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LABOR IN THE TRUMP YEARS

*Charlotte Garden**

INTRODUCTION

Once Donald Trump is inaugurated, American labor unions will be faced with the most hostile federal government in decades. Assuming Trump is able to nominate and have confirmed one or more Supreme Court Justices, all three branches of government, including both houses of the legislature, are likely to be unremittingly hostile to organized labor. Allow this to sink in for a moment: Beginning in 2017, the federal government will be more universally hostile to the interests of unions and their allies than that of August 5, 1981, when President Reagan fired 11,000 striking air traffic controllers and imposed a lifetime rehire ban,¹ breaking the controllers' union and modeling aggressive anti-union tactics to employers nationwide.² And it will be more hostile than the federal government that existed on June 23, 1947, when the Taft-Hartley Act—which had been denounced by labor unions as a “slave labor” bill³—became law over President Truman's veto.⁴ And it will be more hostile than the federal government that existed on May 16, 1938, when the Supreme Court held that employers were free to permanently replace economic strikers,⁵ guaranteeing employers' leverage in bargaining.⁶

Each of these examples shows how a single branch of the federal government can hamper labor unions' effectiveness. Imagine what they can do when no other branch is likely to act as a check. Moreover, while Trump did

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¹ Andrew Glass, *Reagan Fires 11,000 Striking Air Traffic Controllers Aug. 5, 1981*, POLITICO, Aug. 5, 2008, <http://www.politico.com/story/2008/08/reagan-fires-11-000-striking-air-traffic-controllers-aug-5-1981-012292>.

² See Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 66 (2001); Joseph A. McCartin, *Collision Course: Ronald Reagan, The Air Traffic Controllers, And The Strike That Changed America* (2011).

³ See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 766 (1998) (“In giant rallies of protest and petition, both the AFL and the CIO unfurled huge banners denouncing Taft-Hartley as a “Slave-Labor Act.”).

⁴ H.R. 3020, 80th Cong. (1947) (passing Labor Management Relations Act, also known as the Taft-Hartley Act, over Truman's veto).

⁵ See, NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

⁶ *Id.*

not run on a campaign message of undermining labor unions, the interests of the Republican Party and the interests of unions are clearly opposed. Because organized labor today mostly supports Democratic candidates with their political spending and get-out-the-vote efforts, anything that weakens unions or depletes their coffers helps Republicans.⁷ Thus, even though Trump himself is unpredictable,⁸ it is readily apparent that he will surround himself with union opponents.

This essay proceeds in two parts. Part I contrasts the situation in which many union leaders and supporters expected to find themselves with respect to the federal government on November 9, 2016, with the emerging reality of a Trump administration. Part II suggests some priorities that the labor movement might pursue, notwithstanding the likely actions of the federal government.

I. THE FEDERAL GOVERNMENT IN THE TRUMP ADMINISTRATION: EMERGING REALITIES

The last eight years of federal labor policy have been largely shaped by the measured pro-labor stances of the NLRB and Department of Labor; a hostile Congress, particularly once Democrats lost control of the Senate in 2015; and courts that have been increasingly willing to defer to federal agencies actions as President Obama has filled appellate court vacancies—but a hostile Supreme Court.⁹ Had Hillary Clinton been elected president, unions and workers could have expected more of the same, with the important addition of at least one liberal-leaning Justice to the Supreme Court. This state of affairs would not have revolutionized the environment in which unions operate, but it

⁷ See, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 436 (2015).

⁸ See, Ian Kullgren, *Trump Called for Eliminating the Federal Minimum Wage. He Also Called for it to Be Raised.*, POLITICO, Oct. 4, 2016, <http://www.politico.com/blogs/2016-presidential-debate-fact-check/2016/10/trump-kaine-minimum-wage-229149>.

