

LABOR CZARS-COMMISSARS-KEEPING WOMEN IN THE KITCHEN-THE PURPOSE AND EFFECTS OF THE ADMINISTRATIVE CHANGES MADE BY TAFT-HARTLEY

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The Taft-Hartley amendments to the National Labor Relations Act (NLRA) made a number of changes in the administrative structure of the National Labor Relations Board (NLRB or Board) and created a new position-the General Counsel of the Board. This paper will examine some of these changes with particular emphasis on section 3(d), which created the independent office of the General Counsel and mandated a statutory separation of the prosecutorial and adjudicative functions under the NLRA.

The other structural and administrative changes mandated by the 1947 amendments were the increase, from three to five, in the number of Board Members, the abolition of the Board's Review Section, and the statutory prohibition that the Board not engage in economic analysis. Each of these changes had a definite and significant purpose at the time, but none has been as influential on American labor management relations as has the creation of an independent General Counsel. Each is, in one way or another, connected to the title of this paper, and each reference will be described in turn.

The better known provisions of Taft-Hartley are outside the scope of this paper because they represent substantive changes in the NLRA. Clearly, the additions to the Act of injunctive authority (discretionary 10(j) authority and mandatory 10(l) authority), section 8(b), and of the "right to refrain" as a section 7 right have had enormous implications for the American workplace. But my assignment is to consider the administrative changes wrought by Taft-Hartley. The other changes are enticing subjects but, quite simply, they are for another paper, not this one. Nor is this paper intended as a detailed history of the NLRB, the Wagner

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1. 29 U.S.C. § 153 (1994).

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Act, or Taft-Hartley. Others have done more complete work on those subjects than I could ever hope to do. However, in order to understand where the Board is today and to evaluate what the Board is doing, it is necessary to touch on these histories.

I. THE FOCUS

Whether or not you label section 3(d) as a substantive or an administrative change or whether you call it a hybrid, the new office of the General Counsel and the statutory separation of functions are the most significant of the changes wrought by Taft-Hartley. Indeed, it may be that, notwithstanding the impact of unfair labor practice provisions regulating unions on the labor management community, the powers that Taft-Hartley granted to the independent General Counsel have had the greatest implications of any of the 1947 amendments on the American work-place and on American administrative law.

President Truman recognized the implications of this new position and did not like them. In vetoing Taft-Hartley, he commented:

The bill would erect an unworkable administrative structure for carrying out the National Labor Relations Act. The bill would establish, in effect, an independent general counsel and an independent Board.... It would invite conflict between the ...Board and its general counsel, since the general counsel would decide, without any right of appeal ... whether charges were to be heard by the Board.... By virtue of this unlimited authority,, a single administrative official might usurp the Board's responsibility for establishing policy under the act?

In my view, the fifty-year experience with section 3(d) and its creature, the General Counsel, clearly evidences that Truman was wrong in his prediction. That experience is the subject of this paper.

The other administrative changes made by the 1947 amendments were not as significant as the independent General Counsel, but they have either served the Board well, as in the case of the increase in the size of the Board, or they have not been a hindrance to Board operations, as in the case of the limitation on economic analysis. In considering these changes and their effects, I will draw upon the historical and legislative record, the views of other commentators on the NLRA, and upon my thirty-three years with the NLRB, twenty-four of which were spent in the office of the General Counsel. Twelve of these twenty-four years were as Deputy

2. H.R. DOC. NO. 80-334, at 6 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 918 (1948) [hereinafter NLRB, LEGISLATIVE HISTORY OF 1947].

General Counsel. Whether that experience qualifies or disqualifies me as a commentator, I leave to the reader.

II. THE NLRB'S ADMINISTRATIVE STRUCTURE-1935-1947

During the Board's first twelve years, it functioned very much like other administrative agencies. Indeed, in its first Annual Report, the Board commented that its administrative machinery:

follows closely the familiar provisions of the Federal Trade Commission Act, a procedural pattern which has been repeatedly approved as an appropriate and constitutional method for the administration of Federal law.³

Under the Wagner Act, the Board was responsible for the investigation, prosecution, and adjudication of unfair labor practices. The Board itself had three members, but like other administrative agencies, no independent prosecutor. Thus, as the final authority within the Agency, Board Members had, at least in theory, full authority for both the prosecution and adjudication of unfair labor practice cases. In practice, however, the Board sought to maintain an internal separation of these functions. For example, the Board's Trial Examiners-now known as Administrative Law Judges-were kept separate, both geographically and administratively, from the field staff. It was the field staff, under the supervision of a Regional Director, that investigated unfair labor practice cases and made decisions on whether or not to issue unfair labor practice complaints!

Separation was in most cases effective, but it was by no means complete. The Regional Director was under the ultimate supervision of the adjudicating authority, and decisions not to prosecute were appealable to the Board! In 1939, the House of Representatives authorized "a sweeping investigation" of the Board by the Special Committee to Investigate the NLRB. The Special Committee was created as a result of dissatisfaction with the Board during its first four years and the perceived failure of the Labor Committees of both Houses of Congress to conduct adequate oversight of the Board. The leadership of the American Federation

3. 1 NLRB ANN. REP. at 16 (1936) [hereinafter FIRST ANNUAL REPORT].

4. *See id.* at 16.

5. *See id.* at 22. This appeal was not a direct appeal to the Board. There were intermediate levels between the field and the Board. In the final analysis, the Board retained the right to decide to prosecute and then adjudicate that case. In fact, even after the Board-initiated reforms of the 1940s, Board members continued to consider the question of whether or not to issue complaints concerning "important policy issues." *See* Ida Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 INDUS. & LAB.

of Labor (AFL) had proposed amendments to the Wagner Act because of their sense that the Board favored the Congress of Industrial Organizations (CIO). The AFL's efforts, together with those of the National Association of Manufacturers, set the stage for the creation of the Special Committee to study the Board.⁶

The Special Committee, usually referred to as the Smith Committee, was under the chairmanship of Congressman Howard W. Smith of Virginia. Its deliberations were to be quite influential in the amendments of 1947, and its intermediate and final committee reports contain a number of allegations of misconduct and bias by Board personnel which prompted action by the House of Representatives.⁷ In fact, the Smith Committee's recommendation became the basis for a House bill passed in 1940 that presaged the 1947 amendments. That bill, however, never cleared the Senate Committee on Education and Labor.⁸ Most important for our consideration is the Smith Committee's findings that the Board's prosecutorial and adjudicative lines were sometimes blurred, or that headquarters personnel whose duties were adjudicative often adopted a prosecutorial role. In its Intermediate Report, the Special Committee majority recommended a separation of functions by statute with the appointment of a prosecutor to be called the Administrator of the NLRB.⁹

The Special Committee condemned the access to informal records by both Associate Attorneys-at-law who worked for the Chief Trial Examiner and who reviewed intermediate reports for the Chief and Review Attorneys-at-law who worked for the Board and whose duties were to advise the Board on what position to take on appeals from intermediate reports. The informal records were, in effect, raw case files

6. See JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947*, at 85-108 (1981) (providing an excellent description of the Special Committee's study of the Board).

7. See REPORT OF THE SPECIAL COMM. TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 76-3109, pt. 1, at 32, 41 (1941) [hereinafter FINAL REPORT]; SPECIAL COMM. OF THE HOUSE OF REPRESENTATIVES TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD, INTERMEDIATE REPORT ON THE INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 76-1902, at 18, 28, 48 (1940) [hereinafter INTERMEDIATE REPORT].

8. See GROSS, *supra* note 6, at 206-11 (discussing the Smith bill); see also Gene S. Booker & Alan C. Coe, *The Labor Board and Its Reformers*, 18 LAB. L.J. 67, 68 (1967) (same).

9. See INTERMEDIATE REPORT, *supra* note 7, at 89-90 (recognizing the Board's failure to separate adjudicative and prosecutorial roles and proposing the Administrator as a solution to their problem).

containing material "of which the respondent company has no knowledge and no possibility of access."¹⁰

The comments of the two minority members of the Smith Committee strongly rebutted much of the majority's allegations. With respect to the separation of functions, Representatives Arthur D. Healey and Abe Murdock countered that the record contained only one instance of a Review Attorney having access to an informal record, and this case only involved the reviewing of a letter urging expedition in handling the case. Further, as to discussions between Trial Examiners and Review Attorneys about cases, the Minority Report found only two instances, both of which occurred in non-adversarial representation cases.¹¹

For all the frailties noted by the Smith Committee, in the view of at least some commentators, the Board's efforts at separation of functions in the years before the Smith Committee worked reasonably well. Two contemporary commentators on NLRB operations noted that "the Board has made a largely successful effort to perform a difficult assignment by a procedure which, while minimizing the chance of mistake, fully preserves the basic values of traditional judicial processes."¹² With respect to the separation of functions, these commentators stated that "the relations between the Board's examiners [Administrative Law Judges] and its attorneys are ordinarily not sharply different from those existing between many District Judges and United States Attorneys."¹³

Nonetheless, after the Smith Committee's Intermediate and Final Reports, the Board made further efforts at separating functions. It adopted the recommendations of the Attorney General's Committee on Administrative Procedure and developed procedures that attempted to isolate the individual Board Members, at least as much as possible, from the Board's prosecutorial arm.¹⁴ But as the debates and the legislation of 1940 and 1947 show, these efforts were not good enough for those seeking change at the Board.

10. FINAL REPORT, *supra* note 7, at 141. The Board's policy allowed Associate Attorneys access to files while denying access to the Review Attorneys. *See id.*

11. *See* SPECIAL COMM. OF THE HOUSE OF REPRESENTATIVES TO INVESTIGATE THE NATIONAL LABOR RELATIONS BOARD, INTERMEDIATE REPORT, MINORITY VIEWS ON THE INVESTIGATION OF THE NATIONAL LABOR RELATIONS BOARD, H.R. REP. NO. 76-1902, pt. 2, at 72 (1940) [hereinafter MINORITY REPORT].

