate and Executive Branch practice dating back to the administration of George

Washington. Because all three of the arguments raised by Charging Party Zamora are meritless, the Acting General Counsel's motion should be granted.

**I. *The Acting General Counsel articulated a compelling basis for requesting that the Board act within its authority.***

The Charging Party asserts that the Acting General Counsel has not articulated any basis for dismissal of the Complaint and that the Acting General Counsel is attempting to act beyond his authority. On the contrary, by filing this motion, the Acting General Counsel has only requested that the Board act within the Board's authority to dismiss complaints. The Acting General Counsel's motion does not challenge the clear, extant Board law relating to dismissal of complaints pending before it.<sup>1</sup>

Significantly, the Acting General Counsel based his request on extant Board law, which is plainly a basis upon which the Board may act. The Charging Party's objection to the Board taking the requested action is fixated on the need for a "remedy or settlement" to the alleged unfair labor practices.<sup>2</sup> (Opp. at 2). However, no remedy is required where no unfair labor practice has occurred. Under established precedent, the refusal to provide information that does not relate to an employee's terms or conditions of employment does not violate Section 8(b)(1)(A) of the Act.<sup>3</sup> The Acting General Counsel does not share former General Counsel Robb's desire to alter Board law in this area, agrees with the decision of the Administrative Law Judge below, and would not have issued complaint in this matter.<sup>4</sup> Therefore, to prevent the expenditure of further Agency

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<sup>1</sup> See, e.g., *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957).

<sup>2</sup> Zamora's various allegations that the Acting General Counsel is acting "based on bare political and ideological considerations," "do[ing] the bidding of politically-motivated outside forces," and such, are unsupported.

<sup>3</sup> *Letter Carriers Branch 529 (USPS)*, 319 NLRB 879, 881-882 (1995).

<sup>4</sup> Contrary to Zamora's assertions (Opp. at 6), dismissal of the complaint would work no violation of "due process"; she articulates no specific liberty or property interest which could entitle her to the relief she

resources, and in the public interest, the Acting General Counsel requests that the Board, on the basis of current Board law, remand this matter to the Regional Director or, alternatively, dismiss the Complaint.<sup>5</sup>

## **II. Former General Counsel Robb was properly removed.**

The Charging Party contends that former General Counsel Robb was unlawfully removed and, therefore, that Acting General Counsel Ohr's designation under Section 3(d) of the Act is infirm. As shown below, former General Counsel Robb was lawfully removed and thus Acting General Counsel Ohr's designation is not subject to attack on these grounds.

### **A. Background: By default, federal officers are removable at the will of the appointing authority.**

Before turning to the text of Section 3(d) of the Act, we believe that some background will assist the Board. The basic principle is this: in the absence of any specific statutory provision to the contrary, the power to appoint to office carries with it the power to remove from that office at will. That default rule helps ensure that the President can carry out the functions of the Executive Branch. In this section, we describe the caselaw establishing that principle. In the next section, we show that Section 3(d) does not limit the President's power to remove the General Counsel.

Although the Constitution details how executive-branch officers may be appointed,<sup>6</sup> it is “silent with respect to the power of removal from office,”<sup>7</sup> aside from the power of Congress to

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seeks. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To the contrary, if the Board were to deny this motion and find a violation of the Act, supplemental briefing would be appropriate on the question of whether issuing a remedy would violate the *Respondent's* due process rights, by retroactively making unlawful what was lawful at the time of its actions. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001).

<sup>5</sup> See, e.g., *Dow Chem. Co.*, 349 NLRB 104, 104–05 (2007) (public interest not served by expending potentially significant future Board resources, including the possibility of litigating the Board's order in appellate court, and therefore granting General Counsel's Motion to Sever and Remand cases).

<sup>6</sup> See U.S. Const., Art. II, Sec. 2, Cl. 2.

<sup>7</sup> *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839).

impeach and convict. Through the years, therefore, the Supreme Court has repeatedly been called upon to construe the nature of, and limitations on, the power to remove officers. These cases dictate a clear standard. Where Congress has not spoken to the question of removal of an officer, that officer may be removed at any time by the person or body authorized to make the appointment.<sup>8</sup> But where Congress has limited this authority, such limitations offend the Constitution where they would interfere with the President's duty to "take Care that the Laws be faithfully executed."<sup>9</sup>

*Parsons v. United States* established long ago that merely stating a term of years for an office did not imply any limitation upon the President's authority to remove officials from that office.<sup>10</sup> As the Supreme Court there explained, a statute providing a four-year term of office for United States Attorneys established a limitation on the period of time for which those attorneys could hold office, but did not entitle them "to hold for four years as against any power of the President to remove."<sup>11</sup>

In short, the default rule is that the President has authority to remove, at will, officers he appoints, absent clear congressional indication to the contrary.