⁹ See, Lawrence Hurley, *Obama's Judges Leave Liberal Imprint on U.S. Law*, Reuters, Aug. 26, 2016, <http://www.reuters.com/article/us-usa-court-obama-idUSKCN1110BC>. The change in the federal courts should not be overstated, as several appeals courts remain dominated by conservative jurists. In particular, the Fifth and Eighth Circuit Courts of Appeals have emerged as preferred forums for litigants seeking to invalidate Obama administration initiatives. For example, challenges to the Department of Labor's persuader rule and overtime rule were filed in district courts within those circuits, with a district court within the Fifth Circuit issuing a "nationwide" injunctions against the rule. *Nat'l Fed. of Independent Business v. Perez*, Case No. 5:16-cv-66-C, 2016 WL 3766121 (W.D. Tex. June 27, 2016). Conversely, President Obama has made four appointments to the District of Columbia Circuit, in which many challenges to agency actions are filed; that court now has seven judges appointed by Democratic presidents, and four appointed by Republicans. As a result, that court is now considered to be more likely to defer to federal agencies than it was in the recent past.

would have allowed for steady improvements in labor standards; a continuation of the NLRB agenda discussed in the next section; and a Supreme Court that would maintain the status quo regarding union dues and fees and generally uphold regulatory changes. As discussed below, these advances are likely to come to an abrupt halt in the Trump administration.

A. *The NLRB*¹⁰

In accordance with recent tradition,¹¹ the NLRB under President Obama leaned Democratic,¹² and accordingly was more amenable to taking a broad view of workers' collective action under the NLRA than Republican-leaning Boards. At least three themes have emerged during the Obama years at the NLRB.

First, the Board has responded to the “fissured workplace,” taking a more pragmatic view of which enterprises may be required to bargain with which employees. For example, the Board adopted a more flexible test to determine when an enterprise qualified as a joint employer, considering not just the authority that an enterprise actually exerts over workers, but also authority held in reserve.¹³ Similarly, the Board held that “leased” workers could be included in a bargaining unit with their singly employed co-workers over their employers' objections, recognizing that these workers share common interests regarding the terms and conditions of employment that the common employer sets.¹⁴ And, the Board's General Counsel, Richard Griffin Jr., invited the

¹⁰ This section focuses on the National Labor Relations Board and not the Department of Labor. However, the Department of Labor enforces labor law's union reporting requirements. *See*, Office of Labor-Management and Standards, Department of Labor <https://www.dol.gov/olms/> (describing Department of Labor's role in enforcing the Labor-Management Reporting and Disclosure Act). Thus, in a Trump administration, unions may see increased scrutiny of their finances and reporting compliance. Additionally, the Department of Labor is likely to retract key employee-friendly guidance documents, and to pursue fewer investigations of alleged wage and hour violations. *See*, Administrator's Interpretation No. 2015-1, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who are Misclassified as Independent Contractors*, July 15, 2015, available at https://www.dol.gov/whd/workers/misclassification/AI-2015_1.htm.

¹¹ Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1365 (2000) (“since 1970 a majority of the Board members appointed have come from management or union-side rather than neutral backgrounds”).

¹² *See*, *NLRB, Board Members Since 1935*, <https://www.nlr.gov/who-we-are/board/board-members-1935>.

¹³ *Browning-Ferris Inds. of CA*, 362 NLRB No. 186 *2 (2015) (“We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority.”) (emphasis in original).

¹⁴ *Miller & Anderson, Inc.*, 364 NLRB No. 39 *8 (2016) (adopting rule “not requiring employer consent to units combining jointly employed and solely employed employees of a single user employer”).