12. Walter Gellhorn & Seymour L. Linfield, *Politics and Labor Relations. An Appraisal of Criticisms of NLRB Procedure*, 39 COLUM. L. REV. 339, 395 (1939).

13. *Id.* at 388.

14. *See Klaus, supra* note 5, at 373.

III. THE ADMINISTRATIVE CHANGES MANDATED BY TAFT-HARTLEY

A. *The Board*

Taft-Hartley effected three major changes in the administrative structure of the Board: it increased the number of Board Members from three to five; it abolished the Review Section; and it prohibited the Board from engaging in economic analysis. Each of these changes will be discussed seriatim.

1. *Increase in Size of the Board*

The increase in size from three to five Members was probably the least controversial aspect of the changes wrought by Taft-Hartley. President Truman did not mention it in his veto message. In addition, throughout the Senate debates, there was a recognition that the amendments, in whatever form they emerged, would increase the volume of the Board's work.¹⁵ Indeed, until the conference report, Senator Taft was advocating a seven-member Board which would in turn work in two panels of three members each.

On June 5, 1947, Senator Taft presented a summary of the conference on the bill. He noted that the House version had been designed to create a new three-member Board—the old Board was to be abolished and the newly-created Board was to be limited to quasi-judicial duties. The Senate's position was a little less drastic. It proposed a seven-member Board by simply adding four members, and did not abolish the old Board. The conference decided to add two members, but not to abolish the old Board as the House bill had sought¹⁶

While the increase from three to five Board members appears to be an obvious compromise between the House and Senate versions, there was surprisingly little discussion of the size of the Board in the debates. Only Senator Murray, an opponent of Taft-Hartley, had advocated a five-member Board, because he believed that a seven-member Board would

15. See 93 CONG. REC. 1809, 1845 (Mar. 10, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 984 (remarks of Senator Morse); 93 CONG. REC. 4012, 4037-38 (Apr. 25, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1052 (remarks of Senator Murray); 93 CONG. REC. 4421, 4433 (May 2, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1201 (remarks of Senator Ball).

16. See 93 CONG. REC. 6395, 6442 (June 5, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1538; see also Klaus, *supra* note 5, at 377 (discussing the compromise reached by the conference committee).

be unwieldy.¹⁷ Senator Ball, on the other hand, had argued for the addition of four members. Ball's view was not based on the increased work-load implications of the amendments, but rather because "seven individual quasi-judicial officials are much less likely to become rabid proponents of a certain point of view than would be a group of three."¹⁸

Nonetheless, the increase in Board size was clearly designed to meet the expected workload. There was also a recognition that increasing Board membership would not completely solve the Board's workload problems. Senator Murray observed in his analysis of the conference re-port - a point that has been made by many Board Members and General Counsels since 1947:

The real need sought to be met by the amendment increasing the Board membership to 5 is the handling of a large volume of cases and a consequent backlog of over 5,000 cases. This problem can best be solved *by providing adequate appropriations to permit employment of a staff adequate to meet the situation rather than by enlarging the Board to an extent which may make it unwieldy and which may interfere with efficient administration.*¹⁹

In the final analysis, and for whatever reasons may have motivated the Eightieth Congress, section 4 of the Wagner Act was amended to increase the Board from three to five members and to authorize the Board to work in panels, meaning "to delegate to any group of three or more members any or all of the powers which it may itself exercise."²⁰

2 Abolition of the Review Section

In its First Annual Report, the Board described the Review Section as follows:

The Review Section, headed by the assistant general counsel, assists the analysis of the records of hearings in the regions and before the Board in Washington. It submits to the Board opinions and advice on general questions of law and problems of interpretations of the act and the Board's rules and regulations, and in response to inquiries from the regional offices submits to the regional attorneys opinions on the interpretation

17. See 93 CONG. REC. 4012, 4037-38 (Apr. 25, 1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1052.

18. 93 CONG. REC. 4421, 4433 (May 2, 1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1201.

19. 93 CONG. REC. 6494, 6501 (June 6, 1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1576 (remarks of Senator Murray) (emphasis added).

20. 29 U.S.C. § 153(b) (1994).

of the act as applied to specific facts. In collaboration with other divisions it prepares, for submission to the Board, orders, forms, rules, and regulations, and it engages in the research incidental to the formulation of legal opinions.²¹

The Review Section was a highly controversial part of the Wagner Act Board's administrative structure. The Smith Committee Report found that there was "a palpable lack of any kind of experience that would constitute a qualification for competent review of legal problems arising from labor relations under the Act."²² No doubt this inexperience bothered the Smith Committee, but it may also have been something of a pre-text for dissatisfaction with the politics and gender profile of the Review Attorneys. This is not to say that the Committee's concerns about the politics were groundless. Indeed, there is ample evidence of actual Communist influence, a condition that certainly warranted congressional investigation.²³ The gender profile is another matter. The Minority members of the Smith Committee noted that: "the first week of testimony was devoted solely to questioning members of the Review Division who were women. No explanation is given by the majority for this action in singling out the women attorneys for investigation."²⁴ This concern was not limited to the members of the committee's majority. Congressman Hoffman referred to the Review Division on the floor of the House in 1939 as follows:

Those girls who are acting as reviewing attorneys for the board are fine young ladies. They are good looking; they are intelligent appearing; they are just as wonderful, I imagine, to visit with, to talk with, and to look at as any like number of young ladies anywhere in the country, but the chances are 99 out of 100 that none of them ever changed a diaper, hung a washing, or baked a loaf of bread. None of them has had any judicial or industrial experience to qualify her for the job they are trying to do, and yet here they are after all good looking, intelligent appearing as they may be, and well groomed all of them, writing opinions on which the jobs of hundreds of thousands of men depend and upon which the success or failure of an industrial enterprise may depend and we stand for it.²⁵

21. FIRST ANNUAL REPORT, *supra* note 3, at 15.

22. INTERMEDIATE REPORT, *supra* note 7, at 46.

23. See GROSS, *supra* note 6, at 134-35 (discussing the contemporary left-wing or communist political slant of the Review Division).

24. MINORITY REPORT, *supra* note 11, at 69.

25. See GROSS, *supra* note 6, at 182-83.

Thus the reference in my title. The "Commissar" reference is, of course, to the concerns of the Smith Committee concerning the left wing and/or Communist activities among the Board's attorneys.

The Smith Committee also found that the Review Attorneys regularly reviewed materials outside the record in preparing cases for the Board, and that they overstepped the bounds of permissible conduct in that they often acted more like prosecutors than like judicial clerks. The Taft-Hartley Congress shared these views. Its solution was to abolish the Review Section indirectly. The drafters wanted a Board that would function quasi-judicially. In short, the Board was to be like an appellate court and, just as an appellate court does not have its own attorneys—they work for individual judges—the Taft-Hartley Congress wanted Board members to have their own attorneys.²⁶ The solution was to prohibit the Board from employing "any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts."²⁷ In short then, the Board, as a Board, was not permitted to have Board attorneys handle the kind of appellate review work that had been done by the Review Section. Rather, the work was to be done by "legal assistants" to Board Members—law clerks if you will.

B. The Solicitor

While the attorney employment prohibition resolved the Review Section issue, it created other problems. The Board recognized that it would need legal advice, but section 4(a) seemed to preclude the Board having an advisor.²⁸ Therefore, even prior to the effective date of Taft-Hartley, the Board designated Herbert Fuchs as its Solicitor.²⁹ It also wrote to the

26. See 93 CONG. REC. 3829, 3837 (Apr. 23, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1011. Senator Taft commented that he wanted these Board aides to function like Supreme Court clerks and wanted abolition of the "anonymous" Review Section. See *id.*, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1011 (1948). Senator Ellender wanted to assure that Board members would not all get the same recommendations from the Review Section. See 93 CONG. REC. 4115, 4143 (Apr. 28, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1078.

27. National Labor Relations Act § 4(a), 29 U.S.C. § 154(a) (1994).

28. Cf. Klaus, *supra* note 5, at 379 n.39 (noting the Board's need for legal advice); Edwin A. Elliott, *The Labor-Management Relations Act of 1947*, 29 SW. SOC. SCI. Q. 107, 116 (1948) (discussing the role of the general counsel). Dr. Elliott was at the time Regional Director of the Board's Fort Worth, Texas office.

29. Actually, Mr. Fuchs had been a Review Section attorney. Many of those attorneys, including Mr. Fuchs and Ida Klaus, were assigned to the General Counsel's office

Comptroller General of the United States asking for an opinion on whether or not it could have a legal adviser. The response of the Comptroller General was that the appointment of a Solicitor was permissible as long as the duties of the incumbent did not include reviewing transcripts of hearings, preparing drafts of opinions, or reviewing trial examiner decisions.³⁰

It is interesting to note here that the Board apparently thought that its Chairman might have powers that transcended the restriction on the appointment of attorneys. Thus, in the Board's letter to the Comptroller General, it suggested that the Solicitor be one of the Chairman's legal assistants and advise the Board in that capacity. That concept was rejected.³¹

because the Board could no longer employ attorneys. Mr. Fuchs and Ms. Klaus were then detailed back to the Board. That detail was later made permanent when the Comptroller General approved the appointment of a Solicitor. Although the Comptroller General's approval raised the question of whether the Solicitor would have to be under the "general supervision" of the General Counsel because of the language in section 3(d), the Board, for whatever reason, never asked for an opinion on this point from the Attorney General. The General Counsel agreed that he would not supervise the Solicitor, and the Board made the appointments of Mr. Fuchs and Ms. Klaus permanent details. *See* Klaus, *supra* note 5, at 379 n.39; *see also NLRB's Right to Legal Counsel of Its Own*, 20 L.R.R.M. (BNA) 34-36 (1947) (hereinafter *Right to Legal Counsel*] (providing the correspondence between the Board and the Comptroller General).

30. *See Right to Legal Counsel, supra* note 29, at 34-36.