***B. The NLRB's General Counsel serves at the pleasure of the President.***

Despite the foregoing, Charging Party Zamora asserts that former General Counsel Peter B. Robb could not be removed from office by President Biden. This contention is based on an argument that the Act *implicitly* limits the President's power to remove the General Counsel. This argument fails.

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<sup>8</sup> *Free Enter. Fund v. Pub. Co. Acct'g Oversight Bd.*, 561 U.S. 477, 493 (2010) (citing *Sampson v. Murray*, 415 U.S. 61, 70, n. 17 (1974)); *Myers v. United States*, 272 U.S. 52, 119 (1926); *Hennen*, 38 U.S. at 259-60.

<sup>9</sup> U.S. Const., Art. II, Sec. 3, Cl. 5.

<sup>10</sup> 167 U.S. 324, 342 (1897).

<sup>11</sup> *Id.*

1. *The Act does not shield the General Counsel from removal.*

Section 3(a) of the Act establishes the Board, provides that members “shall be appointed for terms of five years each,” and states that “[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” By contrast, Section 3(d) of the Act, states that the General Counsel “shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.” Zamora says that these two provisions mean the same thing. They do not.

Begin with the plain text. The Board’s tenure provisions are standard for a multi-member independent administrative agency.<sup>12</sup> The General Counsel’s tenure provisions—and absence of a removal restriction—are standard for a prosecutor.<sup>13</sup> If the 1947 Congress, when creating the General Counsel position, had wanted to grant tenure protection, it would simply have cribbed the language it had already used regarding Board members in 1935. Cases too legion to count hold that the use of different language in analogous parts of the same statute requires that those sections be construed to have different meanings.<sup>14</sup> And Zamora does not even attempt an argument as to why that settled canon of statutory construction does not apply here.

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<sup>12</sup> *E.g.*, 12 U.S.C. § 242 (Federal Reserve Act) (“each member [of the Board of Governors] shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President”); 15 U.S.C. § 41 (FTC Act) (“Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”).

<sup>13</sup> *Parsons*, 167 U.S. at 342.

<sup>14</sup> *E.g.*, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (“This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning.”) (cleaned up); *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (“Instead we ‘generally presum[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.’”) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994)); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (“Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.”) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Fairbanks v. Superior Court*, 46 Cal. 4th 56, 62 (2009) (“The use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended.”); *accord Lincoln*

Applying the plain language according to its terms also accords with the well-entrenched default rule that removal authority follows appointment authority.<sup>15</sup> When Congress wants to alter the President’s ability “to keep [executive] officers accountable—by removing them from office, if necessary,” it does (and must) clearly express its intent to do so.<sup>16</sup>

The Act’s context further supports this plain reading of its text. Here, Section 3(d)’s language reflects that Congress had every reason to want to treat the General Counsel differently from the Board with respect to tenure. The General Counsel and Board have entirely distinct functions. The Board makes rules, 29 U.S.C. § 156, issues certificates of representative, 29 U.S.C. § 159, adjudicates unfair labor practice cases, 29 U.S.C. § 160(c), and subpoenas evidence, 29 U.S.C. § 161.

In contrast, the General Counsel’s sole statutory functions are to supervise attorneys and regional office officials, 29 U.S.C. § 153(d), and litigate unfair labor practice complaints, 29 U.S.C. § 160(b). In performing those functions, the General Counsel acts with significant prosecutorial discretion, holding the sole power to initiate or refuse to initiate an unfair labor practice case.<sup>17</sup> The remainder of the General Counsel’s functions are delegated to that position by the Board, pursuant to Section 3(d)’s authorization to perform “such other duties as the Board may prescribe.” And while the Board has delegated *executive* functions to the General Counsel,<sup>18</sup> two

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*Lutheran of Racine*, 362 NLRB 1655, 1659 n.18 (2015) (quoting *Russello*, 464 U.S. at 23), *overruled on other grounds*, *Valley Hosp. Med. Ctr.*, 368 NLRB No. 139 (2019), *review granted and remanded sub nom. Loc. Joint Exec. Bd. of Las Vegas v. NLRB*, \_\_\_ F. App’x \_\_\_, 2020 WL 7774953 (9th Cir. Dec. 30, 2020).

<sup>15</sup> *See supra* n.4.

<sup>16</sup> *Free Enter. Fund*, 561 U.S. at 483.

