

**THE ENDANGERED MIDDLE CLASS: IS THE  
AMERICAN DREAM SLIPPING OUT OF REACH  
FOR AMERICAN FAMILIES?**

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**HEARING**  
OF THE  
**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**  
**UNITED STATES SENATE**  
**ONE HUNDRED TWELFTH CONGRESS**  
FIRST SESSION  
ON  
EXAMINING THE MIDDLE CLASS, FOCUSING ON IF THE AMERICAN  
DREAM IS SLIPPING OUT OF REACH FOR AMERICAN FAMILIES

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MAY 12, 2011

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## **THE ENDANGERED MIDDLE CLASS: IS THE AMERICAN DREAM SLIPPING OUT OF REACH FOR AMERICAN FAMILIES?**

**THURSDAY, MAY 12, 2011**

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:15 a.m. in Room 430, Dirksen Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Enzi, Merkley, Franken, Whitehouse, Blumenthal, Alexander, Isakson, Roberts, and Kirk.

### **OPENING STATEMENT OF SENATOR HARKIN**

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

This is another in a series of hearings that we are holding on, "The Endangered Middle Class: Is the American Dream Slipping Out of Reach for American Families?"

As I have traveled through Iowa and across the country I have heard more and more from middle class families who feel their dream, American dream is slipping away. I just received a letter from one of my constituents who wrote,

"My own disposable income has disappeared and I am not alone. Where I once joined friends occasionally for a lunch out, that no longer happens. I don't buy new clothes. I don't travel. My friends and neighbors, formerly middle class all, are in the same boat. We are the new poor."

Unfortunately she said she is not, by any means alone. Take, for instance, the town of Webster City, IA. Webster City, IA, small town, middle class families, work hard, play by the rules, sacrifice for their children. It is a town where a decent, middle class way of life is threatened. Recently in Webster City the Electrolux plant that had been the town's economic engine for 80 years closed its doors. Production moved to Juarez, Mexico. In the final round of layoffs in March, 500 Iowans lost their middle class jobs. This most recent factory closing comes on the heels of 222 plant closings in my State last year, destroying nearly 12,000 good paying jobs.

The American dream used to mean something, that if you put in a hard days work you could expect good American wages, decent benefits and a better life for your kids. Today we are in danger of losing that dream and our middle class. For the first time in history the majority of Americans believe their kids will have fewer

opportunities than they had. Now Americans don't expect to be rich or privileged, but they do expect to be treated fairly. And they deserve to have the opportunity to build a better life for their children, again, these are in jeopardy.

It wasn't always like this. In the decades after World War II a rising tide lifted all boats. Worker productivity and family income grew together at about 2 percent annually. This chart shows that in those years, down from about 1947 up to about 1970, that the two went together at about 2 percent a year.

From about 1947 to 1977 the blue bars show that the share of the national wealth was fairly distributed, about 2.5 percent across the board for every quintile. But as you can see now, from 1977 until now, the red bars show what has happened, that more of the wealth has gone only to the top quintile and down at the bottom they haven't even grown at all, they have actually lost.

These are the two pictures. The blue bars are what happened during the Great Prosperity, as Secretary Reich has pointed out, as he has stated, but during the last 30 years the share of wealth has only basically gone to the top quintile.

As productivity has continued to climb and Americans have worked harder than ever, middle class incomes have stagnated, wages and salaries fell to the lowest share of total national income since 1929, in the last 10 years. Corporate profits have skyrocketed, income and wealth at the very top has surged, but Americans haven't shared in this prosperity.

Families in Webster City and across the country are under enormous strain because of the changes in our economy. Their paychecks aren't keeping pace with the soaring costs of everyday expenses, like education and housing, gas. Jobs are insecure. Savings and pensions have disappeared. People are profoundly worried about the future.

Now when I talk to business owners today one of the things I hear is that they aren't hiring new workers because they don't know whether the workers can buy the things they make. These are smart business people, they will readily expand and invest if they sense demand, but demand is weak. Unless middle class families have the resources available to purchase gas and pay rent and buy groceries and clothes and new cars and things like that, our economy is going to suffer and be driven by boom and bust cycles on Wall Street.

Let me state what I think is a simple truth. We can't have a strong economy unless we have a strong middle class to make and buy the every day items a family needs to live a decent life. Now it is true that our economy has undergone fundamental changes in recent years but I don't think these changes should be viewed as the inevitable result of forces beyond our control, things like new technology and globalization. While these forces have presented challenges we have also made deliberate policy choices that have hurt the middle class. Ordinary Americans know this is true. Again, one of my constituents just put this in a letter to me, "Why is Washington determined to make the rich richer and to turn its back on the middle class?"

For years our economy has operated on the flawed premise that if we just let powerful corporations basically do whatever they want

to reap huge profits, then everyone will prosper. Many people here in Washington bought into this vision that if corporate profits surged and the rich got richer they would magically create jobs and prosperity would trickle down to everyone else. Instead what we got was the Great Recession, falling real incomes and a real unemployment rate close to 16 percent.

The only problem was it didn't work. Instead a few powerful people gamed the system and got very, very rich at the expense of the middle class. And they used their influence to change the rules so they could bust unions, refuse to pay their fair share of taxes and collect big bailouts while leaving ordinary working people to suffer the consequences of an unstable and dangerous economy.

I don't believe we can keep moving down this same failed path. If we do, frankly we may not have a middle class two decades from now. We have to look closely at what went wrong and how we can make smarter policy choices to restore the fundamental promise of the American dream that if you work hard and play by the rules you should be able to build a better life for you and your family.

One of those smarter policy choices is to restore the voice of working Americans by strengthening workers' rights and defending the agency that protects those rights, the National Labor Relations Board. Recently the dedicated career employees who impartially administer the law through this important agency have come under a vicious and unfair political attack for carrying out their duties under the law.

Also, something is seriously out of whack when a Midwestern governor vilifies teachers and other public employees as, "the privileged elite." This is an unfortunate distraction. These kinds of things won't help the people of Webster City or any middle class community suffering across the country.

The fact is, unions have played a critical role in building the middle class in this country by standing up for good American wages, decent benefits and a 40-hour work week. This again is a track. If you look at the red line, it is the middle class share of national income. You can see it going down. The green line is the percent of workers covered by collective bargaining agreements, going down. And union membership the blue line. They all track each other. By giving workers the opportunity to negotiate their pay and benefits, the same opportunity that corporate executives already have, unions will help restore and rebuild the middle class.

But restoring the right to form unions is only one of many steps to put our country back on track. I look forward to hearing more from our witnesses today about the causes of the crisis facing the middle class and how we can move forward to build better opportunities in the future. One thing I am certain of, there can be no sustainable economic recovery without the recovery of the middle class and I hope today's hearing can help start us down that path at really looking, realistically, at what we need to do to rebuild the middle class in America. I look forward to a lively discussion.

Senator Enzi.

#### STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman and good morning. I am pleased that we are holding this hearing on the middle class and

the American dream. Central to achieving the American dream is one element, a job. As I travel around Wyoming and the rest of the country, I hear one refrain more than any other. Where are the jobs?

As this chart shows, unemployment has remained around 9 percent since May 2009 reaching a high of 10<sup>1</sup>/<sub>10</sub>th percent in October 2009. The last 2 months have been the first time in almost 2 years that it has decreased below 9 percent and job creation numbers were finally where they should be for an actual recovery. Let me just say, I was very pleased to see those numbers. I understand they have increased a little bit now, though.

But the so-called true unemployment rate or U.S. rate has reached almost 18 percent. This figure includes underemployed individuals who are working part-time but would like to work full-time and those who have left the labor force entirely because they simply have given up on the search for employment. You can't blame the American people for being frustrated. Although we have heard a lot of talk about job creation, often this Administration's actions have been counterproductive and come at a steep cost to our growing debt and deficit.

One of the first actions was the enactment of the stimulus bill in February 2009, a bill I did not support. To date, this bill cost more than a trillion dollars, when you add in interest, and was primarily a spending bill funding pet projects but creating few jobs. Two years later some of that money still hasn't been distributed, even though it was supposed to be timely, targeted and shovel ready.

The American people were promised that the passage of the stimulus bill would keep unemployment below 8 percent. As you can see from this chart, that was not the case. The red line was where it actually went, the blue line is where it was projected to go with the stimulus. However, the bill did considerably add to the national debt and is one of the reasons it jumped from 10.6 trillion in January 2009 to more than 14.3 trillion today. That is a 35 percent increase.

For over a year the Administration and the Democrat majority in Congress focused, like a laser, on the healthcare law that will drive up costs and paralyze employers who are uncertain of their future obligations. They enacted a financial services reform bill that failed to ease the flow of credit to the small businesses that are the Nation's economic engine. The Administration has adopted an energy policy that will result in increased prices for Americans by limiting the use of the Nation's cheapest, most abundant energy source, coal. The President's decision to allow the EPA to regulate greenhouse gasses under the Clean Air Act will kill jobs throughout the country. Additional job-crushing regulations are in the works and the continued threat of tax increases will continue to paralyze our job creators.