31. *See id* at 35. There is no discussion in the Act as to what the duties and authorities of the Chairman were under either Wagner or Taft-Hartley. The practice of the Board has been that the Chairman is the head of the Board, but that he or she has no more authority under the Act than any other member. In 1950, Reorganization Plan 12 would have, inter alia, given the Chairman certain additional executive functions. *See infra* notes 78-80 and accompanying text (discussing disagreement between the General Counsel and the Board on matters of enforcement). For other reasons, this plan was rejected. *See* Klaus, *supra* note 5, at 384. In 1979, Congress modeled the Federal Labor Relations Authority (FLRA) after the Board. Its Chairman functioned just like the NLRB Chairman until 1984 when Congress amended that statute to make the FLRA Chairman that agency's "chief executive and administrative officer." 5 U.S.C. § 7104(b) (1994). The absence of any such language in the NLRA along with the Plan 12 experience clearly suggests that the NLRB Chairman does not have this authority. Congress noted this again in the legislative history of the Inspector General Act, which indicates that while the Chairman is "head of the Agency" for Inspector General Act purposes, the normal reporting system for the NLRB Inspector General was somewhat different because of the statutory role of the General Counsel. *See Conference Report, Inspector Gen. Act: Joint Explanatory Statement of the Comm. of Conference*, 100 Cong. 27 (1988). The actual phrasing of the legislative history is "the Chairman shall exercise such authority consistent with the past practices of the Board, which has been to balance the responsibilities of the Board and the unique responsibilities of the General Counsel." H.R. CONF. REP. No. 100-1020, at 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3179, 3186.

1. Economic Analysis

The Taft-Hartley amendments also provide that nothing in the NLRA will be construed as authorizing the Board to appoint individuals to act as mediators or as economic analysts. This language was a slight change from section 4 of the Wagner Act, which provided that "[n]othing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (*or for statistical work*), where such service may be obtained from the Department of Labor."³² The 1947 amendments deleted the reference to the Department of Labor and the phrase "or for statistical work" and inserted the phrase "or for economic analysis."³³ The reference to the Department of Labor and mediation and conciliation made sense in the context of Taft-Hartley's other provisions, because Title II thereof created the Federal Mediation and Conciliation Service, a new and independent agency separate from and replacing the Conciliation Service of the Department of Labor.³⁴

The prohibition against economic analysis is another story altogether. There is virtually no explanation of this restriction in the legislative history. One could surmise that such a prohibition made sense in light of the congressional desire to make the Board like a court, meaning courts do not have staff economists, so why should the Board. But that was not the basis for this particular restriction. To understand it, we must return again to the Smith Committee. Its Intermediate Report included a devastating attack on David J. Saposs, the Director of the Board's Division of Economic Research. The Committee concluded that Mr. Saposs was a left wing radical—a Socialist and perhaps, it implied, a Communist.³⁵ But it was not Mr. Saposs's politics that expressly concerned the Smith Committee as to the necessity or advisability of this Division. Rather, the Committee complained that because Mr. Saposs would testify as an expert witness on behalf of the Board, the Board was not only "prosecutor, judge, jury, and executioner"³⁶ but even acted as its own witness.

The Board abolished the Division of Economic Analysis in 1940, which the Smith Committee cited as one of the Committee's "[c]oncrete

32. See INTERMEDIATE REPORT, *supra* note 7, at 36.

33. Labor Management Relations Act, 1947, § 101, 29 U.S.C. § 154(a) (1994).

34. *Id.* § 202, 29 U.S.C. § 172 (1994).

35. See INTERMEDIATE REPORT, *supra* note 7, at 33-36. The evidence and the views of those who knew Mr. Saposs are that he was not a communist but was a strong anti-communist. See GROSS, *supra* note 6, at 134.

36. INTERMEDIATE REPORT, *supra* note 7, at 34 (quoting *Inland Steel Co. v. NLRB*, 109 F.2d 9, 19 (7th Cir. 1940)). The Committee borrowed this phrase from the Seventh Circuit Court of Appeals opinion, characterizing it as a condemnation of Mr. Saposs.

achievements."³⁷ Mr. Saposs left the Board in the early 1940s. Although both the abolition and Mr. Saposs's departure were referred to in the debates on Taft-Hartley by opponents of the economic analysis restriction, the restriction was not taken out of the final bill. Taft-Hartley's opponents argued that an economic analysis restriction could only create future problems for an agency whose basic work required it to make extensive payroll and employment record examinations. Even though it was undisputed that those examinations would continue to be an essential part of the Board's work under Taft-Hartley,³⁸ the opponents were not successful in securing removal of the language. The drafters did, however, clearly state that the prohibition did not intend to limit Board analysis of payroll records in its cases.

IV. FIFTY YEARS LATER—AN ASSESSMENT

President Truman issued an extensive and strongly worded veto message on Taft-Hartley, but he was relatively silent about the proposed changes in the provisions of section 4 of the Act. Indeed, in his message, President Truman made no reference to the increase in Board size or to the prohibition on economic analysis. There is a brief two-sentence reference decrying the abolition of the Review Section because, as he put it, separate Board member staffs would result in a "costly duplication of work and records."³⁹

To the extent Truman expressed no objection to the increase in the Board, he had it right. There was certainly a need for an increase in the number of Board members and for authority for the Board to work in panels. The workload of the Board has increased substantially since 1947. Although there are still regrettable delays in the processing of those cases that go the full litigation route, the panel system has proven an effective device in meeting the workload. The Board's resource problem continues to be, not an inadequate number of Board Members, but rather an insufficient staff to meet an increasingly difficult and complex workload.⁴⁰

37. See FINAL REPORT, *supra* note 7, at 151.

38. See 93rd CONG. REC. 4012, 4038 (Apr. 25, 1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 1052 (1948) (remarks of Senator Murray); S. MINORITY REP. NO. 80-105, pt. 2, at 33 (1947).

39. H.R. Doc. NO. 80-334, at 6 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 918.

40. There was an attempt in 1959 to increase the Board from five to seven members. The House Committee voted out a labor reform bill that was opposed by the Republicans and the Chamber of Commerce. Senator Goldwater inserted the Chamber's objection to that bill in the Congressional Record. Of the seven-member Board, the Chamber com-

The abolition of the Review Section and the increase from three to five in the number of members of the Board would have been of little value to the Board without the authority to work in panels. Clearly, that has been the salvation of the system. There are five panels, with three members comprising each panel; no two panels are composed of the same members. Each Board member heads one panel, and is a member of two other panels. In general, cases are decided by the full five-member Board only if they present novel or unusual issues, require an interpretation for which there is no precedent, or involve questions of policy. The remaining cases are decided by the Board panels.

The Board's policies with respect to the panel system assure that there will be at least three members reviewing each case. The other two members have an opportunity to review the work of a panel on which they are not participating. If a member should decide that he or she wishes to participate in that case, the member need only announce a wish to be on the panel. In short, a member has an absolute right to join a panel. Moreover, any member, regardless of whether he or she is on the panel or not, may request that the matter be considered by all five Board members.

The key to the Board's productivity success is collegiality. While there have been inevitable conflicts between and among five-Board members, such conflicts are minor given the fifty-year history of Board members working together to resolve the cases brought before the NLRB.

Taft-Hartley's Achilles heel is the appointment process. A fully staffed, five-member Board is an effective and productive operation. In the past twenty years, however, Board member turnover and delays in appointments and in the confirmation process have kept the Board from reaching its true potential. For example, during the 1980s, under a perfect appointment system, there should have been ten vacancies on the Board-one each year. In fact, there were sixteen.⁴¹ From March to November 1997, the Board operated with only three members, two of whom, myself included, were recess appointees.⁴²

mented that it was a "superficial attempt to reduce the backlog of NLRB cases since seven members instead of five would be required to review and consider policy issues." *See id.*

41. *See* AMERICAN BAR ASSOCIATION, *THE FIRST SIXTY YEARS-THE STORY OF THE NATIONAL LABOR RELATIONS BOARD: 1935-1995*, at 56 (1995). In fact, when I was appointed by President Reagan in 1988, I was the fifteenth member to serve in the 1980s.

42. *See* U.S. CONST. art. II, § 2, cl. 3 (granting the President the power to appoint persons during a recess of the Senate to serve in a position until the end of the next session of Congress).

For a short period in 1993, the Board actually fell to two members, one short of its statutory quorum.⁴³ The problem is not one of recent vintage. For example, from 1979 to 1983, the Board had a full five members for approximately fifty percent of the time. For the balance of this time period, the Board had only four members for about fifteen months and three members for about seven months.⁴⁴

It would be an error to suggest that even with only three members, the Board is not a productive organization. At the time I became a Member in 1997, there was a four-member Board with 383 cases pending. With the death of Member Margaret Browning, the membership was reduced to three with 435 cases pending. When the Board went to a full five members eight months later, the number of pending cases had increased to 481. The increase of 46 in the Board's pending workload during that time is in substantial part a result of this situation. Indeed, notwithstanding this reduced number of members, the three member Board issued a substantial number of decisions and the workload at the end of that period amounts to an increase in the number of pending cases. It should by no means be characterized as a backlog.⁴⁵

The abolition of the Review Section has presented no problem for the Board. Indeed, the use of individual Board member's staffs resulted in precisely what Congress wanted—a quasi-judicial Board that functions similar to a court.

Finally, the restriction on economic analysis was, for all practical purposes, a meaningless gesture in 1947 and has presented no difficulties in the administration of the Act since then. The Division of Economic Analysis had been defunct for seven years when Taft-Hartley was passed. More importantly, however, the objections to the Board acting as a witness in its own cases became a moot point with the creation of the independent General Counsel.⁴⁶ Thus, any economist expert witness who testifies for the government in an unfair labor practice proceeding acts as a General Counsel witness rather than as a Board witness. While the General Counsel has no economic analysis section on his staff, the economic analysis prohibition is on the Board, not on the General Counsel.

43. During this period, the Board could not act on contested cases. Anticipating the loss of a quorum, the Board delegated the section 100) authority to the General Counsel.

44. *National Labor Relations Board Case Backlog (Part 2): Hearing Before a Sub-comm. of the Comm. on Gov't Operations of the House of Representatives*, 98th Cong. 56-57 (1984) (statement of Donald L. Dotson, Chairman of the NLRB).