<sup>17</sup> *E.g.*, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (“the Board’s General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint”).

<sup>18</sup> Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board, 20 Fed. Reg. 2175 (April 1, 1955), at § 1(b) (court litigation to enforce the Act).

powers that the General Counsel has no authority whatsoever to exercise are the enactment of quasi-legislative rules under Section 6 and the adjudication of cases under Sections 9 and 10.<sup>19</sup>

In short, the General Counsel is an entirely different position, with entirely different duties, under the plain text of the Act. Congress's decision to provide tenure protections for the Board-member office in no way suggests Congress intended such restrictions to implicitly extend to the General Counsel role. The difference in treatment of those two offices was no coincidence.

Nor is this some recent *ad hoc* interpretation of the Act. To the contrary, the Executive Branch has so understood the Act since it was enacted. Current Chief Justice John Roberts, then a member of the White House counsel's office, explained the Executive Branch position on this very question in a memorandum written in 1983.<sup>20</sup> And as that memorandum makes clear, this merely reaffirmed long-held views.<sup>21</sup>

Finally, the construction that Zamora would put on the Act may raise questions about whether such a construction would be constitutional.<sup>22</sup> If there were any ambiguity, the Board would have to construe the Act to avoid any such questions.<sup>23</sup> And given that such a construction is not only readily available here, but also the best reading of the statute, there is no reason to follow Zamora's invitation down the proverbial primrose path.

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<sup>19</sup> Regional offices do supply hearing officers in most representation and jurisdictional-dispute cases, but such hearing officers are acting on behalf of the Regional Director and the Board, respectively, and all such cases are subject to review *by the Board*, not the General Counsel. 29 C.F.R. §§ 102.67; 102.71; 102.90.

<sup>20</sup> Memo from John Roberts to Fred Fielding, White House Counsel re: NLRB Dispute 1, 3 (July 18, 1983), attached as **Exhibit 1** ("clear" that General Counsel is "a purely executive officer and that the President has inherent constitutional power to remove him from office at pleasure") (cleaned up).

<sup>21</sup> *Id.*

<sup>22</sup> *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020) (unconstitutional to insulate Director of the Consumer Finance Protection Bureau from removal at the President's pleasure).

<sup>23</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1987).

2. *Zamora's contrary arguments are unsupported by precedent.*

In the teeth of this overwhelming authority, Zamora makes three counterarguments. First, she asserts that the NLRB, as a whole, being a “quasi-judicial agency” somehow implies for-cause protections for the General Counsel. Second, she suggests that the Act’s specification of a four-year term for the General Counsel implies the existence of for-cause removal protection. Third, she makes a handful of policy arguments urging the Board to ignore the Act because of the allegedly undesirable consequences that obeying it would have.

The first of these (Opp. at 7-9) can be quickly dispensed with. Although the Board exercises quasi-judicial functions, that has no bearing on this case. Congress could shield the Board Members from removal under *Seila Law*, but that does not resolve whether it would be constitutional if it had similarly insulated the General Counsel from removal, much less provide any reason to think that Congress actually did so. The mere fact that two positions happen to be located within the same agency does not mandate that they have identical tenure protections.

Zamora’s second argument is based on her observation that the General Counsel has a four-year term of office pursuant to Section 3(d). (Opp. at 9-13.) As already noted above, however, the creation of a term of years for a position does not give it for-cause removal protection.<sup>24</sup> It has been standard practice for well over one hundred years for United States Attorneys to be appointed for terms of years, yet the Supreme Court in *Parsons* held squarely that such terms, without for-cause removal protection language, merely set an outer limit upon the duration of an appointment and do not allow the appointee to hold the position against the President’s will.<sup>25</sup> Zamora’s effort to reverse the standard presumption—to suggest that the absence of language *permitting* removal

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<sup>24</sup> See *supra* n. 7.

<sup>25</sup> 167 U.S. at 342. Indeed, *Parsons* is so nearly on all fours with the present case that it virtually disposes of Zamora’s argument on its own.

somehow implies that Congress wished to *prohibit* such removal—thus contravenes controlling precedent. And the fact that past presidents elected not to remove General Counsels appointed by their predecessors (Opp. at 13) does not in any way imply that they could not have done so; it shows only that for their own reasons, they chose not to.<sup>26</sup> Officials do not acquire for-cause removal protection by adverse possession.<sup>27</sup>

Zamora contrives a strained interpretation of *Humphrey's Executor* and *Wiener v. United States*<sup>28</sup> as mandating for-cause removal protection for the General Counsel. (Opp. at 11.) Contrary to her assertions, the General Counsel's duties, discussed above, are not akin to a member of the adjudicatory board in *Humphrey's Executor*, nor to the member of an adjudicating war claims commission in *Wiener*. The General Counsel simply is not a member of the Board. (Opp. at 11.)<sup>29</sup>