Meanwhile, the Workforce Investment Act, WIA, which would help Americans retrain for good jobs in this modern economy, continues to languish. The findings of the National Deficit Commission are being ignored and a major credit rating company lowered its outlook for the U.S.A. from stable to negative. I was in China re-



cently and the China bondholders, the government, brought up the debt and deficit everywhere we went.

Instead of taking actions to create a positive job growth environment, this Administration has taken some steps that actually discourage and prevent job growth. One of the driving forces behind these actions is the ideology that every employee should be a union member, paying union dues. It has become increasingly clear that when some members of the Administration say they want good jobs for everyone, they mean only union jobs.

Let me be clear, I fully support the National Labor Relations Act and the right of employees to collectively bargain when they freely choose to do so. What I do not support is government stepping in to limit employees' ability to exercise their right not to form or join a union. We have seen rulemaking from the National Mediation Board, changing the way election results are counted to favor unions and actions by both the Department of Labor and the National Labor Relations Board, that limit the information provided to employees to exclude their right to refrain from union political activities.

The President issued Executive orders aimed at boosting unionization among Federal contractors and most importantly, we have seen dozens of decisions from the National Labor Relations Board limiting the ability of employers to make their case to employees and restricting the ability of workers to decertify their union. These government-sponsored efforts to increase union density have done nothing to create jobs, and in some cases they have been counter-productive to that goal.

For example, on April 20, 2011 the National Labor Relations Board acting general counsel filed a complaint against the Boeing Company alleging the company committed an unfair labor practice by opening a new production line for the 787 Dreamliner aircraft at a nonunion plant in South Carolina. The complaint argues that Boeing is opening the South Carolina production line in retaliation for past strikes in Washington State by the machinists union and seeks to have the second production line moved out of South Carolina to Washington State.

The outrage over this agency's attempt to intervene in a U.S. company's legitimate business decision and take jobs away from South Carolina has been very widespread. I am pleased that we were able to have a representative from Boeing here today, J. Michael Luttig. Judge Luttig is the general counsel and executive vice president of Boeing and prior to that served as a Federal judge in the Fourth Circuit Court of Appeals for 15 years. We thank you for appearing here today.

The Boeing story illustrates this Administration's focus on favoring unions at the cost of creating the kind of middle class jobs we all want. In early 2009, Boeing announced that it was going to build a second production line for 787 Dreamliners in order to meet increased demand. The existing collective bargaining agreement between Boeing and the Union did not require union consent if the company sought to open new worksites outside of Washington. Still, Boeing voluntarily entered into discussions with the machinists union about bringing the second production line to Washington State. No agreement was reached and Boeing announced that it

would locate its second production line at a facility it had recently purchased in South Carolina. The employees at this facility had been represented by the International Machinists Union, but in September 2009 they exercised their legal right to decertify their union by a vote of 199 to 68 in a secret ballot election.

Boeing moved forward with plans to expand their manufacturing in the United States in the middle of a deep recession. They hired over 1,000 new employees in South Carolina and invested millions of dollars in the plant facility there. At the same time, production and hiring were also increasing in Puget Sound. Boeing created over 2,000 new union jobs in the Puget Sound area since 2009, again, all during the height of a recession. The jobs they created are among the highest paid aerospace workers in the United States.

Mr. Chairman, this company deserves our congratulations and respect not demonization.

But, 17 months after Boeing announced the second production line and just 3 months before production was set to begin, the National Labor Relations Board acting general counsel issued this complaint and an accompanying press release trumpeting that action. Employers across the country have been greatly disturbed by this complaint and the possibility that a government bureaucrat serving in an acting capacity could direct U.S. companies about where to locate facilities, what work to do there and who to hire. It sounds like China, not the United States.

This is not the way to encourage new job creation in the United States or even keep the jobs we currently have. This complaint has also raised considerable concern that the National Labor Relations Board is now targeting the 22 Right-to-Work States which have been an engine of new job creation and attracted many foreign companies to manufacture in the United States. Many States that did not have a wide manufacturing base historically have found a path to significant new job creation by offering high-skilled job training for its workforce and attracting foreign employers.

I will join my colleagues in fighting any attempts to deter investment in Right-to-Work States in order to prop up union bosses.

Freedom is the quintessential American value. Freedom to build a new plant, to create a new job, to join a union, to reject a union. All of these choices are threatened by the National Labor Relations Board complaint. While I hope the complaint will ultimately not be successful as it works through the process, it will create a chilling effect nationwide.

With last month's positive job numbers, I hope we are truly at the brink of an actual recovery that will create more jobs and get this country back on track. Job creators are trying to do their part, but as the National Labor Relations Board complaint against Boeing shows, this Administration has yet to get the message. We have heard speeches and seen opinion pieces, it is time to see action and real changes in policy. New job creation is the key to preserving this country, to preserving the middle class, and to preserving the American dream for future generations.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Enzi.

Now we will proceed to our witnesses. We will just go from my left over to the right in sequence. We will ask you each to make a statement of about 7 minutes. I have put the clock at 7 minutes. If you could sum up your testimony in that period of time, then we can get into a more open discussion.

First it is my distinct honor to introduce Robert Reich our former 22d Secretary of Labor under President Clinton. He is currently the chancellor's professor of public policy at the Goldman School of Public Policy at the University of California. In addition to his time in the Clinton administration he has served in two other presidential administrations. Mr. Reich was the 2003 recipient of the Vaclav Havel Vision Foundation prize for his work on economic and social thought. He is the author of 12 books, I haven't read them all, a couple of them. But his most recent book called "Aftershock: The Next Economy in America's Future," I recommend to all. As the *New York Times* book review said, "Important and well executed. Reich is fluent and fearless," and there is no doubt about that.

A long time friend and someone who is a keen observer and interpreter of the economy in this country, our former Secretary of Labor, Secretary Reich, welcome and please proceed.

By the way, all of your statements will be made a part of the record in their entirety and we are just asking you to kind of sum them up.

Secretary Reich.

**STATEMENT OF ROBERT B. REICH, CHANCELLOR'S PROFESSOR OF PUBLIC POLICY, GOLDMAN SCHOOL OF PUBLIC POLICY, UNIVERSITY OF CALIFORNIA, BERKELEY, CA**

Mr. REICH. Mr. Chairman, Ranking Member, members of the committee, thank you for having this hearing. And as you suggest, Mr. Chairman, I am going to submit for the record my formal remarks and keep my informal remarks down to under 7 minutes.

Let me just say that we are in a recovery but it is the most lopsided recovery I can remember. The gross domestic product, GDP, is now higher than it was before the Great Recession. What we hear from the *Wall Street Journal* recently is that corporate executive pay is up 11 percent last year. The stock market is doing very well, the stock market is almost back up to what it was before. Corporate profits are very high, in fact big American corporations are sitting on almost \$2 trillion of cash. They are not investing it in new job creation, they don't need tax cuts, there is just not enough demand for the products and services that they otherwise would be creating.

The fundamental problem here is not so much that the economy is not expanding, the economy is expanding. The problem is that the average working person in this country is not getting very much out of this expansion. Yes, new jobs are being created but most of those new jobs are in health, in retail, restaurants, surface transportation. These jobs don't pay very much. And this is part of a pattern.

Mr. Chairman, you mentioned it in your beginning statements, we have seen, over the last 30 years that the American middle class, including what we used to call the working class, that is the

bottom 90 percent of Americans in terms of their income, they are not getting ahead, even before the Great Recession. We saw that over the last 30 years, adjusted for inflation, the typical American worker in that bottom 90 percent ended up the 30 years earning \$280 a year more than 30 years before. That is a 1 percent gain over 30 years.

The American economy expanded dramatically. The American economy almost doubled in size, but the typical American worker did not benefit. What did the typical American family do to maintain their living standards? First of all, women went into paid work, because male wages were starting to drop, again adjusted for inflation. But there is a limit to how many women with young children can go into paid work. In the 1960s only 12 percent of American women, with young children, and we are talking about children under 6, were in the workforce. By the 1990s I remember looking at the data when I was Secretary of Labor, we had 55 percent of American women with young children in the workforce, propping up family wages. I wish I could attribute this to the wonderful professional opportunities open to women, but most of the reason that women with young children went into the workforce was because male wages were dropping.

And then the second coping mechanism many families used when that one was exhausted was for everybody to work longer hours. By the last 1990s when we had that wonderful economic boom that I, as Secretary of Labor, take full credit for.

[Laughter.]

The typical American was working 350 hours more a year than the typical European, more hours even than the extraordinarily industrious Japanese. But there is a limit to how many hours people could work, even when times are good.

And so it was the third coping mechanism American families used when wages were flat, well they went into debt. Housing prices were going up and they could easily refinance their homes or they could use their homes as collateral for new loans. In fact, between 2002 and 2007 American families extracted about \$2.3 trillion from their homes. And that was enough to keep things going. But, when the housing bubble burst, that was the end of that last coping mechanism.

And so one of the problems Americans are having right now, and it is a problem for the American economy overall, is that there is not enough money in the middle class and the working class to keep the economy going. And this is a fundamental problem. It is a problem that we can no longer disguise.