45. I am dealing here solely with the number of cases, not with the age of some of those cases. The age of the pending caseload is always a matter of concern and, as is so often the case, there were during this period more old cases that anyone would like.

46. *But see* GROSS, *supra* note 6, at 264-67.

Thus, when and if the occasion should arise, it may safely be assumed that section 4 of the Act would not limit the General Counsel's choice of witnesses.

Mr. Sapos's job description also provided that he furnish the Board with "data and recommendations" about representation cases.⁴⁷ However, the concerns of the Taft-Hartley Congress about the Board acting as "prosecutor, judge, jury, and executioner" would not apply to representation cases. Nonetheless, the Board does not have a staff that testifies in representation cases as did Mr. Sapos. There is nothing in the legislative history to indicate that congressional concern went beyond unfair labor practice cases or that, if there was any concern at the time, it continued after the separation of adjudicative and prosecutorial functions.⁴⁸ On balance, the only conclusion that can be drawn is that this was a purely political dispute that did not dissipate with the abolition of the Economic Analysis Division in 1940.

A. The General Counsel

On October 5, 1987, in its first case for the 1987-88 Term, the Supreme Court heard argument in *NLRB v. United Food & Commercial Workers Union (UFCW)*⁴⁹ The case arose only slightly more than forty years after the Taft-Hartley amendments to the NLRA. It centered on section 3(d) and its creation, the independent Office of the General Counsel.⁵⁰ From the beginning, the Office of the General Counsel has been the subject of scrutiny by students of administrative and labor law, litigants in NLRB proceedings, the Board, and the courts.⁵¹ Although the Supreme Court has made passing reference to the Office of the General

47. INTERMEDIATE REPORT, *supra* note 7, at 36.

48. Congress clearly wanted to isolate Board members from certain kinds of recommendations in representation cases. Thus, the prohibition on hearing officers making recommendations on pre-election hearing matters was added to section 9(c). The provision restricts the Board from making any assessment of credibility in these cases. There is no explanation given for the restriction, although opponents of Taft-Hartley pointed out that it was inconsistent with the Administrative Procedures Act. S. MINORITY REP. No. 80-105, pt. 2, at 34 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF 1947, *supra* note 2, at 496.

49. 484 U.S. 112 (1987).

50. *See id.* at 114.

51. *See generally* Michael C. McClintock, *The Unreviewable Power of the General Counsel-Partial Enforcement of the Labor Act*, 12 GONZ. L. REV. 79 (1976) (discussing the General Counsel's power to refuse to issue an unfair labor practice complaint); Jonathan B. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA*, 86 YALE L.J. 1349 (1976-77) (discussing courts refusal to review the General Counsel's decisions).

Counsel and its powers,⁵² the case was the first occasion for the Court to consider squarely the prosecutorial role of the General Counsel in the statutory scheme of Taft-Hartley.

The narrow issue presented in *UFCW* was "whether a federal court has authority to review a 'decision' of the National Labor Relations Board's General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join."⁵³ The Court's ruling sustained the broad authority of section 3(d)⁵⁴ and generally silenced the remaining doubt concerning the likelihood of success of any litigation challenging the General Counsel's "final authority" under section 3(d) of the NLRA.

Nonetheless; dispute over the wisdom of section 3(d) remains. It began during the debates over Taft-Hartley and has continued over the years. While *UFCW* settles the statutory issue, there is no reason to expect that the decision will do very much to quiet the debate concerning the wisdom of unreviewability and the desirability of changing the statute. Indeed, unsuccessful charging parties will continue to argue that they should be able to appeal an adverse decision by a General Counsel, and students of administrative law will continue to seek appeal rights for these charging parties premised on a belief that no government official should have the "final authority" that a NLRB General Counsel possesses.

This section of this paper will examine the Office of the General Counsel and consider how the position came about, how it has developed, and assess how well it has functioned. As noted earlier, I was Deputy General Counsel from 1975 to 1988, serving three General Counsels and two Acting General Counsels. That experience is, of course, a two-edged sword. On the one hand, it offers a somewhat unique perspective of the position. On the other hand, it does; to some extent, at least during the time I was Deputy General Counsel; result in a certain amount of self assessment. I have made considerable effort to avoid the pitfalls of that kind of assessment, and where my personal views are involved, I have attempted to clearly indicate just what they are. At the same time as I said at the outset of this paper, but repeat here because of its significance—to paraphrase the great commercial law axiom—let the reader beware.

52: See *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting that the "General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint").

53. See *UFCW*, 484 U.S. at 114.

54 See *id*

1. The History of the Office of the General Counsel

a. The Wagner Act-1935-1947

It must be confusing for the new student of the NLRA to observe that the Office of the General Counsel was created in 1947, only to discover that the Board identifies its first General Counsel as Charles Fahy, who served in that capacity from 1935 to 1940. The explanation lies in the fact that Wagner Act General Counsels served not as independent prosecutors appointed by the President, but as Board appointees responsible to it for "the legal work involved in the administration of the National Labor Relations Act."⁵⁵ A Wagner Act General Counsel was subject to Board control and was responsible for the Board's Legal Division. Wagner Act General Counsels were, in short, the Board's lawyers, not independent prosecutors.

During the early Wagner Act years, the Board's Legal Division was composed of a Litigation Section and a Review Section, with the former responsible for providing advice to the Regional Offices on hearings before Trial Examiners and for representing the Board in court. In 1940, a third section was created: the Trial Section. Its responsibilities were described as "a miscellany of duties" ranging from "supervis[ing the] preparation and trial of cases in the regional offices" to maintaining "a compliance unit and a staff of attorneys to handle miscellaneous legal problems so that the Assistant General Counsel in charge may act as legal counselor to the Board in respect to such problems."⁵⁶

With the fifty years of hindsight of a clear Taft-Hartley separation of the prosecutorial and adjudication functions at the NLRB, it is easy to see the conflicts or, at a minimum, the apparent conflicts that could arise with this kind of administrative structure. While those pitfalls prompted the legislative changes in Taft-Hartley, the Wagner Act Boards were not oblivious to the need for separating their functions. The natural sensitivity to being prosecutor and judge was heightened by an unrelated 1938 Supreme Court decision in *Morgan v. United States*.⁵⁷ The Court held that an ex parte discussion between government prosecutors and the Secretary of Agriculture concerning a matter under the Packers and Stockyards Act presented "a vital defect" in the administrative proceedings.⁵⁸ This sensitivity is exemplified by the Board's description of its administrative

55. FIRST ANNUAL REPORT, *supra* note 3, at 14.

56. 5 NLRB ANN. REP. 9 (1941).

57. 304 U.S.1 (1938), *rev'd*, 313 U.S. 409 (1941).

58. *See id.* at 22.

process in the Third Annual Report, stating that "[t]he Board it-self decides whether complaints should be issued in only a very small proportion of the cases, and then only if the preliminary investigation indicates that the case involves a particularly difficult question of fact or law or an important new application of the statutory policy."⁵⁹ The Board also stated that:

In this work [adjudication] the Board is assisted, as the Supreme Court has expressly said administrative agencies may be, by a staff of lawyers under the supervision of an Assistant General Counsel. In deciding a particular case on the record there is no consultation between the Board or its assistants, on the one hand, and the attorney who tried the case or the trial examiner who heard it, on the other.⁶⁰

The extensive hearings by the Smith Committee in 1939 and 1940 covered virtually all aspects of Board operations, but were centered on a concern about separation of functions at the Board. The Committee referred to it as "the prosecutor, judge, jury, and executioner" problem

The Board made internal adjustments necessary to keep its prosecutorial and adjudicative functions separate even though there was a belief among some Board Members that there was only a limited need, if any, to separate functions. For example, in a 1940 letter to John R. Connors, a professor of Economics at the University of Wisconsin, Board Member William M. Leiserson commented that the call for a separation of the prosecutorial and adjudicative functions:

[m]akes plain the basis misconception regarding the work of the Board. As a matter of fact, we have neither prosecuting nor judicial powers. We are really a branch of the Congress for investigation and finding purposes similar to the Interstate Commerce Commission.... 'The Board' and its lawyers can't seem to grasp this idea. Essentially they really agree with the Smith Committee that we do have prosecuting and judicial functions. Therefore their defense before the Smith Committee was that the Board itself is very careful to keep in separate compartments the prosecuting and judicial functions and not to mix the two. I warned them that that kind of defense accepts the premise of the Smith Committee and they are bound to lose⁶¹

Leiserson's letter to Connors acknowledged that the evidence before the Smith Committee "showed many instances where what was considered

59. 3 NLRB ANN. REP. 5 (1939) [hereinafter THIRD ANNUAL REPORT].

60. AL

61. 18-24 *Investigation of the National Labor Relations Board: Hearings Before the Special Comm.*, 78th Cong., at 4977, Ex. # 1607 (1940).

prosecuting was mixed with the so-called judicial."⁶² Nonetheless whatever Leiserson's views were, the Board itself recognized the problem, and at least from approximately 1938 forward, it made an effort to separate its prosecutorial and adjudicative functions.⁶³

In his testimony before the House Committee in 1947 on the proposed amendments to the Wagner Act, Chairman Paul Herzog described the practices of the Board in separating its functions. In Herzog's view, the proposals requiring separation by a specific amendment to the NLRA were unnecessary. As he saw it, the Board's separation policies were consistent with the requirements of the Administrative Procedure Act of 1946. Herzog viewed the specific targeting of the Board as taking "as its premise that this Board is the single pariah, among all Government agencies, where a merger of functions is not to be trusted."⁶⁴ For Herzog, there was no difference between the Board, on the one hand, and the Interstate Commerce Commission, the Federal Trade Commission, and the Securities and Exchange Commission, on the other. And yet, as Herzog noted "no one has suggested the cleavage of these other agencies."⁶⁵

Former Board Member Henry A. Millis made the same point in his history of the Board's twelve years under the Wagner Act. Millis acknowledged that mistakes were made, but that the real concern behind the charge that the Board was "prosecutor, judge, jury, and executioner" was "a general attack upon the administrative agency system, not only on the NLRB."⁶⁶ For Millis, the Board had made the right adjustments over the years to protect its internal separation of functions "subject only to the possibility of human error."⁶⁷ He viewed the Wagner Act period as one in which the Board had "profited from its own study of its experience and from the criticisms in Congress and those of the Attorney-General's Committee" and that it was highly significant that when the Administrative Procedure Act was passed the Board was already meeting most of its requirements. "⁶⁸

62. *Id.*

63. See THIRD ANNUAL REPORT, *supra* note 59, at 5 (discussing how the Board investigates complaints and maintains a separation of functions in that process).