Zamora also contends that the General Counsel lacks policymaking authority. (Opp. at 12.) Again, the relevance of this is not explained, since even non-policymaking inferior officers do not acquire for-cause removal protections without clear evidence of congressional intent to provide

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<sup>26</sup> Cf. *Chadha v. INS*, 634 F.2d 408, 435 (9th Cir. 1981) (inaction can “equally imply endorsement, acquiescence, passivity, indecision, or indifference”), *aff'd*, 462 U.S. 919 (1983).

<sup>27</sup> Zamora's ancillary argument that General Counsel Robb's decision not to voluntarily resign means that there was no “vacancy” within the meaning of Section 3(d) (Opp. at 11), is meritless. Black's Law Dictionary defines a “vacancy” as “[a]n unoccupied office, post, or piece of property; an empty place,” and specifically identifies the “removal” of an official as an example of an act creating a vacancy. *Vacancy*, Black's Law Dictionary (11th ed. 2019); see also *NLRB v. Noel Canning*, 573 U.S. 513, 540 (2014) (observing that the word “vacancy” simply means the “condition of an office or post being . . . vacant” (citing the Oxford English Dictionary)); Compact Oxford English Dictionary 2208 (2d ed. 1989) (defining “vacancy” as “[a]n unoccupied period or interval; a time of absence of some activity”). Zamora concedes, elsewhere in her opposition, that the President's removal of General Counsel Robb “created [a] vacancy.” (Opp. at 16.)

<sup>28</sup> 357 U.S. 349, 352, 356 (1958).

<sup>29</sup> In *Wiener*, the Court inferred for-cause removal protection for quasi-judicial tribunals that “‘adjudicated according to law,’ that is, on the merits of each claim, supported by evidence and governing legal considerations[.]” *Wiener*, 357 U.S. at 355 (quoting *Humphrey's Executor*, 295 U.S. at 629). Those decisions apply by their terms only to officials who engage in formal adjudications of cases with evidentiary records.

such protections. More importantly, though, the argument is disingenuous. Settled precedent holds that the General Counsel controls the legal theory of an unfair labor practice case—it is the General Counsel, not the Board, that sets the direction of adjudicative policymaking by determining which cases to bring to trial and what legal theories to pursue.<sup>30</sup>

Finally, Zamora makes various policy arguments advancing a view that the Act’s administration would be better served if the General Counsel were to have removal protections. (Opp. at 13-15.) These arguments fail on their own terms,<sup>31</sup> but the broader problem is that they are disconnected from the text of the Act. Zamora has every right to lobby Congress to enact her policy preferences into law, but the nature of what she asks here—for the Board to, in effect, copy and paste its own for-cause removal provisions into Section 3(d)—far exceeds the limits of the Board’s authority. Zamora seeks “not a construction of a statute, but, in effect, an enlargement of it by the [Board], so that what was [allegedly] omitted . . . may be included within its scope. To supply omissions transcends the judicial function.”<sup>32</sup>

### **III. Acting General Counsel Ohr was properly designated.**

As an additional argument challenging the termination of the prior General Counsel, Zamora challenges President Biden’s designation of an *Acting* General Counsel under the National

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<sup>30</sup> “It is settled that a charging party cannot enlarge upon or change the General Counsel’s theory.” *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) (citing *Penntech Papers*, 263 NLRB 264, 265 (1982)).

<sup>31</sup> Zamora’s musings on the possibility that a politically-accountable General Counsel might decline to defend Board actions in court, or refuse to enforce Board orders, are both speculative and irrelevant. A General Counsel serving at the President’s pleasure is no more likely to conflict with the Board than a General Counsel removable by the President only for cause. Only subordinating the General Counsel *to the Board itself*, i.e. precisely the Board’s structure before 1947, would eliminate the possibility of such conflicts—but at the expense of the General Counsel’s independence. The 1947 Congress unambiguously chose independence.

<sup>32</sup> *Iselin v. United States*, 270 U.S. 245, 251 (1926).

Labor Relations Act.<sup>33</sup> Zamora contends that any vacancy in a principal office of the United States must paralyze that office's duties from being performed by an acting official until the Senate confirms a nominee to fill the vacancy and the President makes the appointment, at least absent unspecified emergency circumstances. By so doing, she asks the Board to overthrow consistent federal practice going back to the George Washington administration (and declare dozens of duly-passed federal statutes unconstitutional along the way). Fortunately, the Supreme Court settled this question over a hundred years ago.