Now I do understand concerns that people have about budget deficits. Obviously those are real problems, we have got to do something about those over the long-term. But when you see what has happened to American incomes over the last 30 years, flat, you see what is happening with the American economy, doubled in size, you have got to wonder where did all that money go. Well, the simple answer is it went to the top. Thirty years ago the top 1 percent of Americans, by income, were taking home roughly 9.5 percent of total national income. By 2007, just before the great crash of 2008, they were taking home 23.5 percent of total national income. Their income as a total percentage of total national economy almost dou-

bled. In fact the top .1 of 1 percent of Americans saw their portion of the American total income triple over those years. And so, people who say we can't increase taxes on the top in order to deal with the long-term budget deficit, I frankly don't know what they are talking about.

Mr. Chairman, members of this committee, I envy you in a sense that we have a lot of work to do, you have a lot of work to do. Your work over the last 30 years, not all of you, but this committee's work has been central to reviving the American economy. Central, and it will be in the future, central to reviving the economy because human resources, education and healthcare and the other things you deal with are so central to the American economy.

But let me just add one final point because Senator Enzi raised it and I think it needs to be responded to. Thirty years ago 35 percent of Americans were members of labor unions in the private sector. And that was such a large percentage that even in the non-unionized sector of the economy employers provided the prevailing wages in those labor contracts because employers were afraid, obviously, that if they didn't they would be unionized next. And it was the right thing to do.

Employers of big corporations only had about 30 times, in terms of their pay, CEO pay, was only about 30 times greater than the average worker. Now where are we? In the private sector fewer than 8 percent of private sector workers are unionized and CEO pay is greater than 300 times that of the average worker. The lines are diverging and people know this out there in the country.

People are upset, they are frustrated, they are worried, they feel like the game is stacked against them. And hopefully this committee, this committee's work, Congress' work, the Administration's work can put this right.

We, in the Clinton administration, are on the right track, I am sure and convinced we were on the right track, we just did not have a chance to finish the agenda we started. Thank you, Mr. Chairman.

[The prepared statement of Mr. Reich follows:]

#### PREPARED STATEMENT OF ROBERT B. REICH

Mr. Chairman and members of the committee, the jobs and wage crisis of the American middle class began decades before the Great Recession. It was hidden from view by households borrowing against their homes and, before that, by millions of women entering the paid workforce to prop up declining male wages. The crisis contributed to the severity of the Great Recession and is a principal reason why America is having such difficulty emerging from it.

If the American dream is to be restored, this long-term crisis must be understood, and policies adopted to reverse it.

Let me explain.<sup>1</sup>

#### THE GREAT PROSPERITY: 1947–1977

How did we go from the Great Depression to 30 years of Great Prosperity? And from there, to 30 years of stagnant incomes and widening inequality, culminating in the Great Recession? And from the Great Recession into such an anemic recovery?

During three decades from 1947 to 1977, the Nation implemented what might be called a basic bargain with American workers. Employers paid them enough to buy what they produced. Mass production and mass consumption proved perfect com-

<sup>1</sup> Sources for the following can be found in my most recent book, *Aftershock: The Next Economy and America's Future* (Alfred A. Knopf, 2010, Vintage paperback, 2011).

plements. Almost everyone who wanted a job could find one with good wages, or at least wages that were trending upward. During these three decades everyone's wages grew—not just those at or near the top.

Government enforced the basic bargain in several ways. It used Keynesian policy to achieve nearly full employment. It gave ordinary workers more bargaining power. It provided social insurance. And it expanded public investment. Consequently, the portion of total income that went to the middle class grew while the portion going to the top declined. But this was no zero-sum game. As the economy grew almost everyone came out ahead, including those at the top.

The pay of workers in the bottom fifth grew 116 percent over these years—faster than the pay of those in the top fifth (which rose 99 percent), and in the top 5 percent (86 percent). By the late 1940s, the Nation was “more than halfway to perfect equality,” as the National Bureau of Economic Research wryly observed.

Productivity also grew quickly, defying the predictions of those who said wide inequality was necessary for rapid growth. Labor productivity—average output per hour worked—doubled. So did median incomes. Expressed in 2007 dollars, the typical family's income rose from about \$25,000 to \$55,000. The basic bargain was cinched.

The middle class had the means to buy, and their buying created new jobs. As the economy grew, the national debt shrank as a percentage of it. “We’re all Keynesians now,” Richard Nixon purportedly proclaimed in 1971.<sup>2</sup> By then even Nixon had accepted government's ability to keep people employed when consumers and businesses did not spend enough, by filling the breach.

The Great Prosperity also marked the culmination of a reorganization of work that had begun during the Depression. Employers were required by law to provide extra pay—time-and-a-half—for work stretching beyond 40 hours a week. This created an incentive for employers to hire additional workers when demand picked up. Employers also were required to pay a minimum wage, which improved the pay of workers near the bottom as demand picked up. When workers were laid off, usually during an economic downturn, government provided them with unemployment benefits, usually lasting until the economy recovered and they were rehired. Not only did this tide families over but it kept them buying goods and services—an “automatic stabilizer” for the economy in downturns.

Perhaps most significantly, government increased the bargaining leverage of ordinary workers. They were guaranteed the right to join labor unions, with which employers had to bargain in good faith. By the mid-1950s more than a third of all American workers in the private sector were unionized. And the unions demanded and received a fair slice of the American pie. Non-unionized companies, fearing their workers would otherwise want a union, offered similar deals. UAW president Walter Reuther, among others, explicitly invoked the basic bargain: “Unless we get a more realistic distribution of America's wealth, we won't get enough to keep this machinery going.” As employers boosted wages, the higher wages did indeed keep the machinery going by giving average workers more money to buy what they produced.

The result was that as corporations did better, so did all their employees. A college sociology textbook of 1956 entitled *The American Class Structure* noted that “[t]he trend of income distribution has been toward a reduction in inequality. Owners have been receiving a smaller share relative to employees; professionals and clerks have been losing some of their advantages over operatives and laborers.”<sup>3</sup> Americans also enjoyed economic security against the risks of economic life—not only unemployment benefits but also, through Social Security, insurance against disability, loss of a major breadwinner, workplace injury, and inability to save enough for retirement. In 1965 came health insurance for the elderly and the poor (Medicare and Medicaid). Economic security proved the handmaiden of prosperity. In requiring Americans to share the costs of adversity it enabled them to share the benefits of peace of mind. And by offering peace of mind, it freed them to consume the fruits of their labors.

The government sponsored the dreams of American families to own their own home by providing low-cost mortgages and interest deductions on mortgage payments. In many sections of the country government subsidized electricity and water to make such homes habitable. And it built the roads and freeways that connected the homes with major commercial centers. The interstate highway system—40,000 miles of straight four-lane freeways to replace the old two-lane Federal roads that meandered through cities and towns—became the single most ambitious public works program in American history. Begun under Dwight Eisenhower and justified

<sup>2</sup>In fact, Nixon didn't actually say this although he is widely credited with it. He said “I am now a Keynesian in economics.”

<sup>3</sup>J. Kahl, *The American Class Structure* (New York: Holt, Rinehart, 1956), pp. 109–10.

in the halls of Congress as a means of speeding munitions across the Nation in the event of war, it did much more than that—generating sprawling suburbs and shopping malls, boosting auto sales, vastly enlarging the construction industry, creating an entire trucking industry, and radically reducing the cost of transporting and distributing goods across America.

Government also widened access to higher education. The GI Bill paid college costs for those who returned from war. The expansion of public universities—whose tuitions averaged about 4 percent of median family incomes during the Great Prosperity in contrast to the 20 percent then demanded by private universities—made higher education affordable to the American middle class. Consequently, college enrollments surged. By 1970, 70 percent of the Nation's 4-year students were in public universities and colleges. The Federal Government, especially the Defense Department, also underwrote a growing portion of university research, especially in the sciences.

Notwithstanding all this, the Nation also found the time and money in these years to rebuild Western Europe and Japan—spending billions of dollars to restore foreign factories, roads, railways, and schools. The effort proved an astounding success. The years 1945 to 1970 witnessed the most dramatic and widely shared economic growth in the history of the world, which contributed to America's Great Prosperity. In helping restore the world's leading economies and thus keep communism at bay, the new global system of trade and assistance created vast new opportunities for American corporations—far richer, larger, and more technologically advanced than any other—to expand and prosper.