64. *Amendments to the National Labor Relations Act: Hearings on Bills to Amend and Repeal the National Labor Relations Act, and for Other Purposes Before the House Comm. on Educ. and Labor*, 80th Cong. 3190 (1947) (testimony of Chairman Paul Herzog).

65. See *id.*

66. HARRY A. MILLIS & EMILY CLARK BROWN, *From the: WAGNER ACT TO TAFT-HARTLEY* 66 (1950).

67. *Id.* at 67.

68. *Id.* at 239.

Herzog's and Millis's views to the contrary, there is no question that by 1947, Congress saw the Board as requiring changes in its statutory structure. From its earliest days, the Board had been criticized as being "pro-labor," and the ideological leanings of some of its staff had been carefully scrutinized by its critics. Those leanings gave impetus to the drive to make the Board a different kind of administrative agency and to separate, in clear and unmistakable terms, its prosecution and adjudication functions. For Herzog, this made the Board a "pariah" among administrative agencies, but it is, I believe, more accurate to consider it a natural consequence of the highly charged nature of the field of labor relations. Labor law is more than just "regulatory" as that term is used by other administrative agencies, and parties to NLRB proceedings often have very strong views about the effect of an adverse decision that transcends even the economic consequence of that decision. It should not, therefore, have come as a surprise to anyone that the Board would be selected as an experiment in administrative law.

b. Taft-Hartley-The Early Years 1947-1953

. Despite the Truman veto, Taft-Hartley became law in August 1947. Two new Board Members, Abe Murdock and J. Copeland Gray, joined John M. Huston, James J. Reynolds, Jr., and Chairman Paul M. Herzog to comprise the first Taft-Hartley Board. The first Taft-Hartley General Counsel was Robert N. Denham.

One of the first acts of business for the new Board was to structure it along the quasi-judicial lines mandated by the Taft-Hartley Act. Thus, on August 22, 1947, it announced a delegation of authority to the General Counsel which both paraphrased and somewhat expanded section 3(d).⁶⁹ Through this action, the General Counsel, in addition to his prosecutorial role, assumed compliance responsibilities and court litigation duties for injunctions, court enforcement, and subpoena enforcement.⁷⁰ The General Counsel was also given responsibility for representation cases, liaison with other government agencies, and handling the "non-communist" proceedings under sections 9(f), (g), and (h) of Taft-Hartley.⁷¹ Finally, the Board delegated to the General Counsel all general

69. It is really not accurate to characterize all aspects of "the Delegation" as an actual assignment of duties by the Board to the General Counsel because section 3(d) gave him the Act's investigatory and prosecutorial powers. Nonetheless, the Board in 1947 and Agency personnel even to this day use the term in this manner.

70. See NLRB ANN. REP. 9 (1948).

71. See *U* (stating that the Board reserved the right to decide appeals in General Counsel representation matters, while delegating all other authority to the General Counsel).

administrative duties, including budget and personnel .⁷² This "**delegation**" was clearly an acknowledgment by the Board that its duties were quasi-judicial in nature. As one of its long-time Regional Directors wrote at the time, the Board's action was a recognition of

[T]he Congressional intent that their functions henceforth must be confined to the judicial area of activities.... It was a complete cleavage of jurisdiction, and an absolute separation of the judicial from the prosecution side [P]erhaps eighty percent of the personnel and activities of the agency ... rests in the General Counsel exclusively. In this way, the criticism that the Board is a combination of prosecutor, jury, and judge, has been, extinguished⁷³

The delegation also solved some of the anomalies of Taft-Hartley. Thus, while the statute carried over the language of the Wagner Act that made the Board the appointing authority, Taft-Hartley provided that attorneys and field personnel other than legal assistants were under the General Counsel's general supervision. In 1953, Chairman Herzog described the situation as the Board saw it:

The statute expressly provides that the Board shall hire all employees. The statute provides in section 3(d) that there shall be a General Counsel. The hiring of employees by the Board appears in section 4(a). The statute contains some language which, frankly, created a dilemma. It provided that the Board should hire everybody, but where attorneys were concerned the General Counsel should exercise general supervision.

The Board, in an attempt to make section 3(d) work as well as possible, entered into a delegation agreement in 1947 with the former General Counsel, slightly amended in 1950 on 2 occasions, whereby we-delegated to the General Counsel the authority to hire attorneys and employees in the regional offices, as well as to supervise them. It made no sense, as we agreed with Mr. Denham, to have one outfit' hire people and fire them, and another outfit conduct the supervision.⁷⁴

This recognition of a need to dovetail the roles of the Board and of the General Counsel did not avert a conflict between those roles. The seeds of the conflict are apparent from the statutory structure, and one need

72. *See id.* at 11.

73. *See Elliott, supra* note 2 8 at 116.

74. *Labor-Management Relation : Hearings on N.R. 115 Before the House Comm. on Educ. and Labor*, 83rd Cong. 259 (1953) (statement of Paul M. Herzog, Chairman, NLRB); *see also* Klaus, *supra* note 5, at 378-79 (discussing the duties of the General Counsel and the Delegation Agreement).

only look at the language of the Act itself to see the potential for conflict between a Board and a General Counsel. Senator O'Mahoney of Wyoming

predicted such a conflict during the Taft-Hartley debates:

[B]y the terms of the bill itself it becomes clear that the first action under the bill will be the institution of a violent intraagency row between the newly established or expanded Labor Relations Board and the newly created independent general counsel of the Board. The bill ought to be called a bill to create a labor czar and promote discord.⁷⁵

Senator O'Mahoney was only partially right. The discord was not the first order of business for the Taft-Hartley Board and General Counsel, but it was not long in coming. In fact, during its first two years, the Board was periodically scrutinized by the Joint Committee on Labor Management Relations, which was created by section 401 of Taft-Hartley.⁷⁶ The Board generally received good marks for carrying out "the congressional intent of confining the Board to the functions of a court, with duties of administration and supervision over regional offices handled by the general counsel."⁷⁷

The disagreement between the Board and the General Counsel, when it came, centered on two issues: jurisdiction and the enforcement of Board cases in the courts. The jurisdiction controversy arose when the Board set its own jurisdictional standards, exercising its discretion not to extend its jurisdiction as fully as it could. The Board decided that it would not cover every labor dispute involved in interstate commerce, but only those affecting employers whose business affected commerce at levels decided by the Board.⁷⁸ The Board's decision to limit its authority was a matter of available resources. The General Counsel, however, believed he had a duty to prosecute cases even in situations which fell below the lines at which the Board would exercise its jurisdiction.⁷⁹ The court enforcement dispute occurred because the General Counsel believed that his office had the responsibility not to argue positions in the courts with which he personally disagreed.⁸⁰

75. 93 CONG. REC. 7523, 7524 (June 23, 1947), reprinted in 2 NLRB, LEGISLATIVE HISTORY of 1947, *supra* note 2, at 1629.

76. The Joint Committee was charged with studying and investigating "the entire field of labor-management relations" including the labor laws. *See* Labor-Management Relations Act, 1947, Pub. L. No. 80-101, § 402, 61 Stat. 136 (1947).

77. S. REP. No. 80-896, pt. 3, at 8 (1948).

78. *See* Klaus, *supra* note 5, at 380.

79. *See id.*

80. This is a fascinating and defining period in Board history but it, like so many other aspects of Board history, is beyond the scope of this paper. For more information,

The final resolution of these disputes established that the Board sets its jurisdictional standards, not the General Counsel. It was also clearly established that when General Counsels appear in court, they do so as the Board's lawyer and not in their section 3(d) "final authority" capacity.⁸¹ In short, the Board, not the General Counsel, makes national labor policy, and it is the Board's position, not the General Counsel's, that is presented to the courts. The important point about these disputes is that despite the enormous powers granted to the General Counsel under section 3(d), there are limits.

This conflict occasioned the Reorganization Plan Number 12, which would have repealed section 3(d) and given the General Counsel's duties back to the Board. The hearings before the Senate Committee on Expenditures in the Executive Departments on Senate Resolution 298, Reorganization Plan Number 12 of 1950 provide further information on this dispute. Although Chairman Herzog endorsed the plan, it was defeated and section 3(d) survived. In fact, the 1959 amendments, which created the position of Acting General Counsel, are the only changes in this section since 1947.

The conflict between General Counsel Denham and the Board resulted in the Board writing to President Truman seeking his assistance in the conflict. Almost immediately Denham was called to the White House and "resigned." He later characterized the incident by saying that he had been "fired."⁸² No doubt, his resignation was requested, and he complied.

After the Denham era, there were a few rough spots in the relationship between the Board and the second General Counsel.⁸³ But since that time, there has, with a few exceptions, been a general acceptance of the proper roles of the Board and the General Counsel. Thirteen years after Taft-Hartley and ten years after Denham's resignation, General Counsel Stuart Rothman commented that after the Denham era, "the administration of the act has, in general, proceeded smoothly."⁸⁴ Professor Davis commented twelve years later that:

see id. at 380-81.

81. *See id. at 381.*

82. Denham clearly did resign after being asked for his resignation. While section 3(d) does not explicitly set forth criteria and procedures governing this situation, the practice since 1947 has been that General Counsels serve four-year terms, and not at the pleasure of the President. Thus, they can only be removed for cause.

83. *See Klaus, supra note 5, at 382.*

84. Stuart Rothman, *The National Labor Relations Board and Administrative Law*, 29 GEO. WASH. L. REV. 301, 307 (1960-61).

