

# Trump's National Anti-Labor Relations Board

JUSTIN MILLER JULY 18, 2017

The president's NLRB nominees portend a bleak future for American workers.



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**I**n his first seven months in office, President Trump has made quick work undoing a host of Obama-era labor regulations. Now that he finally got around to making two nominations to the National Labor Relations Board, he's beginning the pernicious, though slow-moving, assault on worker and union rights that typically plays out when the board has a Republican majority.

It's at the NLRB, the independent agency charged with enforcing and interpreting the nation's labor laws, where Trump will be able to most forcefully reverse President Obama's

workers' rights legacy—a highly vulnerable legacy given that it was confined to leveraging the power of executive-branch departments and agencies.

Trump's NLRB nominees are longtime Republican lawyer Marvin Kaplan and management-side labor lawyer William Emanuel. If they're confirmed, Republicans would have a 3-to-2 majority. The Senate Health, Education, Labor, and Pensions committee is expected to vote Wednesday to confirm both appointees, at which point they will go before the full Senate.

It took years for Obama to overcome Republican intransigence and have the Senate approve all five of his appointees. But once Obama's NLRB was finally up and running, it delivered a series of bold decisions that moved labor law back in favor of workers and their unions—as the original National Labor Relations Act was intended to do—after George W. Bush's board had, for eight years, tilted the scales in favor of management.

With several landmark decisions, Obama's board altered the labor law landscape in ways that made it easier for employees to organize and increased corporate responsibility for workers.

In 2011, the board ruled in *Specialty Healthcare* that workers were able to form smaller collective-bargaining units, which have come to be known as “micro-units.” It also enacted a new rule that speeds up the union election process in hopes of mitigating the influence of management's union-busting tactics. Both are vulnerable under a Republican NLRB.

The NLRB's most impactful ruling came in 2015's *Browning Ferris* decision, in which it ruled that a company was responsible for the labor violations of a contractor or franchise operator. The case established a major precedent that labor advocates believed would be used to address the fissuring of work that many companies relied on to limit their exposure to traditional employer responsibilities. Based on this new standard, the Service Employees International Union is currently seeking to establish that the McDonald's corporation is a joint employer of the workers at its franchise locations, which could make it partially responsible, for instance, for negotiating collective-bargaining agreements at individual stores. The SEIU case is currently before an NLRB administrative judge. Depending on the judge's ruling, the case could go before the full board.

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*Browning Ferris's* joint-employer standard and restore the legal barriers provided to companies that utilize contracting and franchising. Meanwhile, corporate lobbying outfits and congressional Republicans are gearing up to push legislation that would simply undo the standard.

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Another landmark case came when the NLRB ruled in 2016 that graduate students at private universities are covered under the National Labor Relations Act and are allowed to form unions. The ruling has led grad students at several prestigious private universities to launch organizing campaigns and hold union elections. Many of those universities' presidents have responded with delaying or union-busting campaigns in the hope that a Trump NLRB will reverse the decision.

The board also ruled in *D.R. Horton* that mandatory arbitration clauses, which forbid employees from joining class-action lawsuits over labor violations, are illegal. The Supreme Court is expected to take up the matter, but if it defers to federal agencies, Trump's NLRB could reverse the decision.

Both Emanuel and Kaplan have drawn the wrath of labor unions and progressive advocacy organizations, which contend that they will come down in favor of corporations instead of the working people that Trump purported to speak for during his presidential campaign. "In today's economy, where inequality is on the rise and unions are on the decline, workers need to be able to feel comfortable when they come together to better working conditions," says Catherine Ruckelshaus, general counsel for the National Employment Law Project. "The board is supposed to support those actions."

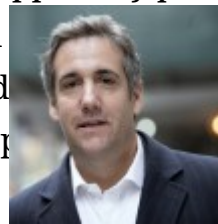
William Emanuel is a lawyer with a long track record of representing corporate giants in labor disputes. As Michael Arria **reported** last week for *In These Times*, Emanuel disclosed 49 former clients, pledging to recuse himself from cases involving those companies, which include Uber, Nissan, and JPMorgan Chase. He also authored an amicus brief defending the class-action waivers in employment contracts that the NLRB outlawed.

Trump's other nominee, Marvin Kaplan, is currently counsel to the Occupational Safety and Health Review Commission. Before that, he was the Republican counsel on the House Committee on Education and the Workforce where, as *The New York Times* **reports**, he helped craft legislation aimed at rolling back specific NLRB actions.

William Gould, who served as the NLRB chairman during the Clinton administration, recently wrote **a scathing op-ed** in the *San Francisco Chronicle* opposing Kaplan's nomination.

Since the 1980s, a number of NLRB nominees by Republicans as well as Democrats have come from Capitol Hill staffs. This has promoted a trend toward the appointment of Washington insiders trading places between political staffs and Washington law firms—the insider elite, which supposedly prompted President Trump's call to “drain the swamp.” Kaplan would plus. His deep involvement in initiatives designed involved him directly in an unprecedented attempt politics.

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Though Trump has already undone many of Obama's pro-labor rules and regulations, it'll take longer for a Republican NLRB to reverse the precedents established by Obama's board because relevant cases have to percolate up to the board, which can take years.

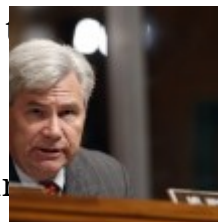
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He learned by listening and empathizing.

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**Trump's Tax Cuts Incentivized Corporate Offshoring. These Dems Want to Reverse It**

The impending Trump NLRB highlights just how precarious transforming labor law in favor of workers. While piecemeal advances under Democratic administrations' labor boards are helpful, they are, of course, nowhere near enough to combat the systemic undermining of federal labor law and collective worker power by corporations and allies in the Republican Party—especially when GOP administrations make the NLRB's pendulum swing back in favor of management.

Democrats have waffled on how, or if, they will repeal the new tax laws. This is a step