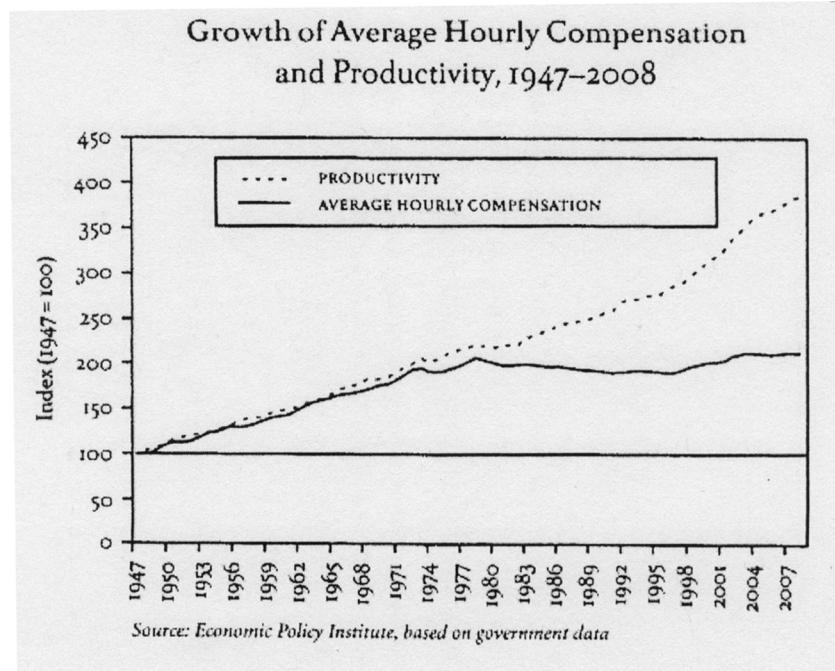
Government paid for all of this with tax revenues from an expanding middle class with rising incomes. Revenues were also boosted by those at the top of the income ladder whose marginal taxes were far higher. The top marginal income tax rate during World War II was over 68 percent. In the 1950s, under Dwight Eisenhower, whom few would call a radical, it rose to 91 percent. In the 1960s and 1970s the highest marginal rate was around 70 percent. Even after exploiting all possible deductions and credits, the typical high-income taxpayer paid a marginal Federal tax of over 50 percent. But contrary to what conservative commentators had predicted, the high tax rates did not reduce economic growth. To the contrary, they enabled the Nation to expand middle-class prosperity and fuel growth.

Support for the government's new role was founded in the crucible of the Great Depression and World War II, in whose wake Americans shared a larger sense of common purpose. We were all in it together, rising or falling together, connected to one another in ways we had barely noticed before the Depression. None of us could prosper unless prosperity was widely shared. The historian James Truslow Adams coined the phrase "the American dream," and defined it as "a better, richer, and happier life for all our citizens of every rank."

America of the era still harbored vast inequalities, of course. But the Nation responded to the reality of unequal opportunity with court decisions and legislation designed to overcome racial and gender discrimination, and with public investments in education intended to enable many more of our young to get ahead regardless of circumstance. The Great Prosperity significantly expanded the American middle class. And it proved that widely-shared income gains were not incompatible with widespread economic growth; they were, in fact, essential to it.

#### THE MIDDLE CLASS SQUEEZE, 1977–2007

During the Great Prosperity of 1947–77, the basic bargain had ensured that the pay of American workers coincided with their output. In effect, the vast middle class received an increasing share of the benefits of economic growth. But after that point, the two lines began to diverge: Output per hour—a measure of productivity—continued to rise. But real hourly compensation was left in the dust, as you can see below.



It's easy to blame "globalization" for the stagnation of middle incomes, but technological advances has played as much if not a greater role. Factories remaining in the United States have shed workers as they automated. So has the service sector. Remember bank tellers? Telephone operators? The fleets of airline workers behind counters who issued tickets? These and millions of other jobs were lost to automation. Any routine job that requires the same steps to be performed over and over can potentially be done anywhere in the world by someone working for a fraction of an American wage or by automated technology. By the late 1970s, all such jobs were on the endangered species list. By now they are nearly extinct.

But contrary to popular mythology, trade and technology have not reduced the overall *number* of American jobs. Their more profound effect has been on pay. Rather than be out of work, most Americans have quietly settled for lower real wages, or wages that have risen more slowly than the overall growth of the economy per person. Although unemployment following the Great Recession remains high, jobs are slowly returning. But in order to get them, many workers have to accept lower pay than before.

Starting more than three decades ago, trade and technology began driving a wedge between the earnings of people at the top and everyone else. The pay of well-connected graduates of prestigious colleges and MBA programs—the so-called "talent" who reached the pinnacles of power in executives suites and on Wall Street—has soared. But the pay and benefits of most other workers has either flattened or dropped. And the ensuing division has also made most middle-class American families less economically secure.

The real puzzle is why so little was done in response to these forces conferring an increasing share of economic growth on a small group at the top and leaving most other Americans behind. With the gains from that growth, the Nation could, for example, have expanded our educational system to encompass early-childhood education and have better equipped our public schools. It could have supported affordable public universities, created more job retraining, and better and more extensive public transportation.

In addition, the Nation could have given employees more bargaining power to get higher wages, especially in industries sheltered from global competition and requiring personal service. We could have enlarged safety nets to compensate for increasing anxieties about job loss—unemployment insurance covering part-time work, wage insurance if pay dropped, transition assistance to move to new jobs in new



locations, insurance for entire communities that lose a major employer so they can lure other employers. We could have financed Medicare for all. Regulators could have prohibited big, profitable companies from laying off a large number of workers all at once; required them to pay severance—say, a year of wages—to anyone they let go; and train them for new jobs. The minimum wage could have been linked to inflation.

We could have raised taxes on the rich and cut them for poorer Americans—including payroll taxes, capital-gains taxes, and estate taxes. America could have attacked overseas tax havens by threatening loss of U.S. citizenship to anyone who keeps their money abroad in order to escape U.S. taxes. We could have expanded public investments in research and development, and required any corporation that commercialized such investments to create the resulting new jobs in the United States. And we could have insisted that foreign nations we trade with establish a minimum wage that's half their countries' median wage. That way, all citizens could share in gains from trade, setting the stage for the creation of a new middle class that in turn could participate more fully in the global economy.

In these and many other ways, government could have enforced the basic bargain. But it did the opposite. Starting in the late 1970s, and with increasing fervor over the next three decades, it deregulated and privatized. It slashed public goods and investments—whacking school budgets, increasing the cost of public higher education, reducing job training, cutting public transportation, and allowing bridges, ports, and highways to corrode. It shredded safety nets—reducing aid to jobless families with children, tightening eligibility for food stamps, and cutting unemployment insurance so much that by 2007 only 40 percent of the unemployed were covered. It halved the top income tax rate from the range of 70 to 90 percent that prevailed during the Great Prosperity of 28 to 35 percent; allowed many of the Nation's rich to treat their income as capital gains subject to no more than 15 percent tax; and shrunk inheritance taxes that affected only the top-most 1.5 percent of earners. Yet at the same time, America boosted sales and payroll taxes, both of which took a bigger chunk out of the pay of the middle class and the poor than of the well-off.

We allowed companies to break the basic bargain with impunity—slashing jobs and wages, cutting benefits, and shifting risks to employees (from you-can-count-on-it pensions to do-it-yourself 401 (k)s, from good health coverage to soaring premiums and deductibles). Companies were allowed to bust unions and threaten employees who tried to organize (by 2010, fewer than 8 percent of private-sector workers were unionized). And nothing impeded CEO salaries from skyrocketing to 300 times that of the average worker (from 30 times during the Great Prosperity), while the pay of financial executives and traders rose into the stratosphere. We stood by as big American companies became global companies with no more loyalty or connection to the United States than a G.P.S. satellite. Now, firms such as Caterpillar, GE, and Oracle and other so-called “American” firms are selling more outside the United States than in it, and are creating more jobs outside the United States as well.

Most telling of all, Washington deregulated Wall Street while insuring it against major losses. In so doing, it allowed finance—which until then had been the servant of American industry—to become its master, demanding short-term profits over long-term growth, and raking in an ever-larger portion of the Nation's profits. Between 1997 and 2007, finance became the fastest-growing part of the U.S. economy. Two-thirds of the growth in the Gross National Product was attributable to the gains of financial executives, traders, and specialists. By 2007, financial companies accounted for over 40 percent of American corporate profits and almost as great a percentage of pay, up from 10 percent during the Great Prosperity. Henry Ford's legacy was a company that no longer made its money off selling cars; in 2007, Ford's financial division accounted for almost half of the company's earnings.

As the financial economy took over the real economy, Treasury and Fed officials grew in importance. The expectations of bond traders dominated public policy. And the stock market became the measure of the economy's success—just as it had before the Great Depression.

We in the Clinton administration tried our best to reverse course. We raised the minimum wage and guaranteed workers time off from their jobs for family or medical emergencies. We tried for universal health care. We offered students from poor families access to college, and expanded a refundable tax credit for low-income workers. We tied executive compensation to company performance. All these were helpful but frustratingly small in light of the larger backward lunge.

Federal Reserve Chief Alan Greenspan insisted that President Clinton cut the Federal budget deficit rather than deliver on his more ambitious campaign promises, and Greenspan reciprocated by reducing interest rates. This ushered in a strong recovery. By the late 1990s the economy was growing so fast and unemployment was so low that middle-class wages started to rise a bit for the first time in

two decades. But because the rise was propelled mainly by an upturn in the business cycle rather than any enduring change in the structure of the economy, it turned out to be temporary. Once the economy cooled, family incomes were barely higher than where they had been before.

#### WHY DIDN'T WE ACT?

Why didn't America counteract the market forces that were shrinking the middle class's share of the American pie? Answers to these questions offer clues about when and how the pendulum will swing in the other direction.