[S]uccessors to the original General Counsel have worked more harmoniously with the Board. The experience seems to show that complete separation may work tolerably well with congenial personnel but can cause serious trouble when the personnel are uncongenial.⁸⁵

c. Later Developments

There have been two additional significant events in the history of section 3(d) since the early 1950s—the 1959 amendments and the Board's decision in 1983 to attempt to obtain control and supervision of the General Counsel personnel involved in the court enforcement process.

1. The 1959 Amendments

The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) amended section 3(d) to give the President the power to appoint an Acting General Counsel in the event of a vacancy in the position of General Counsel.⁸⁶ There is no doubt that this legislation was in response to the experience of 1957 when General Counsel Theophil C. Kammholz resigned and Kenneth McGuinness was appointed as Acting General Counsel. There was no statutory provision for such an appointment, and although McGuinness served only two months and his tenure was not challenged, it was generally recognized that there was a need to provide authority to the President to make such an appointment. Indeed, during the debates over the 1959 amendments, Senator Ervin characterized the Acting General Counsel provision as "the only non-controversial proposal for the amendment of the Taft-Hartley Act."⁸⁷

The President's authority to appoint an Acting General Counsel is somewhat limited. The 1959 amendments limit the President to appointing an "officer or employee who shall act as General Counsel."⁸⁸ This mandate requires that the Acting General Counsel be an employee of the Board. Significantly, the legislative history suggests that the President's authority is even more limited than that. Thus, Senator Ervin stated that the President could "designate an officer or employee of the

85. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT § 13.03, at 259 (3d ed. 1972).

86. See Labor-Management Reporting and Disclosure Act of 1959 § 703, 29 U.S.C. § 153(d) (1994).

87. 105 CONG. REC. 6249, 6286 (Apr. 20, 1959), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1048 (1959) [hereinafter NLRB, LEGISLATIVE HISTORY OF 1959].

88. 29 U.S.C. § 153(d).

general counsel's office to serve as an acting general counsel."⁸⁹ Although Senator Goldwater later stated that the provision authorized the designation of "an employee of the Board only,"⁹⁰ appointments to Acting General Counsel have assumed that it must be an officer or employee of the General Counsel. In fact, the appointment 'of Acting General Counsels by President Nixon and President Ford from the position of Board Solicitor apparently relied on the fact that the Solicitor is an employee of the General Counsel on "permanent detail" to the Board.⁹¹

2. *The Events of 1983*

On May 4, 1983, the Board voted to take over supervision of the attorneys involved in court enforcement and to delegate that supervision to its Solicitor. The proposal was never fully implemented, but it did occasion hearings before a House subcommittee. The then General Counsel William A. Lubbers objected to the "repeal of the delegation," arguing that while the Board had delegated the function of his office, it was a delegation mandated by the NLRA because of the prohibition on employment of attorneys by the Board. In short, if the Board took control of its enforcement program, it would be employing attorneys for purposes other than reading records and transcripts, and thus would be in violation of the restrictions of section 4. Lubbers argued that the language in section 4(a) providing that attorneys appointed by the Board "may, at the direction of the Board, appear for and represent the Board in any case in court"⁹² was part of the Wagner Act and was carried over from that statute and was clearly inconsistent with the other provisions of Taft-Hartley. He correctly noted that this provision makes sense only when it is understood that it was included in the Wagner Act in order to permit the Board to appear in court without having to go through the Department of Justice.⁹³ The Board never fully implemented its May 4 decision.

89. 105 CONG. REC. 6374, 6411 (Apr. 21, 1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF 1959, *supra* note 87, at 1071. This was also the view of the Senate Committee. See S. REP. NO. 86-187, at 33 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF 1959, *supra* note 87, at 429.

90. 105 CONG. REC. APP. A8509, A8523 (Oct. 2, 1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF 1959, *supra* note 87, at 1857.

91. In 1970, President Nixon appointed Board Solicitor Eugene Goslee and in 1975 President Ford appointed Solicitor John C. Miller.

92. 29 U.S.C. § 154(a).

93. See *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong. 19 (1935) (statement of Senator Robert F. Wagner), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2493 (1959) [hereinafter NLRB. LEGISLATIVE HISTORY OF 1935].

2 *The Office of General Counsel Today*

Since Taft-Hartley, General Counsels have described themselves as having three roles—the three hats of a General Counsel—prosecutor, Board lawyer, and the Board's chief administrative officer. I will describe each of them in reverse order after first describing the General Counsel's staff.

Immediately below the General Counsel is the Deputy General Counsel. This position was created in 1971 and functions as a full deputy—an alter ego—to the General Counsel. Reporting to the General Counsel and Deputy are four Division chiefs—three of which are attorney positions: the Associate General Counsels for Advice, Enforcement Litigation, and Operations Management. The fourth Division chief is the Director of the Division of Administration. Also reporting directly to the General Counsel is the Office of Appeals and the Office of Equal Employment Opportunity.

The Divisions of Advice, Enforcement Litigation, and Administration conform generally to the three General Counsel roles. Thus, while Advice handles section 10(j) matters for the General Counsel, its primary work is dealing with difficult and novel prosecutorial matters. Enforcement Litigation, which includes the Appellate Court, Supreme Court, Contempt, and Special litigation branches, conforms generally to the General Counsel's duties as the Board's lawyer in court. Administration handles the administrative functions of the Board: personnel, data processing, government contracts, budget, finance, and the acquisition and management of space. The Division of Operations Management supervises the field operations and coordinates the work of the other divisions as that work relates to the field offices. The Office of Appeals handles appeals from the decision of Regional Directors to dismiss unfair labor practice charges and the Equal Employment Opportunity (EEO) office handles EEO matters for the entire Board.

B. Chief Administrative Officer

The General Counsel supervises all the traditional administrative duties of a federal agency. He is, in a phrase, the NLRB's Chief Administrative Officer. In 1959, the Board commissioned a study of its casehandling and administrative practices. Out of that study came a recommendation that the General Counsel be made the NLRB's "single executive officer."⁹⁴ While that is in fact the situation, it is not mandated by

94. 105 CONG. REC. APP. A4365, A4366 (May 25, 1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY of 1959, *supra* note 87, at 1753.

law, as is the designation of the Chairman of the FLRA as that agency's CEO.⁹⁵ Nonetheless, that is how the NLRB functions and General Counsels and Boards have accepted it as the single best way to run the organization. They have accepted it perhaps because they have recognized the truth in the old adage that a camel is a horse designed by a committee. The five-member Board retains a policy-making role, but day-to-day management and supervision lies with the General Counsel.

C. The Board's Lawyer

In this capacity, the General Counsel's legal staff represents the Board in court. Whether in a District Court, Appellate Court, or the Supreme Court, the General Counsel functions as counsel to the Board and operates within guidelines and policies developed over the years by the Board.⁹⁶ To assure that the General Counsel's prosecutorial and Board lawyer roles remain distinct, General Counsels have traditionally maintained an internal separation of functions in their offices. Thus, Enforcement Litigation work is handled by a separate staff which reports to the General Counsel through its own hierarchy and not through senior officials in the prosecutorial chain of command.

The enforcement and review work represents the greatest volume of the General Counsel's Board lawyer duties. In fiscal year 1996, the General Counsel handled 125 enforcement petitions and 93 review matters.⁹⁷ Enforcement petitions are filed after unsuccessful efforts at securing compliance by the regions and by the settlement counsel in the Appellate Court Branch. Within a median time of thirty-three to thirty-five days after the matter is referred from the region, a petition for enforcement is filed in the court. In a typical year, the Branch's very successful settlement program will resolve forty percent of the Branch's contested case intake (enforcement and review cases) through settlement of the compliance issues.

One of the most difficult issues in appellate practice for the General Counsel is determining whether a case should go back to the Board before

95. *See supra* note 31 (discussing the duties and authorities of the FLRA Chairman and the NLRB Chairman).

96. In litigation involving the General Counsel's prosecutorial discretion, the General Counsel represents himself. Thus, a suit to compel issuance of a complaint where the charge was dismissed would be a situation in which the General Counsel's lawyers are not Board lawyers.

97. There is often an overlap between enforcement petitions and review matters. Review cases are appeals filed by a party aggrieved by a Board decision. If a review petition is filed before the Board files an enforcement petition, the General Counsel, pursuant to agency practice and policy, routinely files a cross-application for enforcement.

it goes to court. Usually the problem arises when the Board does not focus on a particular issue, fails to reconcile conflicting lines of authority, or does not resolve or respond to a concern expressed about a Board position by the circuit in which the petition will be filed.

As the Board's lawyer, the General Counsel has some discretion to supplement the Board's decision. At the same time, the General Counsel must avoid the danger of "post hoc" rationalizations, that is, the practice of counsel saying what the Board did not say. Courts have accused the General Counsel of this in the past.⁹⁸ As a result, the lawyers in the Appellate Court Branch are rightfully wary about saying more than the Board said in its decision. Given the volume of cases the Board has in the courts, the relatively few times that its lawyers have been criticized for post-hoc rationalization clearly reflects the sensitivity of General Counsel staff to this problem.

The Board has a long-standing practice of filing for enforcement in the circuit in which the unfair labor practice took place.⁹⁹ Where a party seeks review in another circuit, the Board varies its practice and files a cross-application for enforcement in the same circuit. Over the years, these venue provisions have resulted in difficult forum problems for the Board, specifically, whether the Board should routinely accept adverse decisions of particular circuits when dealing with unfair labor practice decisions arising in those circuits. In *Arvin Automotive v. United Automotive, Aerospace & Agricultural Implement Workers Union, Local 759*,¹⁰⁰ a divided Board debated this issue extensively. The majority took the traditional Board position that acquiescence with adverse circuit court law would be inconsistent with the venue provisions of the NLRA by cutting off the rights of adversely affected parties to seeking review in different circuits.