**A. The Act expressly authorized President Biden's designation of an Acting General Counsel.**

On January 25, 2021, President Biden designated Peter Ohr Acting General Counsel. He did so pursuant to Section 3(d) of the Act, which states:

In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 153(d). On February 22, President Biden submitted the nomination of Jennifer Abruzzo to be General Counsel of the NLRB.<sup>34</sup> By the terms of the Act, therefore, Acting General Counsel Ohr may continue to act until the adjournment *sine die* of the current session of the Senate.

Zamora cannot and does not dispute any of this. Instead, she rests her argument on the Appointments Clause of the Constitution, which states that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for,

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<sup>33</sup> Zamora does not acknowledge the inconsistency between her contention that the General Counsel can be given removal protections by Congress because he is an inferior officer (Opp. at 13) and her converse claim that an Acting General Counsel cannot be designated because the General Counsel is a principal officer (Opp. at 15). Both cannot be correct.

<sup>34</sup> 167 Cong. Rec. D141 (Feb. 22, 2021).

and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Zamora claims that Acting General Counsel Ohr's designation as such transforms him into a principal officer of the United States, but one appointed without the advice and consent of the Senate.<sup>35</sup> Thus, Zamora claims, the Act is unconstitutional. (Opp. at 15-19.) This argument runs into a brick wall of history and judicial precedent.

**B. The Act is consistent with a long line of vacancy statutes that, since the founding of the United States, have authorized the duties of Senate-confirmed offices to be performed on an acting basis without Senate confirmation.**

No one disputes that the President's designation of Ohr as Acting General Counsel is consistent with the Appointments Clause if the General Counsel is an inferior officer.<sup>36</sup> But even assuming *arguendo* that the General Counsel is a principal officer, it does not follow that Ohr's designation is infirm.

It's well settled that when addressing the constitutionality of a statute affecting the relationship of the branches of the federal government, "historical practice" is entitled to

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<sup>35</sup> As noted above, Zamora's argument on this point (Opp. at 15) is necessarily premised upon the view that the position of General Counsel is a principal officer when held by a permanent appointee. If the General Counsel were an inferior officer, Zamora's argument would hold no water, since statutes may authorize the President alone to appoint inferior officers.

The classification of officers into principal and inferior categories is not always a straightforward task. *See generally Edmond v. United States*, 520 U.S. 651 (1995). Indeed, the Supreme Court is currently deciding a case addressing that very issue. *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. oral argument held March 1, 2021). Fortunately, that task need not be performed here. As we now show, the Board may *assume arguendo* that the General Counsel is a principal officer, because the designation of an acting official to temporarily perform the duties of that office raises no constitutional question.

<sup>36</sup> Zamora correctly intimates (Opp. at 18) that it does not matter whether the official acting as General Counsel is regularly an inferior officer or not an "officer" at all within the meaning of the Constitution. The Act plainly authorizes the President to direct *any* officer or employee of the NLRB to act as General Counsel.

“significant weight.”<sup>37</sup> Here, that practice is dispositive. Since the George Washington administration, Congress has “authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation.”<sup>38</sup> This history provides compelling support for the conclusion that the position of an acting principal officer is not itself a principal office.

In 1792, Congress first “authorized the appointment of ‘any person or persons’ to fill specific vacancies in the Departments of State, Treasury, and War.”<sup>39</sup> Although the 1792 statute “allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed,” Congress “imposed a six-month limit on acting service” in 1795.<sup>40</sup> It substantially revised those statutes in 1863,<sup>41</sup> 1868,<sup>42</sup> and 1891,<sup>43</sup> each time preserving in at least some situations the possibility of non-senate-confirmed officials assuming acting duties. So long before Section 3(d)’s enactment in 1947, Congress had demonstrated its belief that the

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<sup>37</sup> *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014); *see also, e.g., The Pocket Veto Case*, 279 U.S. 655, 689 (1929). It should be noted that the implications to be drawn from past legislative and Presidential action are far stronger than the implications Zamora attempts to draw from Presidential *inaction* (Opp. at 13, 16). As discussed, Congress has long indicated its view that the President alone may appoint officers to temporarily perform the functions of a principal office. And to take action, the President must determine both that his action is lawful and that it is wise, whereas a refusal to act could mean either that the President thinks that an action is unwise or that he thinks it is illegal, and there is no way to tell from inaction alone which it was. *See supra* n. 22 and accompanying text.