Some argue there was simply no need for government intervention. The economy did better on its own, without so much government and with lower taxes on the rich. They point to the great expansion of the 1980s and the long recovery of the 1990s, and to the wildly exuberant bull market of the era. They blame the Great Recession on Alan Greenspan, who by 2002 reduced interest rates so low that too many people got loans who had no business getting them. And, of course, they blame those who did the borrowing.

This argument is bunk. It equates the stock market with the economy, and turns a blind eye to the revocation of the basic bargain—a revocation resulting in stagnating wages, increased insecurity, and widening inequality. The argument refuses to acknowledge the consequences for an economy when the middle class lacks the means to buy what it produces.

Others see the reversal of the pendulum as the inevitable result of declining confidence in government. After all, they say, the era began with the Vietnam War and continued with the Watergate scandal. It culminated in the tax revolts double-digit inflation of the late 1970s—which candidate Ronald Reagan blamed “not on Americans living too well but on government living too well.”

Confidence in government did drop, but proponents of this view have cause and effect backwards. The tax revolts that thundered across America starting in the late 1970s were not so much ideological revolts against government—Americans still wanted all the government services they had before, and then some—as against paying more taxes on incomes that had stagnated. Inevitably, government services deteriorated and government deficits exploded, confirming the public's growing cynicism about government's capacity to do anything right.

The real reason for the reversal of the pendulum was political. As income and wealth became more concentrated in fewer hands, politics reverted to what former Federal Reserve Chair Marriner Eccles described in the 1920s when people “with great economic power had an undue influence in making the rules of the economic game.” With hefty campaign contributions, and platoons of lobbyists and PR flacks, the rich pushed legal changes that enabled them to accumulate even more income and wealth—including tacit permission to bust unions, slash corporate payrolls, and reduce benefits; lower taxes for themselves; and deregulation of Wall Street. Since so much of their wealth depends on the performance of the stock market, they particularly wanted to free up the Street to put greater pressure on companies to perform. The plan worked. The Dow Jones Industrial Average took off—rising tenfold between 1980 and 2000.

The rich and powerful also had substantial influence “in conditioning the attitude taken by people as a whole toward [the] rules,” as Eccles described the pre-Depression years. They generously financed think-tanks, books, media, and ads designed to persuade Americans that free markets always know best. Ronald Reagan, Margaret Thatcher, Alan Greenspan, Milton Friedman, and other apostles of free-market dogma reiterated a simple story: The choice was between a free market and big government. Government was the problem. Free markets were the solution.

But how could the public have been so gullible as to accept this story? After all, America had gone through a Great Depression and suffered the consequences of an unfettered market and unconstrained greed. Even Marriner Eccles, chairman of the Federal Reserve Board, saw that left to its own devices markets concentrate wealth and income—which is disastrous to an economy as well as to a society. Americans had also experienced the Great Prosperity, which depended so obviously on public goods, safety nets, and public investment. Now that the basic bargain was coming apart once again, the need for them was even greater.

One way to understand the paradox is loss of generational memory. While the trauma of the Great Depression echoed in the memories of people who came to adulthood in the 1930s (and who carried its lessons into the forties and fifties), their children *became* adults during the Great Prosperity. And their grandchildren, born *during* the Great Prosperity, had no actual, palpable memory of their grandparents' experience. So when this last generation became adults (from around the end of 1970s onwards), all they recalled was the failure of government and the apparent

success of the market. This made them particularly susceptible to the seductive rants of the free-marketeers who wanted to blame government for the economy's failings. They had no clear memory of a society whose members were all in it together. They witnessed instead an economy in which, increasingly, each of us was on his own.

#### HOW AMERICANS KEPT BUYING ANYWAY: THE THREE COPING MECHANISMS

Americans also accepted the backward swing of the pendulum because they mitigated its effects. Starting in the late 1970s, the American middle class honed three coping mechanisms, allowing it to behave as though it was still taking home the same share of total income as it had during the Great Prosperity, and to spend as if nothing substantially had changed. Not until these coping mechanisms became exhausted in the Great Recession would the underlying reality be exposed.

*Coping mechanism # 1: Women move into paid work.* Starting in the late 1970s, and escalating in the 1980s and 1990s, women went into paid work in greater and greater numbers. For the relatively small sliver of women with 4-year college degrees, this was the natural consequence of wider educational opportunities and new laws against gender discrimination that opened professions to well-educated women. But the vast majority of women who migrated into paid work did so in order to prop up family incomes, as households were hit by the stagnant or declining wages of male workers.

This transition of women into paid work has been one of the most important social and economic changes to occur over the last four decades. It has reshaped American families and challenged traditional patterns of child-rearing and child care. Its magnitude has been extraordinary. In 1966, 20 percent of mothers with young children worked outside the home. By the late 1990s, the proportion had risen to 60 percent. For married women with children under the age of 6, the transformation has been even more dramatic—from 12 percent in the 1960s to 55 percent by the late 1990s.

Families seem to have reached the limit, however—a point of diminishing returns where the costs of hiring others to see to the running of a household or to take care of the children, or both, exceeds the apparent benefits of the additional income.

*Coping mechanism # 2: Everyone works longer hours.* By the mid-2000s it was not uncommon for men to work more than 60 hours a week, and women to work more than 50. Professionals put in more “billable” hours. Hourly workers relied on overtime. A growing number of people took on two or three jobs, each demanding 20 or more hours. All told, by the 2000s, the typical American worker worked more than 2,200 hours a year—350 hours more than the average European worked, more hours even than the typically industrious Japanese put in. It was many more hours than the typical American middle-class family had worked in 1979—500 hours longer, a full 12 weeks more.

Here too, though, Americans seemed to have reached a limit. Even if they can find the work, they can't find any more time.

*Coping mechanism #3: Draw down savings and borrow to the hilt.* After exhausting the first two coping mechanisms, the only way Americans could keep consuming as before was to save less and go deeper into debt. During the Great Prosperity the American middle class saved about 9 percent of their after-tax incomes each year. By the late 1980s and early 1990s, that portion had been whittled down to about 7 percent. The savings rate then dropped to 6 percent in 1994, and on down to 3 percent in 1999. By 2008, Americans saved nothing. Meanwhile, household debt exploded. During the Great Prosperity debt had averaged around 50 to 55 percent of after-tax income. That included what people owed on their mortgages. But starting in 1980 debt took off. In 2001, Americans owed as much as their entire after-tax income that year. But the borrowing didn't even stop there, especially after the Federal Reserve Board lowered interest rates and made borrowing easier. By 2007, the typical American owed 138 percent of their after-tax income.

Mortgage debt exploded. As housing values continued to rise, homes doubled as ATMs. Consumers refinanced their homes with even larger mortgages and used their homes as collateral for additional loans. As long as housing prices continued to rise, it seemed a painless way to get additional money (in 1980 the average home sold for \$62,000; by 2006 it went for \$245,000). Between 2002 and 2007, American households extracted \$2.3 trillion from their houses, putting themselves ever more deeply into the hole.

Eventually, of course, the debt bubble burst. With it, the last coping mechanism ended.

It has been easy to place blame ever since. Some observers blame consumers for borrowing too much. Others fault banks for lending so carelessly. Others blame for-

eign lenders—especially the Chinese—who were happy to send so much money our way. Or they blame the Federal Reserve, which made borrowing too easy by lowering interest rates too much. Or they blame regulators who didn't adequately oversee the banks that did the lending.

All of this misses the point. The huge amount of debt that middle-class consumers took on was the last of a series of coping mechanisms, undertaken because median wages had stopped growing and the proportion of total income going to the middle continued to shrink. The only way most Americans could keep consuming *as if* wages hadn't stalled was for women to move into paid work, for everyone to put in more hours and, finally, for households to take on more debt. But each of these mechanisms reached its inevitable limit. And when the debt bubble burst, most Americans woke up to a startling reality: They could no longer afford to live as they *had* been living; nor as they thought they *should* be living, given the growth in the economy; nor as they *expected* to be living, given how their pay used to grow when the economy grew; nor as they assumed they *could* be living, given the lavish lifestyles of people at the top of the income ladder.

#### THE FUTURE WITHOUT COPING MECHANISMS

The fundamental economic challenge ahead is to restore the vast American middle class. That requires resurrecting the basic bargain linking wages to overall gains, and providing the middle class a share of economic gains sufficient to allow them to purchase more of what the economy can produce.

It is both an economic challenge and a moral challenge. The Nation cannot achieve nearly full employment, a higher median income, and faster growth without a reorganization of the economy on a scale similar to that which occurred during and after the Great Depression.

The Great Recession accelerated the structural change in the economy that began in the late 1970s. More companies have found ways to cut their payrolls for good—discovering new ways to use software and computer technologies to substitute for employees. The spread of such technologies around the world has simultaneously made many more workers in Asia and Latin America almost as productive as Americans, and the Internet has allowed more work to be efficiently outsourced to them. Consequently, large numbers of Americans will not be rehired unless they are willing to settle for lower wages and benefits.