The Board's position on acquiescence *vel non* is clearly consistent with Supreme Court certiorari policies. The Court, absent an unusually serious case, usually awaits conflict in the circuits before granting certiorari.¹⁰¹ If the Board simply accepted court decisions, it would never

98. See, e.g., *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 9 (1974); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965); *NLRB v. Indianapolis Mack Sales & Serv., Inc.*, 802 F.2d 280, 285 (7th Cir.1986).

99. Section 10(e) of the Act provides that the Board can seek enforcement in the circuit in which the unfair labor practice took place, or the circuit in which the respondent resides or does business. See 29 U.S.C. § 160(e) (1994). Review petitions can be filed in either of these circuits or in the Court of Appeals for the District of Columbia. See *id.* § 160(f).

100. 285 N.L.R.B. 753 (1987).

101. See *id.* at 757-58.

be in a position to obtain the conflicting circuit decisions necessary to obtain Supreme Court review. The Board's experience with the Supreme Court in the "right of control"¹⁰² and "cup of coffee"¹⁰³ cases is testament to the wisdom of this practice of the Board and its lawyer, the General Counsel.¹⁰⁴ This is not to say that the Board is not attentive to contrary views of the circuits. It certainly is and has been. At the same time, however, it is charged with fashioning a national labor policy, not a circuit-by-circuit policy. Consequently, when, after careful consideration of a differing view of an issue by a circuit court, the Board decides to adhere to its original position, it does so consistent with Supreme Court certiorari practices, the venue provisions of the Act, and the need for national labor standards.

The Board is ultimately responsible for deciding these issues, but it is the General Counsel and his or her staff that provides the legal advice on the Board's choices in each case. As indicated, General Counsels have separated their staffs in order to separate their Board lawyer and chief prosecutor roles. A separation is also maintained in the Division of Advice, which has one branch for handling regular advice work (section 3(d) prosecutorial decisions), and another branch for injunction litigation work (Board lawyer section 10(j) cases).

Under section 10(j) the Board is authorized to seek interim relief *pendente lite* in unfair labor practice cases. Not all cases meet the standards for this kind of relief. The courts have described the section 10(j) tests as comprising two prongs: 1) a showing of reasonable cause to believe that there is a violation of the Act; and 2) a showing that injunctive relief would be just and proper.¹⁰⁵

102. See *NLRB v. Enterprise Assoc. of Steam, Local Union No. 638*, 429 U.S. 507 (1977).

103. See *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

104. For example, *Ford Motor Co.* and *Enterprise* and were two Supreme Court cases which the Board won after losing the issue in a number of circuits. See *Ford Motor Co.*, 441 U.S. at 494, 503 (holding that in-plant food services and prices are mandatory subjects of bargaining); *Enterprise*, 429 U.S. at 514, 521-24 (sustaining the Board's right of control test). This experience has also occurred in a number of federal circuits. For example, two circuits took different positions on attorneys' fees in Equal Access to Justice Act (EAJA) cases against the Board when the Board continued to litigate on issues that the circuit had previously decided adversely to the Board. Compare *Enerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983) (sustaining an award of attorney's fees in an EAJA action), with *Wyandotte Sav. Bank v. NLRB*, 682 F.2d 119, 120 (6th Cir. 1982) (denying an award of attorneys' fees in an EAJA action).

105. It is not the purpose of this paper to describe the Board and the judiciary's section 100) tests. For the interested reader, compare *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 456-57 (9th Cir. 1994) (holding that there is no reasonable cause prong), with *Pascarella v. Vibra Screw Inc.*, 904 F.2d 874, 877 (3d Cir. 1990) (applying the traditional two

The General Counsel handles the section 10(j) work under delegated authority from the Board. In processing these cases, the General Counsel first makes a section 3(d) decision whether or not to prosecute a given case and then, if the decision is to prosecute, decides whether or not to seek section 10(j) authority from the Board. When the decision is to seek authority, the General Counsel, as the Board's lawyer, communicates that request to the Board. The General Counsel alone does not make the initial decision to issue the complaint in every section 10(j) case. That decision is usually made by the regional director. But whether the decision is made by the regional director or the General Counsel, the communication with the Board concerning section 10(j) has been challenged as an improper ex parte communication between the prosecutor and the adjudicator. The Board's argument is that the General Counsel's role in these communications is that of the "Board's lawyer," to his client and not as "prosecutor." This issue has been fully litigated in the courts, which have consistently accepted that the statute, section 10(j) procedures, and the Board's practices do not involve an "improper combination of functions."¹⁰⁶

D. The General Counsel as the Board's Lawyer-An Assessment

The nature of the Board's work-labor relations law is controversial, and the Board policies under the NLRA will always draw criticism from adversely affected parties. Similarly, General Counsel prosecutorial and section 10(j) decisions can be, and often are, the target of complaints that General Counsels are too aggressive or not aggressive enough. With respect to the quality of the Board lawyer work and the commitment of staff doing that work, however, there is general praise from the labor-management community. Attorneys or respondents may not like the decision that the Board made either in an administrative decision or in a section 10(j) case, but they will seldom contend that the Board is not well represented by its lawyer's efforts to implement the Board's decision in the courts. There is similar acknowledgement of the quality of Contempt, Special Litigation, and Supreme Court representation of the Board by the General Counsel.

Board critics have argued that the Board does not perform as well as it claims in the courts. This is a statistical debate, not one that goes to whether or not the Board's lawyer is doing a good job in litigating Board

prong test for a 10(j) injunction).

106. See e.g., *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 887 (6th Cir. 1989); *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981); *Holland Rantos Co. v. NLRB*, 583 F.2d 100, 104 n.8 (3d Cir. 1978).

policy. Thus, whether or not the percentage of Board cases enforced in full by the courts is too high because it does not isolate every issue in every case is beside the point when the discussion is of the quality of the representation the Board receives from its lawyer.

E. The Independent Prosecutor

The roles of Chief Administrative Officer or Board Lawyer are hardly the stuff of a "Labor Czar." Neither is particularly powerful outside the administrative structure of the Board. Rather, it is the "independent prosecutor" role—the provisions of section 3(d) giving the General Counsel "final authority" over the issuance and prosecution of unfair labor practice complaints—that prompted the "Labor Czar" warning by Senator O'Mahoney and the veto by President Truman. This authority, together with the General Counsel's responsibility to provide "general supervision" of all attorneys employed by the Board—other than administrative law judges and legal assistants to Board members—and of the officers and employees in the regional offices, makes the General Counsel a most controversial position. The authority over investigations and prosecutions makes a General Counsel very much like other public prosecutors and rightfully gives the office the lion's share of the agency staff and budget. For our purposes, it raises two important questions. First, how have General Counsels handled these responsibilities? Second, has this section 3(d) experiment in administrative law been successful?

In my view, General Counsels have generally done very well and the experiment has been a resounding success. This assessment is somewhat subjective and based on the personal experiences of many years. Critics often point to specific examples of what they consider—and I might even agree—to be serious errors by General Counsels. But invariably these instances are few and far between given the thousands of cases that General Counsels and their representatives have handled in the fifty years that section 3(d) has been in force.

There is some objective evidence of the quality of the work of section 3(d) General Counsels. There are four areas which provide such evidence: (1) the record of mandamus litigation against the General Counsel; (2) the record of the Equal Access to Justice Act (EAJA) litigation against the NLRB; (3) the General Counsel's merit factor; and (4) the NLRB's settlement rate. No single one of these tells the entire story. Indeed two of these areas—mandamus litigation and the EAJA—provide only neutral, if not negative, evidence. But taken together, they

provide a reasonable record for evaluating section 3(d) and how General Counsels and their staffs have implemented it.

1. Mandamus Proceedings

Occasionally a party will sue the General Counsel to compel complaint issuance. Such a proceeding is not unlike a suit against a district attorney attempting to force a grand jury proceeding. Similar to such proceedings, the likelihood of success against the General Counsel is almost non-existent. Indeed, in the fifty years of Taft-Hartley, no plaintiff has ever successfully secured a court mandate; compelling the General Counsel to issue a complaint.¹⁰⁷ Because the decision to issue a complaint *vel non* is discretionary, the burden on a plaintiff is; very high, The burden is so high that the General Counsel's success rate in the defense of these cases provides scant evidence of a General Counsel's performance: Mandamus cases, however, have the potential for drawing judicial criticism of General: Counsels regardless of whether the General Counsel wins or loses. Such criticism may in turn, serve as the launching pad for legislative efforts to amend section 3(d). Beyond a few cases; however, neither situation has occurred. While this is a record of limited value in an assessment of section 3(d) and its implementation, it is a favorable record. Perhaps the best way to state it is that the mandamus litigation record does not reflect: unfavorably on the fifty year existence of section 3(d).

2 The. Equal Access to Justice Act

In 1980, Congress passed the Equal Access to Justice Act (EAJA) to provide respondents in NLRB cases with attorneys fees for litigation if they successfully establish that the government was not "substantially justified" in its position in that litigation.¹⁰⁸ The EAJA is limited in its coverage. It is applicable only to individuals whose net worth is under two million dollars and to corporations or organizations; including labor organizations, that do not exceed a \$7,000,000 net worth and do not have more than 500 employees.¹⁰⁹ The Board does not have records indicating how many potential EAJA proceedings could have arisen from NLRB

107. Even when a court found that the General Counsel had dismissed a charge incorrectly because he had erred as to Section 10(b) time limits, the court did not order complaint issuance, but instead ordered the General Counsel to proceed with the investigation. *See* Southern California Dist. Council of Laborers v. Ordman, 318 F. Supp. 633, 636 (C.D. Cal. 1970).

108. *See* STANLEY R. STRAUSS & JOHN E. HIGGINS, JR., PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 169-77 (5th ed. 1996) (discussing the eligibility standard for EAJA).