<sup>38</sup> *Sw. Gen., Inc. v. NLRB*, 137 S. Ct. 929, 934 (2017); *see also Noel Canning*, 573 U.S. at 600 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because “Congress can authorize ‘acting’ officers to perform the duties associated with a temporarily vacant office-and has done that, in one form or another, since 1792”).

<sup>39</sup> *Sw. Gen.*, 137 S. Ct. at 935 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281).

<sup>40</sup> *Id.* at 935 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415).

<sup>41</sup> Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656.

<sup>42</sup> Act of July 23, 1868, ch. 227, 15 Stat. 168.

<sup>43</sup> Act of Feb. 6, 1891, ch. 113, 26 Stat. 733.

Appointments Clause did not require Senate confirmation for temporary service in a principal office.

Nor were these statutes mere paper authorities—Presidents repeatedly exercised them to designate non-principal officers as acting principal officers. The Justice Department’s Office of Legal Counsel comprehensively surveyed this practice in 2018 and found at least 325 instances *prior to 1860 alone* in which acting officials were designated to perform the duties of a principal office.<sup>44</sup> As early as 1809, the non-Senate confirmed chief clerk of the War Department was designated to serve as Acting Secretary of War for 50 days spanning the end of the Jefferson and beginning of the Madison Administrations.<sup>45</sup>

But courts addressing questions of pay for these appointments consistently held that acting officials were entitled to payment as “ad interim” officers, not as holders of the principal office itself.<sup>46</sup> The Court of Claims, in 1857, specifically held that such positions were inferior and not principal offices of the United States.<sup>47</sup>

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to designate a vice-consul to temporarily perform the duties of a consul.<sup>48</sup> The Constitution expressly includes “Consuls” in the category of officers whose appointment requires the Senate’s advice and consent.<sup>49</sup> The *Eaton* Court, however, concluded

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<sup>44</sup> Office of Legal Counsel, *Designating an Acting Attorney General*, 2018 WL 6131923, at \*8-\*10 (Nov. 14, 2018).

<sup>45</sup> *Id.* at \*8 (citing *Biographical Directory of the American Congress, 1774-1971*, at 14 (1971)).

<sup>46</sup> *Id.* at \*9.

<sup>47</sup> *In re Cornelius Boyle*, 34th Cong., 3d Sess., Rep. C.C. 44, at 9, 1857 WL 4155, at \*3 (Ct. Cl. 1857).

<sup>48</sup> 169 U.S. 331, 343 (1898).

<sup>49</sup> U.S. Const. art. II, § 2, cl. 2.

that a “vice-consul” is an inferior officer whose appointment Congress may “vest in the President” alone.<sup>50</sup> The Court held that Eaton’s exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.<sup>51</sup>

The Court concluded that more than forty years of practice “sustain the theory that a vice-consul is a mere subordinate official,” which defeated the contention that Eaton’s appointment required Senate confirmation.<sup>52</sup> In view of the long history of such appointments, *Eaton* simply confirmed the general rule.

The Court has not retreated from *Eaton*. In *Edmond v. United States*, the Court restated *Eaton*’s holding that “a vice consul charged temporarily with the duties of the consul” is an “inferior” officer.<sup>53</sup> And in *Morrison v. Olson*, the Court emphasized that a subordinate who performed a principal officer’s duties “for a limited time and under special and temporary conditions” is not “thereby transformed into the superior and permanent official.”<sup>54</sup>

Consistent with this longstanding practice, Section 3(d) provides for the designation of an acting General Counsel. The Board’s records indicate no fewer than 16 different periods of acting service in this single office since its creation in 1947, i.e., more distinct periods (albeit for a much shorter total period of time) than the 14 Senate-confirmed General Counsels who served during

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<sup>50</sup> 169 U.S. at 343.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 344.

<sup>53</sup> 520 U.S. at 661.

<sup>54</sup> 487 U.S. 654, 672-73 (1988) (quoting *Eaton*, 169 U.S. at 343)).

that span.<sup>55</sup> Some of those acting appointments were made under authorities other than Section 3(d), such as the Federal Vacancies Reform Act, but all of them would be potentially unconstitutional under Zamora’s theory.

**C. *Eaton* and its ancestors are neither incorrect nor distinguishable.**

Against this daunting array of authorities, Zamora presents two counterarguments: first, that “the text of the Appointments Clause itself suggests employees and inferior officers cannot serve as Senate-confirmed officers” (Opp. at 16), and second, that *Eaton* is distinguishable (Opp. at 17-18.). Both arguments fail.