The official unemployment numbers hide the extent to which Americans are already on this path. Among those with jobs, a growing percent have accepted lower pay as a condition for keeping them. Or they have lost higher-paying jobs and are now in new ones paying less. Eventually jobs will return, but if the trend continues more people will be working for pay they consider inadequate, more working families will be at or near poverty, and inequality will have widened.

Nor will households be able to borrow as before. Banks and other lenders that got burned will be far more careful in the future. Furthermore, lending standards have tightened, and bank regulators and new regulations will require prudence. Housing values will not regain their speculative peak for a long time—which means homeowners cannot use their homes as sources of easy money through home equity loans and refinancing deals. A large number of Americans are paying off, paying down, or walking away from trillions of dollars of outstanding loans—in a vast “deleveraging” of household finances that is likely to continue for years. At the same time, tens of millions of boomers are approaching retirement with nest eggs that have shrunk to the size of peanuts, and must save in earnest.

Where will demand come from without a buoyant American middle class? Absent their spending, companies have little incentive to buy new equipment or software, new commercial buildings or factories; entrepreneurs have little incentive to embark on new research and develop new products and services. Government can fill the gap for a time, but government cannot continue indefinitely to stimulate the economy with deficit spending or by printing money. Nor can we rely on exports to fill the shortfall. Exports will remain a relatively small proportion of our economy. Other economies—even the Chinese—are relying on net exports to maintain their employment. It is impossible for every large economy, including the United States, to become a net exporter.

Hence our challenge. As we should have learned from the Great Prosperity—the 30 years after World War II when America grew because most Americans shared in the Nation's prosperity—we cannot have a growing and vibrant economy without a growing and vibrant middle class.

The CHAIRMAN. Thank you, Secretary Reich.

Now we will turn to Heather Boushey a senior economist at the Center for American Progress where her research focuses on employment, social policy and family economics. She holds a Ph.D. in economics from the New School for Social Research and was previously an economist at the Joint Economic Committee.

Ms. Boushey, welcome and again your statement will be made a part of the record in its entirety and if you could please sum it up. Please proceed.

**STATEMENT OF HEATHER BOUSHEY, Ph.D., SENIOR ECONOMIST, CENTER FOR AMERICAN PROGRESS, WASHINGTON, DC**

Ms. BOUSHEY. Thank you. Thank you, Chairman Harkin and Ranking Member Enzi for inviting me to talk to you today.

My name is Heather Boushey and I am a senior economist with the Center for American Progress Action Fund.

Undermining the economic vitality of the middle class is bad for families, especially as it has led to not only declining incomes but also to rising hours of work and greater economic insecurity. The evidence in front of us also points to the conclusion that the middle class matters for economic growth and economic stability. A solid and growing middle class strengthens our economy and leads to more stable growth. Policies that focus on building, supporting and expanding opportunity for the middle class are not only good for families but good for our businesses and our economy overall.

To understand how the middle class matters for families we must begin by asking where economic growth comes from. Supply-siders believe that the key to economic growth is to increase the supply of goods and services and to spur investment government should limit taxation and regulation. But this argument starts in the middle not the beginning of the story, and therefore supply-siders get the story fundamentally wrong. Firms won't invest if they don't see a willing and able customer to buy their goods or services. Ask any business owner, will you open a new factory, purchase inventory for a retail store or add another employee if you don't see customers? In fact, having a deep market with demand from a strong middle class is what tells businesses where there are profitable opportunities to invest. In short, demand drives growth.

The false logic behind the supply-side economics is that lowering wages is the key to economic growth. In fact, lowering wages and a hollowed out middle class means that consumers can demand less and less each year, this puts the brake on growth unless another source of demand is found.

Over the past few decades America's middle class has found innovative ways to cope with an increasingly low-wage economy. Over the 1980s and 1990s families put more adults into the labor force—the labor force participation rate of wives, and as Secretary Reich had said, especially mothers rose remarkably. In fact, it is only because of the additional earnings of wives that married couples have seen any income growth at all since the mid-1970s. The hollowing out of middle class jobs made it necessary for middle class families to have two breadwinners, not just one.

While women certainly have more economic opportunity than in prior generations, families now struggle with how to provide care for the young, the aged and the ill, given that many work in in-

flexible workplaces. Working families need workplace flexibility, including predictable hours that work for families, paid sick days for a worker's illness or to care for a sick family member and paid family leave to provide care during longer illnesses or when a new child comes into the family.

To deal with falling incomes, especially over the 2000s, families took on increasing levels of debt. Family debt rose from about 60 percent of annual income in the 1980s to a whopping 130 percent in December 2007. Over the 2000s greater indebtedness allowed families to continue to spend even as their incomes fell. But as we now know, it also increased the fragility of the U.S. economy.

Our Nation's leaders used to understand the critical role of the middle class in our economy. In 1914 Henry Ford began paying his workers the then princely sum of \$5 a day. He did this to reduce turnover on his assembly line. He also saw this as a win-win. He embraced the idea that paying workers a livable wage meant that he was helping to create a solid consumer base, a large middle class that would create deep markets for the goods and services that he and others produced. Paying decent wages became so thoroughly embedded in the popular imagination as the driver of economic growth, that President Franklin D. Roosevelt said that, "A sounder distribution of buying power," was a reason to enact the Fair Labor Standards Act, which included the minimum wage, into law.

There are other reasons that the middle class is good for growth. The middle class invests in human capital which is a key driver of economic growth and contributes to higher labor productivity. Stagnant incomes, however, limit families' ability to invest in education, reducing productivity. The middle class is also a platform for entrepreneurship and innovation. With the economic security of a middle class family, individuals have the means and the security to take on risks. But greater economic inequality and insecurity limits the capacity of ordinary people to become entrepreneurs or followup on an invention or innovative idea.

The decline of a broad middle class has implications for the poorest among us as well. With fewer middle class jobs what hope do the poor have for working their way up into the middle class?

Now, we have lived through a great experiment in supply-side economics. For years we have been told that growth in income and equality and having more rich people wasn't taking something away from the rest of us, it was a reward for the best and the brightest who would then reinvest in our economy. But we now know the truth. A strong middle class is important because it allows a decent standard of living for most of our Nation's families and because it creates a stable market for businesses to invest. I encourage you to focus on policies that will rebuild our middle class, to strengthen our families and our economy.

I also want to make a point on the issue about allowing workers to bargain collectively without fear of retaliation. The growth of unions in this country helped create the middle class and policies that allow workers the right to collectively bargain, the right to make that decision, without fear that their company is going to retaliate against them, is an important step toward ensuring that we can have a middle class in the future.

Thank you for focusing on these issues.  
[The prepared statement of Ms. Boushey follows:]

PREPARED STATEMENT OF HEATHER BOUSHEY, PH.D.

Thank you, Chairman Harkin and Ranking Member Enzi, for inviting me to talk to you about the importance of a broadly prosperous middle class to the future of our Nation. My name is Heather Boushey and I'm senior economist at the Center for American Progress Action Fund.

This hearing could not be timelier. Our country has experienced a widening income gap and a hollowing out of our middle class since the late 1970s and these trends threaten our Nation's economic growth and stability.

Many academics, pundits and politicians point to rising income inequality as a social concern or a concern for the viability of our democracy. Economists, on the other hand, tend to posit that such income gaps between the wealthy and the rest of the citizens in developed countries are not incompatible with economic growth and thus not a key economic concern. The economic argument goes like this—focusing on income equality for equality's sake, or because high inequality leaves too many in poverty, or because the wealthy are pulling so far out ahead of the middle class misses the point that, in fact, this may be good for the economy as those at the top of the income scale can make the economy grow if they invest their additional income.

Empirical reality, however, has come into direct conflict with this argument.

Beginning in the 1970s, with the decline in union membership across our Nation and the arrival of products made by cheaper workers abroad, businesses began relentless efforts to cut labor costs in union and non-union manufacturing operations across our country. Middle class families struggled to cope, with women entering the labor market in droves to make up for lackluster single-earner's income growth.

This lack of broad-based income growth for the American middle class was clearly exacerbated by the Great Recession. The factors that led to the recession were many of the same ones that led to higher income inequality in the previous decades. While the jury is still out on whether rising inequality was a causal factor in creating the conditions for the still-existing economic crisis for our middle class, there is no question that the wealthy took greater and greater shares of our Nation's income in the 2000s and right up to today—and then failed to reinvest it in renewed economic growth.

At the same time, middle-class incomes failed to keep pace with the cost-of-living, requiring families to increasingly live on credit just to maintain the lifestyle of their parents, send their kids to college, and take care of their aging parents. The lack of income growth for the broad middle class had devastating consequences for the U.S. economy when the housing market collapsed—almost taking our financial markets with it.

Unless we focus wholeheartedly on policies aimed at rebuilding our middle class, our economy will remain fragile and millions will continue to fall down the income ladder. In the remainder of my testimony, then, I will make two key points.

First, the evidence in front of us points to the conclusion that the middle class matters for economic growth and economic stability. Not having a solid and growing middle class weakens our economy and leads to slower, more fragile growth.

Second, undermining the economic vitality of the middle class is bad for families, especially as it has led to not only declining incomes but also to sharply rising hours of work and greater economic insecurity.