Board to consider when franchisors are joint employers with their franchisees, pursuing a high profile set of charges against McDonald's.¹⁵

Second, the Board interpreted the statutory definitions of “employer”¹⁶ and “employee”¹⁷ more capaciously than recent Republican boards, allowing more workers to engage in protected concerted activity including collective bargaining. Thus, in a case involving Columbia University, the Board recently held that graduate student workers qualified for protection under the NLRA;¹⁸ those students quickly voted in favor of union representation.¹⁹ Likewise, the Board articulated a new and more expansive test to determine when university faculty qualify as employees rather than managers, and a new approach to determining when faculty at religiously affiliated colleges and universities must be excluded from the Act's protection.²⁰ However, as with the McDonald's case, the Board's work in this area will not be completed by the time Trump takes office: of particular note, cases regarding the status of gig economy workers remain pending at the trial level.²¹

Third, the Board and the General Counsel actively enforced the NLRA rights of non-union workers. The General Counsel made it a priority to prosecute cases concerning overbroad work rules that infringed employees' rights to engage in protected concerted activity, including rules forbidding workers from discussing their pay or from criticizing their employers on social media.²² Moreover, the Board issued a series of decisions invalidating contracts requiring employees to commit to individual arbitration in lieu of class or collective actions in either judicial or arbitral forums.²³ This rule was upheld by two circuits (though it was rejected by three others);²⁴ its significance is evidenced by the fact that both cases in which the rule was

¹⁵ E.g., McDonald's USA, NLRB Case No. 13-CA-147150. These cases remains pending before an administrative law judge, and therefore will not be decided by the NLRB before President-Elect Trump takes office.

¹⁶ 29 U.S.C. § 152(2).

¹⁷ 29 U.S.C. § 152(3).

¹⁸ Trustees of Columbia University, 364 NLRB No. 90 (2016).

¹⁹ Elizabeth A. Harris, *Columbia Graduate Students Vote Overwhelmingly to Unionize*, NY TIMES, Dec. 9, 2016, http://www.nytimes.com/2016/12/09/nyregion/columbia-graduate-students-union-vote.html?_r=0.

²⁰ Pacific Lutheran University, 361 NLRB No. 157 (2014).

²¹ E.g., Uber Techs., Inc., NLRB Case No. 20-CA-160720.

²² E.g., Report of the General Counsel Concerning Employer Rules, 2015 WL 1278780 (Mar. 18, 2015).

²³ D.R. Horton, Inc., 357 NLRB No. 184 (2012); Murphy Oil USA, Inc., 361 NLRB No. 72 (2014).

²⁴ *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (upholding NLRB rule); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (2016) (upholding NLRB rule); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2013) (rejecting NLRB rule without discussion).

upheld involved plaintiff employees who invoked it in cases brought under statutes other than the National Labor Relations Act. That is, this rule facilitates meaningful enforcement of a range of workplace rights that would otherwise be lost because—even assuming individual arbitration is less expensive than individual litigation—too little money is at stake in many workplace claims to make retaining counsel for individual arbitration financially viable.²⁵

Still, and contrary to the claims of some Republican legislators and employer-leaning groups, the relatively labor-friendly Obama NLRB did not make radical changes to labor law. While there are likely a host of mutually reinforcing reasons for this (including the Board members' fidelity to the NLRA), one reason was undoubtedly the checks imposed by a hostile Congress. Those included a raft of hearings not just on the NLRB's decisions,²⁶ but also the General Counsel's charging decisions;²⁷ threats to defund the Board;²⁸ and routinely blocking the President's NLRB nominees, both through the usual channels and by preventing recess appointments through pro forma congressional sessions.²⁹ Further, although the much-discussed downward slide in union density slowed to a near stop—possibly due in part to the Board's decisions—union density did not begin to increase.³⁰

Thus, while it is likely that—once constituted³¹—a Trump board will reverse several Obama Board decisions, those reversals are unlikely to significantly undermine the labor movement as a whole. However, the Board

²⁵ See Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 59 (2016).

²⁶ E.g., Culture of Union Favoritism: Recent Actions of the National Labor Relations Board, Sept. 22, 2011, <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=260180>.