Zamora’s first argument would require one to believe that everyone in all three branches of government since the 2nd Congress has gotten the Appointments Clause wrong from the outset. This misses the mark. Presidential designations under Section 3(d) and like statutes assign to an individual the duties of an office regularly filled by presidential appointment and Senate confirmation, but they do not appoint the individual to the office itself. As explained above, these acting designations to Senate-confirmed offices have occurred since the Founding.<sup>56</sup>

Nor do such acting designations result, as Zamora suggests (Opp. at 17), in eradicating the distinction between principal and inferior officers. There is no question that Senate confirmation is an important constitutional check on the President’s appointments of senior officers. At the same time, the “constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted.”<sup>57</sup> Despite their frequent

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<sup>55</sup> *General Counsels Since 1935*, <https://www.nlr.gov/about-nlr/who-we-are/general-counsel/general-counsels-since-1935> (last visited Feb. 24, 2021).

<sup>56</sup> See *supra* n. 29-37 and accompanying text.

<sup>57</sup> *Sw. Gen.*, 137 S. Ct. at 935.

disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, to overcome the delays of the confirmation process.<sup>58</sup> It is those limits—which perforce must be approved by the very body, the Senate, whose prerogatives are supposedly under attack here—that establish the “special and temporary conditions” under which acting officials can serve and thereby preserve the key distinction between acting and permanent officials.<sup>59</sup>

This segues naturally into Zamora’s second argument, namely that *Eaton* is distinguishable because there are no “special and temporary conditions” presented here (Opp. at 17-18). But Congress has already made clear its view that the limitations in Section 3(d) are the type of “special and temporary conditions” that make an acting appointment to the General Counsel role appropriate, and Zamora gives no reason why her contrary view—or her undefined caveat for “emergency circumstances”—represents the better view of the Appointments Clause’s requirements. Congress’s enactment of a vacancy statute presumptively codifies the conditions

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<sup>58</sup> If the President could not rely on temporary designations for Senate-confirmed offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign or are removed at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the operation of the federal government—including matters of national security, fiscal solvency, and law enforcement—would shudder to a halt precisely as a new President is transitioning into office. The potentially dire consequences are not difficult to imagine. And the alternative—saddling a new President with the prior President’s appointees until such time as those appointees can be replaced—would thwart the President’s ability to advance policy priorities of the new administration, and potentially leave the dead hand of the prior administration in charge of most of the government for months after inauguration.

What’s more, if Zamora were correct, the Senate could block the appropriate functioning of the Executive Branch entirely by blocking the confirmation of principal officers. *Designating an Acting Attorney General*, 2018 WL 6131923, at \*16 (citing legislative history of the Federal Vacancies Reform Act). A political dispute with the Senate, or even just the ordinary press of business, could frustrate the President’s ability to execute the laws by delaying the appointment of principal officers.

<sup>59</sup> *Eaton*, 169 U.S. at 343.

under which acting appointments can be made.<sup>60</sup> One can hypothesize a vacancy statute so far-reaching as to be facially unconstitutional, but Section 3(d) limits designations to 40 days if no nomination is submitted or an absolute maximum of one year if one is.<sup>61</sup>

In short, President Biden had the constitutional power and authority to remove former General Counsel Robb, and he exercised that power. The Charging Party's arguments are contrary to the Act and seek to casually overthrow over a hundred years of settled law on the question of removal of federal officers.

The Board should grant the Acting General Counsel's motion.

**DATED** at Fort Worth, Texas this 16<sup>th</sup> day of March 2021.

Respectfully submitted,

/s/ Roberto Perez

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<sup>60</sup> The late Justice (then-Judge) Ginsburg explained the rationale for Congressional deference in her dissent in *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1988), *rev'd sub nom. Morrison*, 487 U.S. at 670-77. As she explained, in any "fairly debatable" situation where a court must classify an office as either principal or inferior, Congress's exercise of its legislative prerogatives to structure offices must carry the day.

<sup>61</sup> *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 289-90 (1977) ("implicit" that "the tenure of an Acting Director should not continue beyond a reasonable time").

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Acting General Counsel's Reply to the Charging Party's Response in Opposition to the Acting General Counsel's Motion to Remand or, alternatively, to Dismiss the Complaint was served on this 16<sup>th</sup> day of March 2021, on the following persons by email:

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## **EXHIBIT 1**

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: NLRB Dispute

On July 14, Donald Dotson sent Mr. Hauser a note advising that Dotson and NLRB member Robert Hunter wanted to meet with him to "discuss alternatives" in connection with the dispute at NLRB concerning the respective powers of the Solicitor and the General Counsel. Dotson enclosed a legal analysis of the dispute and noted that it was urgent that the matter be resolved. Hauser asked that I review the question and determine (1) whether the Board had the authority to act as it did in transferring authority from the General Counsel to the Solicitor, (2) whether the General Counsel may be removed by the President, (3) if the General Counsel's defiance of the Board directive constitutes "cause" for removal of the General Counsel, and (4) how Mr. Meese's office is involved in the dispute.