Policies that focus on building, supporting, and expanding opportunity for the middle class will not only be good for families, but good for our businesses and our economy overall as well.

WHERE DOES ECONOMIC GROWTH COME FROM?

To understand how the middle class matters for our economy, we have to begin with the question where does economic growth come from?

Supply-siders argue that economic growth comes from increasing the supply of goods and services, which means expanding the capacity to invest. Supply-siders thus believe that the key to growth is for government to reduce taxes and limit regulation to spur investment.

It is true that investment is the key to growth. But this argument starts in the middle, not the beginning of the story. The supply-siders get the story fundamentally wrong because firms won't invest if they don't see a willing and able customer to buy their goods or services. Ask any business owner: Will you open a new factory,

purchase inventory for a retail store, or add another employee if you don't see customers?

In fact, having a deep market with demand from a strong middle class is what tells businesses where there are profitable opportunities to invest.

This, by the way, is the problem our economy continues to face today. Small businesses report that their single largest concern is poor sales. They say this is more of a problem than regulations, taxes, inflation, or the cost of labor.<sup>1</sup>

And, in here lies the crux of the issue: Supply alone does not create growth; it must be balanced by demand. Supply-side policies have led us to where we are today: Unbalanced growth and a crisis-prone economy.

It is demand for goods and services, backed up by an ability to pay for them, which drives economic growth. The hollowing out of our middle class limits our Nation's capacity to grow unless firms can find new customers.

Today, many believe that to be competitive, employers must always focus on reducing costs. This is a supply-side argument: If employers keep more of the money, they will have more to invest. The false logic behind our "Wal-Mart" economy is that lowering wages is the key to growth.

In fact, lowering wages and a hollowed out middle class means that consumers can demand less and less each year. This puts a brake on economic growth, unless another source of demand is found.

Of course, many U.S. firms do business in countries around the world and may not care one iota about whether U.S. consumers can afford to buy their wares. But we, as a nation, need to care.

Over the past few decades, the middle class found innovative ways to cope with the Wal-Mart economy. Over the 1980s and 1990s, as I noted earlier, families put more adults in the labor force, with the labor force participation rate of wives and mothers rising remarkably.<sup>2</sup>

In fact, it is only because of the earnings of wives that married couples have seen any income growth. From the late 1940s through the mid-1970s, married-couple families with and without a working wife saw their income rise at about the same pace, about 3 percent per year after inflation.<sup>3</sup> But since the mid-1970s, married couples with a stay-at-home wife experienced no increase in income, after inflation, while those with a working wife watched their income grow by less than a percent per year—not impressive, but not backsliding.

Working more means families have less time together and less time to care for one another. This is a net loss for the typical middle class family, who works longer than their parents, but has seen slower income gains than their parent's generation.

Families also began taking on increasing levels of debt. Up until the 1980s, family debt was about 60 percent of annual income.<sup>4</sup> But as middle class incomes began falling, the share of debt rose enormously, so much so that debt was a whopping 130 percent of income by December 2007. With wage growth not keeping pace with inflation, and with falling asset values slamming middle class families at the onset of the housing and financial crises at the end of the last decade, even as families try to pay off debt, debt continues to be at near-historic highs.

Over the 2000s, the median family saw their income fall from the economic peak in 2000 to the peak in 2007, a first in the post-World War II. Since consumption is about 70 percent of the total U.S. economy, this lack of income growth would have reduced our economic growth if families had not borrowed to make ends meet.<sup>5</sup>

Indebtedness, however, especially in light of the lack of income growth, increased the fragility of the U.S. economy.

The idea that the middle class was important to our economy was one American business leaders used to understand. In 1914, Henry Ford announced that he'd

<sup>1</sup>William C. Dunkelberg and Holly Wade. "NFIB Small Business Economic Trends." (Washington, DC: National Federation of Independent Business, 2011), available at <http://www.nfib.com/Portals/0/PDF/sbet/sbet201104.pdf>.

<sup>2</sup>Bureau of Labor Statistics. 2011. "Current Population Survey, Table A-1." (<http://bls.gov/webapps/legacy/cpsatab1.html> [May 09, 2011]).

<sup>3</sup>U.S. Census Bureau. 2009. "Income, Poverty, and Health Insurance Coverage in the United States: Table F-7." (<http://www.census.gov/hhes/www/income/data/historical/families/index.html> [May 9, 2011]).

<sup>4</sup>Christian Weller and Jessica Lynch. "Household Wealth in Freefall: Americans' Private Safety Net in Tatters." (Washington, DC: Center for American Progress, 2009), available at [http://www.americanprogress.org/issues/2009/04/pdf/wealth\\_declines.pdf](http://www.americanprogress.org/issues/2009/04/pdf/wealth_declines.pdf).

<sup>5</sup>Bureau of Economic Analysis. 2011. "National Income and Product Accounts Table 1.1.6." (<http://bea.gov/national/nipaweb/TableView.asp?SelectedTable=6&Freq=Qtr&FirstYear=2009&LastYear=2011> [May 9, 2011]).



begin paying his workers the then-princely sum of \$5 a day.<sup>6</sup> He did this because at the time, the assembly line was not a good job and turnover was exceptionally high. By offering workers a better wage, Henry Ford was taking the “high road” to economic development.

It wasn’t until later that Ford embraced the idea that paying workers a live-able wage also meant that they could become his consumer base. But today, that’s the notion we associate with Fordism: The win-win concept that if you create a solid consumer base—a large middle class—then you’ll have deep markets for the goods and services produced.

Paying decent wages became so thoroughly embedded in the popular imagination as a driver of economic growth that President Franklin D. Roosevelt was able to say that “a sounder distribution of buying power” was a key reason to enact the Fair Labor Standards Act into law, which established the minimum wage.<sup>7</sup>

Decades of empirical research demonstrates that the middle class is good for growth. The middle class invests in human capital—they learn, work and spend—which are key drivers of economic growth and contributors to higher labor productivity.

Today, stagnant incomes not only limit our economy’s capacity to grow, it limits families’ ability to invest in education and improve our Nation’s stock of human capital, which reduces our Nation’s productivity.

Indeed, the hollowing out of the middle class actually reduces the incentives for young people to get a higher education. Among 25- to 34-year-old men, one-in-five (19.4 percent) who has a college degree actually earns less than the average male high school graduate—and yet is saddled with debt (as are his parents) from the cost of education. This is also the case for women, although less so, as one-in-seven women with a college degree (14.0 percent) earns less than the typical female high school graduate.<sup>8</sup>

Then there’s the loss of the middle class as a platform for entrepreneurship and innovation. With the economic security of a middle-class family, individuals have the means and the security to take on risks. But greater economic inequality and insecurity limits the capacity of ordinary people to become entrepreneurs or follow-up on an invention or innovative idea are increasingly limited. With a hollowed-out middle class, families have less access to resources that could float an entrepreneur while her vision takes shape.

The decline of a broad middle class has real implications for the poorest among us as well. With fewer middle-class jobs, what hope do the poor have for working their way up into the middle class?<sup>9</sup>

Certainly, economic competitiveness requires that firms produce the highest quality products for the lowest price. This is a key feature of a capitalist mode of production. However, in the Wal-Mart economy, when every employer focuses solely on reducing wages at the expense of all else, this has devastating consequences for the economy overall.

My generation lived through a great experiment in supply side economics. The result? Our Nation experienced more growth in income inequality than any other developed nation. For years we were told that this was OK, that having more rich people wasn’t taking away from the rest of us, it was a reward for the best and the brightest, who would then reinvest in our economy.

What we now know is that a strong middle class creates stable markets for businesses to invest. The decline of America’s middle class entails real hardships for families and limits opportunity. But, it also appears that the demise of our middle class is a part of what ails our economy overall.

<sup>6</sup>Ford Motor Company. 2011. “Henry Ford’s \$5-a-Day Revolution.” (<http://corporate.ford.com/about-ford/heritage/milestones/5dollaraday/677-5-dollar-a-day> [May 9, 2011]).

<sup>7</sup>“I came to the conclusion that the present-day problem calls for action both by the government and by the people, that we suffer primarily from a failure of consumer demand because of lack of buying power. Therefore it is up to us to create an economic upturn. . . . I am again expressing my hope that the Congress will enact at this session a wage and hour bill putting a floor under industrial wages and a limit on working hours—to ensure a better distribution of our prosperity, a better distribution of available work, and **a sounder distribution of buying power** (emphasis added).” Franklin Delano Roosevelt, “Fireside Chat 12: On the Recession,” (Miller Center for Public Affairs University of Virginia, 1938).

<sup>8</sup>John Schmitt and Heather Boushey, “The College Conundrum: Why the Benefits of a College Education May Not Be So Clear, Especially to Men” (Washington, DC: Center for American Progress, 2010).

<sup>9</sup>David H. Autor, “The Polarization of Job Opportunities in the U.S. Labor Market: Implications for Employment and Earnings” (Washington: MIT Department of Economics, National Bureau of Economic Research, 2010).

Thank you for your attention to this matter. I encourage you to focus on policies that will rebuild our middle class, to strengthen our families and our economy.