109. *See id.* at 170.

proceedings. Since 1982, however, there have been 345 EAJA applications to the Board and the courts, out of which 56 or approximately thirteen percent have resulted in awards.¹¹⁰ During the same period, the comparable figures for the Department of Labor were 74 successful claimants out of 177 applications, or forty-one percent.¹¹¹

Two policies—the General Counsel's credibility policy and investigative cooperation as a "special circumstance"—play a significant role in EAJA litigation. The General Counsel has a standard for determining when to issue complaints in cases in which the alleged unfair labor practice *vel non* depends on credibility, that is, where one party alleges that something happened and the other party argues that it did not. Because the unfair labor practice issue in such a case depends on who is credited, General Counsels have directed Regional Offices to exhaust investigative efforts that may provide objective evidence upon which a credibility assessment can be made. Where that evidence is not available, the General Counsel's policy is to issue a complaint and leave the credibility determination to the trier of fact. The Board and EAJA reviewing courts have generally accepted that policy as a reasonable exercise of prosecutorial discretion.¹¹² Consequently, when the government loses a case because of an adverse credibility determination, the prosecution will usually be found to be "substantially justified."

Similarly, General Counsels have successfully argued that failure to cooperate in an investigation is a "special circumstance [which would] make an [EAJA] award unjust."¹¹³ Simply stated, a party cannot refuse to tell the investigator its side of the story and then claim EAJA fees for

110. It is important to note that while the Board does not maintain records on the net worth of parties to the cases, the number of proceedings in which the General Counsel finds merit exceeds 10,000 every year. It would thus not be unreasonable to estimate the potential EAJA proceedings as being in the thousands. See *infra* Part IV.E.3 (discussing the Merit Factor).

111. See HEALTH, EDUCATION, AND HUMAN SERV. DIV., GENERAL ACCOUNTING OFFICE, GAO NO. B-278335, GAO/HEHS-98-58R, EQUAL ACCESS TO JUSTICE ACT: ITS USE IN SELECTED AGENCIES 5 (1998). The report also included a review of the Equal Employment Opportunity Commission, but since that agency does not have administrative authority to award EAJA fees, its experience is irrelevant for a comparison with the Board.

112. Compare *Wolf Street Supermarkets, Inc.*, 266 N.L.R.B. 665, 666-67 (1983) (denying a claim for attorneys fees even though the evidence supporting the charge was deemed incredible), and *Charter Management, Inc.*, 271 N.L.R.B. 169, 169-70 (1984) (denying a claim for attorneys fees even though the evidence supporting the charge was deemed incredible), with *Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638, 643 (7th Cir. 1987) (awarding attorneys fees on the basis that the Board's conclusion was not substantially justified).

113. See *Lion Uniform*, 285 N.L.R.B. 249, 253 & n.32 (1987).

litigation when its story is later accepted in litigation and the case dismissed. Again, while the experience with EAJA applications does not provide a definitive basis for assessing the success or failure of section 3(d) and its implementation, the record certainly reflects favorably on the exercise of prosecutorial discretion by General Counsels.

3. *The Merit Factor*

A third area of this assessment composite of section 3(d) is the merit factor; that is, the percentage of unfair labor practice cases which, after investigation, the General Counsel deems worthy of prosecution. Year in and year out, in tight budget years or in bad, with Republican as well as Democratic General Counsels, the merit factor hovers at around thirty-five percent. In other words about thirty-five percent of the cases present sufficient evidence to warrant litigation while sixty-five percent do not. The consistency of this statistic reflects the evenhandedness with which General Counsels have applied section 3(d). No General Counsel has ever set a merit factor goal of thirty-five percent. Sometimes the factor for a given year may be thirty-three or thirty-six percent. But most importantly, it hovers at about the same place regardless of the identity of the General Counsel, clearly indicating a regularity in prosecutorial policy among General Counsels.¹¹⁴

What about the sixty-five percent of the 40,000 or so cases filed every year that are dismissed, that is, those that are found unworthy of prosecution? In a way, indeed, in a very effective way, such section 3(d) decisions of the General Counsel or his agents resolves those labor disputes too. Parties are told very early in the dispute by an independent public prosecutor that their case lacks merit. They may not like the result, but they have a decision without the possibility of endless appeals.

114. There is a connection between this consistent merit factor and the General Counsel's "time target" system. Prior to 1960 and the development of the time target system as we know it today, the Board was notorious for its casehandling delays. Senator John F. Kennedy, in a 1959 speech before the Allegheny Bar Association in Pittsburgh, likened an NLRB case to Charles Dickens's case, *Jarndyce v. Jarndyce*, contained in *Bleak House*. See Joseph E. DeSio & John E. Higgins, Jr., *The Management and Control of Case Handling, Office of the General Counsel, NLRB*, 2 BUREAUCRAT 385 (1974). Although General Counsels had time targets for case processing before this speech, Kennedy's accusation prompted General Counsel Stuart Rothman to institute a system of measurement of case-handling performance that continues, with some recent variations, to this day. See *id.* at 385, 390. This post-1960 emphasis on expedition resulted in an increase in the merit factor from a fairly consistent 20% to the 35% discussed above. In other words, the sooner the investigative staff completed an investigation, the more likely the case would be deemed worthy of prosecution.

To assure uniformity and quality in the decisions of Regional Offices not to prosecute, General Counsels maintain an Office of Appeals. This office considers appeals from charging parties who are dissatisfied with the dismissal decisions of Regional Directors. It is comprised of dedicated professionals who view their roles not as defenders of Regional Directors, but as protectors of the system. They handle approximately 3,000 appeals a year, with a fairly consistent reversal rate of three to five percent annually. Such a consistency also reflects an evenhandedness in General Counsel decisions.

4. Settlement Policy and Practice

The fourth area in the composite is the settlement rate—the percentage of merit cases that are settled without the necessity of litigation. For most of the past twenty years, that figure has exceeded ninety percent, which reflects at least in part, a willingness of parties to accept the General Counsel's decision in unfair labor practice cases. The settlement rate is clearly affected by the costs of litigation, but this is only part of the reason for the success of the General Counsel's settlement program. No organization could maintain such a high settlement rate without a general acknowledgment by the bar that prosecutorial decisions are generally made in a reasonable fashion with due regard for the rights of the parties and consistency with Board law.

F. The Division of Operations-Management

The Division of Operations-Management is composed of the Regional Offices and a Headquarters Staff. Well over ninety percent of the cases filed with the Agency are resolved in the Regional Offices without any Washington involvement. The fine record of these Regional Offices during the Board's sixty-three-year history is the grist for another paper. What is important here is that General Counsels have maintained an effective system for assuring consistency among the Board's thirty-three Regional Offices. The key to that system continues to be the Division's Headquarters' Staff. The Staff monitors and supervises the General Counsel's Case Management Program (time targets), the General Counsel's Quality Control Program, and the General Counsel's personnel and management policies.

The Case Management Program is described elsewhere,¹¹⁵ and it would only serve to unduly lengthen this paper to describe it here. Suffice it to say that it is a system designed to measure and manage agency case-

115. See DeSio & Higgins, *supra* note 114, at 387-94.

handling that has been labeled an "Exemplary Practice in Federal Productivity."¹¹⁶ It has resulted in more than ninety percent of the Agency's unfair labor practices being resolved in the Regional Offices in a median time of under fifty days.¹¹⁷

In conjunction with this "time target" program, the Division also conducts a quality control program. Under this program, a statistically sound number of cases handled by the Regional Offices, which would not otherwise have been reviewed by Headquarters' Staff, are selected, reviewed, evaluated, and then discussed with the Regional Office involved. A recent audit of this system by the Inspector General's staff, with the author serving as the Board's Acting Inspector General, characterized the system as one from which General Counsels can take reasonable assurance as to the quality of the work being performed in the Regional Offices.¹¹⁸

V. CONCLUSION

Fifty years have passed since Taft-Hartley. During that period, section 3(d) General Counsels and their staffs have prosecuted thousands of cases and handled hundreds of thousands more. The early years evidenced some difficulties in the relationship with the Board, but the past thirty-five to forty years have proven the wisdom of section 3(d). The section 3(d) authority delegated to General Counsels has generally been used wisely and effectively and it is to the career staff that most of the credit is due. Their efforts over 50 years, together with Section 3(d) "final authority," have served the Board, the parties, and the nation very well.

If as they say, the past is prologue, we can expect some efforts now and then to amend 3(d) to make the General Counsel's decisions not to prosecute appealable. *UFCW* put the issue to rest as a statutory matter, but the issue can always be raised anew. If it is, I hope that such an effort is unsuccessful. As recently as last summer, federal district court Judge Stanley Sporkin commented on the need to find some way to reduce the

116. See WORKFORCE EFFECTIVENESS & DEV. GROUP, U.S. OFFICE OF PERSONNEL, MANAGEMENT, WPR-10, CASE MANAGEMENT IN NLRB'S OFFICE OF THE GENERAL COUNSEL (1980).

117. See *id.* at 4. In recent years, budget and staffing constraints have caused slippage in the traditional time records of the Board. However, the system continues to provide the information necessary to manage approximately 34,000 cases filed every year in the most effective and efficient means possible under the circumstances.

118. Review of the Quality Control Program Over Casehandling, Audit Report of the Office of the Inspector General, NLRB (OIG-AMR-16).

burden of personnel litigation in the courts.¹¹⁹ He suggested some gate-keeping mechanism for making merit calls in employment matters, including discrimination cases. Otherwise, Judge Sporkin argued federal district court judges run the risk of being employment czars. Sporkin suggested section 3(d) be used as a model for such a mechanism.¹²⁰

Judge Sporkin's remarks bring to mind the suggestion some years ago of former NLRB Chairman Edward Miller that there be a new statutory provision-section 8(a)(6)-to cover wrongful discharge cases. Mr. Miller's proposal also involved replacing the NLRB with labor courts but retaining section 3(d).

What would happen to the floodgate of employment litigation if Congress were to choose the General Counsel or some other "labor or employment czar" as an independent prosecutor? It is premature to suggest that the merit factor would be the same for these cases as it has been for early cases. But it would certainly be an effective and responsible device for reducing litigation while at the same time giving parties an opportunity to have their cases considered by an independent public prosecutor.

119. See Gerald D. Skoning, *Federal Judiciary Reluctant Personnel Czar*, CHI. TRIB., July 3, 1997, § 1, at 23.

120. See *id.*