I first reported on this dispute in a memorandum of May 18, 1983 (attached). You will recall that on May 4, 1983, the Board required the General Counsel to submit "all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation" to the Solicitor for his review, and directed that such pleadings and briefs may be filed only after approval of the Solicitor, acting for the Board. The Board also assumed authority to "transfer, promote, discipline, discharge" and take other appropriate personnel action with respect to NLRB attorneys engaged in the activities to be reviewed by the Solicitor. The General Counsel, however, was directed to exercise "general supervisory responsibility" over those attorneys.

The legal memorandum submitted by Dotson defends the Board's action by noting the statutory authority of the Board to "appoint... attorneys... necessary for the proper performance of its duties... Attorneys appointed under this section may, at the discretion of the Board, appear for and represent the Board in any case in court." 29 U.S.C. § 154(a). The Board recognizes that the General Counsel, under 29 U.S.C. § 153(d), has independent authority to investigate charges and issue unfair labor practice complaints. The Board's action does not affect attorneys employed in these areas. The Board maintained, however, that the General Counsel's

authority to represent the Board in court is based not on any similar statutory grant of authority but rather on a revocable delegation of authority from the Board. The Board's legal memorandum notes that a similar dispute between the Board and its General Counsel arose in 1950, and was resolved when the President requested and obtained the General Counsel's resignation.

We have not been provided with a copy of the General Counsel's legal analysis, but I understand that it focuses on the language of 29 U.S.C. § 153(d): "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board..." This clear statutory language, according to the General Counsel, flatly prohibits any effort by the Board to place control over enforcement and appellate attorneys in the hands of the Solicitor. Simply stating, as the Board did, that the General Counsel will continue to exercise "general supervisory responsibility" over such attorneys is a meaningless assertion in the face of the Board's requirement that the Solicitor review and approve briefs and pleadings and the Board's assertion of authority over attorney promotions, disciplining, transfers, and terminations.

As I pointed out in my earlier memorandum, the Board's position is not illogical, nor does it contravene the intent of the Taft-Hartley Act, which established the office of NLRB General Counsel. It was the purpose of that Act to insulate the General Counsel from the Board with respect to the presentation of complaints before the Board. Such insulation with respect to enforcement of orders issued by the Board was not necessary (no problem of commingling adjudicative and prosecutive roles being present once the Board had issued an order), and accordingly this question was not specifically addressed by the Taft-Hartley amendments. In addition, there is a great deal of common sense appeal to the proposition that the Board should be able to control the legal arguments presented on its behalf before the courts.

On the other hand, the plain language of 29 U.S.C. § 153(d) presents a major hurdle to the Board's legal analysis. Even if the intent of Congress was only to insulate NLRB attorneys from the Board with respect to the filing of complaints, the language chosen -- giving the General Counsel "general supervision over all attorneys employed by the Board" (emphasis supplied) -- is not so limited. In sum, it is not apparent which side in this dispute would prevail if the matter were put to the proof, which in this case would presumably entail an Attorney General opinion rather than a court test.

There is a clear answer to the second query posed by Mr. Hauser. In an opinion dated March 11, 1959, Malcolm Wilkey, then Assistant Attorney General for the Office of Legal Counsel, concluded that "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." We were advised in April of this year that the Department of Justice still adhered to the Wilkey opinion. Since the General Counsel serves at the pleasure of the President, it is unnecessary to consider Mr. Hauser's third question, viz., whether the General Counsel's conduct constitutes "cause" justifying Presidential dismissal for cause.

With respect to the fourth question, Ken Cribb advised me on July 15 that it was his understanding that Craig Fuller would be meeting with Dotson to discuss the matter, at Mr. Meese's direction. Hauser called Fuller, who seemed unaware of any such arrangement. In any event, Hauser advised Fuller that our office was looking into the matter and should be kept apprised of any developments.

In light of the NLRB's status as an independent agency, we should keep some distance from the legal dispute. Dotson may want a meeting to discuss firing the General Counsel, the step taken over thirty years ago when the NLRB was similarly deadlocked. Since such a move can only come from the President, we are inevitably involved if Dotson seeks that solution. I would, however, recommend against taking sides in the legal dispute. Dotson took this action without consulting us or, more appropriately, the Justice Department, and we should not be anxious to sleep in a bed not of our own making.