²⁷ See, e.g., Keith Laing, NLRB Lawyer: Boeing Complaint 'Not Intended to Harm' Workers, THE HILL June 17, 2011, <http://thehill.com/policy/transportation/167159-nlr-lawyer-boeing-complaint-not-intended-to-harm-the-workers-of-sc>.

²⁸ See, e.g., Christina Marcos, *GOP Lawmaker Proposed Defunding NLRB*, THE HILL May 18, 2015, <http://thehill.com/blogs/floor-action/house/242387-gop-lawmaker-proposes-defunding-nlr>.

²⁹ NLRB v. Noel Canning, 134 S.Ct. 2250 (2014) (invalidating President Obama's recess appointments to the NLRB).

³⁰ Melanie Trotman, *Membership Rate Falls for U.S. Unions in 2014*, WALLSTREET JOURNAL, Jan. 23, 2015, <http://www.wsj.com/articles/membership-rate-falls-for-u-s-unions-in-2014-1422028558>.

³¹ There are presently two open seats on the NLRB; recent history suggests Trump will nominate two Republicans to fill them. Further, the General Counsel's term expires in November 2017, and Trump is likely to nominate a replacement with much different priorities. These positions require the consent of the Senate, but with only a simple majority vote. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASHINGTON POST, Nov. 21, 2013, https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?utm_term=.b5e3f5867593.

may pursue other priorities that have a greater deleterious effect on labor. For example, conservative groups have in recent years urged the Board and the courts to take a broader view of what groups qualify as “labor organizations” under the NLRA, which are subject to a suite of disclosure requirements as well as limitations on secondary and recognitional striking and picketing.³² Similarly, the Board may expand the scope of Section 8(c) of the NLRA, which protects employers’ speech rights; and take a more expansive view of what activity qualifies as secondary picketing, limiting a key tool in the labor movement’s arsenal.

B. The Federal Courts

The Supreme Court headline of 2016 was Justice Scalia’s death, and the Court’s subsequent deadlock on a list of highly contested cases. One of those cases was *Friedrichs v. California Teachers Association*, in which the plaintiffs argued that public sector employees have a First Amendment right not to pay union dues or fees.³³ Justice Scalia was widely expected to vote with the four other conservative members of the Court in the plaintiffs’ favor; if this had happened, *Friedrichs* would have represented the culmination of a multi-decade litigation and advocacy effort to weaken unions and constrain their participation in electoral politics by allowing represented public sector workers in every jurisdiction to decline to contribute towards the costs of union representation.³⁴

With President Obama’s nomination of Judge Merrick Garland of the District of Columbia Circuit Court of Appeals to fill Justice Scalia’s seat, unions probably thought they could breathe a sigh of relief. But obstruction by Senate Republicans means that—barring an effective filibuster by Senate democrats—President Trump will fill Scalia’s seat and possibly others as well. When that happens, it is a virtual certainty that the Court will grant cert. on another public sector union dues case, and decide it adversely to the union. The only question then will be how much farther the Court is willing to go. Anti-union advocacy groups have already begun advancing arguments that exclusive representation (the principle that a duly-elected union represents all of the employees in a bargaining unit) is unconstitutional as to certain public

³² See Mike Emanuel, *Unions by Another Name? Lawmakers Question Rise of ‘Worker Centers’*, FOX NEWS Jul. 27, 2013, <http://www.foxnews.com/politics/2013/07/27/unions-by-another-name-lawmakers-question-rise-worker-centers.html>.

³³ *Friedrichs v. Cal. Teachers Ass’n*, 136 S.Ct. 1083 (2016).

³⁴ See Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 179 (2015).

workers; and that unions representing public sector workers may not offer membership incentives or restrict voting rights to members.³⁵ These arguments, if accepted by the Court, would simultaneously worsen the impact of a decision barring public sector agency fees by making it more difficult for unions to incentivize voluntary payments; and make it more likely that even union-friendly states will bar groups of workers from collective bargaining, because exclusive representation is critical to promoting stability within a system of collective bargaining.

Finally, while perhaps less high-profile than cases concerning the rights of public sector union objectors, the Court may also hear other cases about substantive aspects of labor law. Among those, the leading candidates involve the NLRB's individual arbitration rule; cert. petitions in *Epic Systems* and *Ernst & Young* are now pending.³⁶ Another—though a less likely—candidate is *UAW v. Hardin County*, in which the Sixth Circuit held that “right to work” laws enacted at the municipal level were not preempted by the National Labor Relations Act.³⁷ If the Supreme Court hears the case and upholds the Sixth Circuit, then Republican-controlled municipalities in Democratic-controlled states will have the ability to adopt their own “right to work” laws, unless barred by state law.

C. Congress

Finally, unions will continue to face a hostile Congress, with President-Elect Trump unlikely to veto anti-labor legislation. Thus, a bill to include “right to work” provisions in both the NLRA and the RLA to—similar to bills proposed during the 114th Congress³⁸—would not need to overcome a presidential veto in order to become law. Similarly, the National Labor Relations Board may face significant funding cuts from Congress, rendering it unable to prosecute many unfair labor practices.

³⁵ I have elsewhere discussed these and other legal theories in more detail. See Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016).

³⁶ Docket, Case No. 16-285; Docket, Case NO. 16-300.

³⁷ *United Auto., Aerospace & Agric. Implement Workers of Am. v. Hardin Cty.*, 842 F.3d 407 (6th Cir. 2016).

³⁸ H.R. 6121 (114th Congress); S. 391 (114th Congress).

II. CONCLUSION: LOOKING AHEAD

With what is almost certain to be unremitting hostility from the federal government ahead, unions are likely to turn to blue states to continue to press for improvements in minimum labor standards and to organize workers in the public and private sectors.³⁹ In particular, the Fight for Fifteen movement, backed by the Service Employees International Union, has demonstrated the appeal of its message, with minimum wage increases succeeding even in Republican-leaning states like Arizona.⁴⁰ Unions are likely to continue backing similar campaigns involving wage increases, paid sick and safe leave, and predictable scheduling practices. Further, in anticipation of *Friedrichs* being decided adversely to labor unions, many public sector unions began successful “internal organizing” campaigns, appealing to represented workers to become union members.⁴¹ Unions will need to build on these experiences.

While the American labor movement faces enormous challenges in the Trump era, I remain optimistic that the core union message of worker rights, voice, and empowerment will continue to resonate with the American public.⁴² The problem riddling organized labor’s leaders and grassroots activists is how to translate the popularity of this message into lasting pro-worker policies. With committed opponents in the federal government, that struggle becomes exponentially more difficult, as unions will have to play defense in the federal courts and keep pressure on congressional democrats to mount a unified resistance against their republican colleagues and executive branch initiatives, all while pushing for new wins in states, cities, and individual workplaces. This may prove to be the most challenging political era for unions since before the New Deal, but labor should view the more promising picture at the state level as a proving ground for its ideas and priorities.

³⁹ For an account of the labor movement’s role in advocating for improvements in minimum labor standards, see generally Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

⁴⁰ *Arizona Minimum Wage and Paid Time Off, Proposition 206*, BALLTOPIA (2016), [https://ballotpedia.org/Arizona_Minimum_Wage_and_Paid_Time_Off_Proposition_206_\(2016\)](https://ballotpedia.org/Arizona_Minimum_Wage_and_Paid_Time_Off_Proposition_206_(2016)).

⁴¹ See *Internal Organizing*, AFSCME <http://www.afscme.org/members/conventions/resolutions-and-amendments/1988/resolutions/67-internal-organizing>.

⁴² See Bruce Drake, *Opinion of Unions is Up, Membership Down*, Pew Research Center, Sept. 2, 2013 <http://www.pewresearch.org/fact-tank/2013/09/02/opinion-of-unions-is-up-membership-down/>.