Thank you.

The CHAIRMAN. Thank you, Ms. Boushey. Bou-shee or Bou-shay?

Ms. BOUSHEY. Bou-shay.

The CHAIRMAN. Bou-shay. Thank you, Ms. Boushey.

Next we have J. Michael Luttig, he is the executive vice president and general counsel at the Boeing Company. He joined Boeing after having served for 15 years on the U.S. Court of Appeals for the Fourth Circuit, to which he was appointed in 1991. Prior to his appointment Mr. Luttig served as Assistant Attorney General of the United States.

Welcome, Mr. Luttig. And again your statement will be made a part of the record and if you could sum it up for us we would be appreciative. Thank you.

**STATEMENT OF J. MICHAEL LUTTIG, GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT, BOEING COMPANY, CHICAGO, IL**

Mr. LUTTIG. Thank you, Chairman Harkin and Ranking Member Enzi, it is a privilege to be here today.

I have been invited by the committee to discuss a complaint recently filed by the acting general counsel of the National Labor Relations Board against my company, the Boeing Company. That complaint challenges a decision to build a new final assembly line in South Carolina for the company's revolutionary new airplane, the 787 Dreamliner.

The legal and public policy issues raised by the NLRB's complaint are enormously consequential, indeed profound. If the principle of law the NLRB seeks is ultimately validated by the Federal courts, the effect will be that no company with a unionized workforce, in a non-Right-to-Work State, will be permitted to locate additional work in another State. But I urge this be understood as well, neither will companies be willing to locate new production facilities in non-Right-to-Work States because they will not, thereafter, be free to locate additional work outside of those States.

The implications of this extraordinary and unprecedented action against my company, for the particular subject on which the committee has convened today are self-evident. This one action by the NLRB puts at risk thousands of American jobs. If enforced against companies across the country it will put at risk literally hundreds of thousands of jobs that would otherwise be created for America and for American workers.

I would be pleased to discuss any of these larger issues presented by the NLRB's complaint. I will begin, however, with the narrower question of the propriety of that complaint.

The 787 Dreamliner is the world's most efficient, technologically advanced passenger airplane in aviation history. It is also the fastest selling airplane in history. Almost 850 of this historic new airplane have already been ordered and demand for the airplane grows daily.

As you are aware, the Boeing Company is America's largest exporter and most of this enormous order book will be exported to countries and to customers around the world. At a time when American companies are locked in a fierce, global competition with

overseas competitors, the Dreamliner is a testament to the pre-eminent skill and promise of American manufacturing and the American worker.

It was this demand that promoted and necessitated Boeing's decision to build a second final assembly line. While Boeing's contract with the IAM gave the company the unfettered right to place new work wherever it chooses, we engaged in discussions with our union in an effort to reach agreement to locate the second line in Washington State. When these discussions were unsuccessful, Boeing made the considered business judgment to place the second line in South Carolina. Our decision was based on a host of business considerations including the desirability of geographic diversity for our commercial operations, the national security benefits of a multiple site airplane production capability, the comparative labor costs of the competing States, the significant financial incentives that Boeing was offered by the State of South Carolina and as well, production stability for the 787's global production system.

Boeing has since spent hundreds of millions of dollars to build this massive, state-of-the-art final assembly facility in South Carolina which promises to create thousands upon thousands of new jobs and in short order. It is the location of this billion dollar airplane production facility that the NLRB seeks to prevent.

The complaint filed by the board's acting general counsel alleges that Boeing located its facility in South Carolina in order to retaliate against the IAM for its history of repeated strikes. Of course this claim is preposterous on its face. No company commits billions of dollars of capital to build a massive production facility out of spite. And as I have been detailed in a separate letter to the general counsel, not one of the statements by our executives cited in support of this claim even remotely evidences such retaliation.

In an unprecedented remedy the complaint would order Boeing to locate and build its second final assembly line instead in Washington State and this, Senators, a year and a half after Boeing broke ground on its new facility and only weeks before the doors are to open for final assembly in the State of South Carolina.

The general counsel's complaint represents a radical departure from long and clearly established Federal labor law in numerous respects. The NLRB has never before charged a violation of this sort where union workers did not lose jobs, wages, benefits or otherwise have the terms and conditions of their employment affected in any way whatsoever. Since the decision to open the second line, Boeing has actually added over 2,000 union jobs in the State of Washington.

The board has never before charged an employer with engaging in conduct that is "inherently destructive," of union rights whereas here such conduct is expressly permitted in the collective bargaining agreement. The board has never before asserted that an employer's decision to anticipate the economic affect of potential future strikes constitutes an unfair labor practice. And the board has never before ordered an employer actually to construct or expand a facility in a particular State in what is frankly a breathhtaking substitution of the board for management in the running of an American company.

The implications of the NLRB's complaint are sweeping, not just for Boeing, not just for the States of Washington and South Carolina. If this complaint prevails it will effectively prevent employers with unionized workforces from expanding into Right-to-Work States, but it will also effectively prevent them from expanding into other non-Right-to-Work States. It will just as certainly discourage businesses from choosing to locate in non-Right-to-Work States in the first place. And it promises to quicken what is already a troubling flight of American business and American jobs out of this country and to countries overseas.

For all of these reasons this action should be a matter of utmost concern to all States, to all American businesses, to all employees, whether represented or not, and to both the Congress and the Administration. The NLRB's complaint is both legally unfounded and it is irresponsible. It should never have been brought. If it is allowed to proceed it will disserve the interest of both represented employees and unrepresented employees alike, it will disserve the companies and businesses that employ and hope to employ these workers, it will disserve non-Right-to-Work States as it will also disserve Right-to-Work States. And in the end this complaint will greatly disserve a country that is struggling to recover from prolonged recession and in desperate need of economic growth and the concomitant job creation that will power that recovery, if recovery is to come.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Luttig follows:]

PREPARED STATEMENT OF J. MICHAEL LUTTIG

Thank you Chairman Harkin, Ranking Member Enzi and members of the Senate Committee on Health, Education, Labor, and Pensions, for inviting me to testify before the committee today.

The complaint filed by Acting General Counsel Lafe Solomon of the National Labor Relations Board ("NLRB") against "The Boeing Company" that is at issue before the committee arises from Boeing's selection of North Charleston, SC, as its location for a second final assembly facility for the 787 Dreamliner. The Dreamliner is Boeing's revolutionary new wide-body commercial airplane that will be significantly more energy efficient than comparably sized airplanes, with advanced electric systems. The assembly of the 787 began (and continues) in Everett, WA, at the site where Boeing builds its other twin-aisle commercial airplanes, including the 747 and the 777. In response to extraordinary customer demand for the 787, Boeing decided in 2008 to create significant new production capacity by establishing a second 787 assembly line.

The decision to place the second line in North Charleston was one of the more important decisions in Boeing's recent history, and was made only after extensive deliberation by the company's senior management. Boeing was predisposed to place the second assembly line in Everett, where the company could draw upon a pre-existing, skilled workforce and benefit from the lower construction costs of expanding its existing footprint. But there were also good reasons to consider locating the second assembly line in North Charleston. South Carolina offers an exceptional business environment for manufacturing companies, which in this case included a significant package of financial incentives in its effort to persuade Boeing to build the new line there. Further, North Charleston would provide Boeing, for the first time, with desirable geographical diversity for its commercial airplanes operations. Boeing's desire to protect the future stability of the Dreamliner's global production system was also a significant factor in its decisionmaking process. An International Association of Machinists and Aerospace Workers ("IAM") strike in 2008 shut down 787 production, costing the company more than a billion dollars and damaging Boeing's reputation for reliability with its airline customers, suppliers, and investors.

Boeing's collective bargaining agreement with IAM authorizes it to place work at locations of its choosing. The Company, however, recognized the potential advan-

tages of locating the second line in Everett and invited the IAM to discuss the issue during the time that Boeing was evaluating several key issues that would ultimately frame the business decision as to where to place the second line. Boeing's intense discussions with the IAM continued for more than a month, and focused on Boeing's interest in obtaining a long-term contract, with a no-strike clause, which would ensure future production stability for the 787. The IAM, however, would not agree to a long-term extension of the collective bargaining agreement unless Boeing would agree to material changes in the contract, including significant guaranteed wage and benefit increases, an assurance that all future commercial aircraft work be placed in the Puget Sound area, and a commitment that Boeing would remain neutral in future IAM organizing efforts in other parts of the country. Those conditions were unacceptable to Boeing. At about the same time that the IAM provided Boeing with its final position, South Carolina confirmed Boeing's eligibility for several hundred million dollars in incentives were it to locate its second line in North Charleston. Weighing the business case presented by the two alternatives, Boeing decided to build the second line in North Charleston.

Contrary to what Acting General Counsel Solomon's complaint asserts, Boeing's conduct in selecting South Carolina for the second line did not violate the NLRA for two independently sufficient reasons. First, the law unambiguously requires a showing of an adverse employment action caused by the challenged action. Again contrary to what the acting general counsel says in the complaint, Boeing's decision concerned the placement of *new* work, not the movement of existing work to North Charleston. No IAM member in Puget Sound was (or will be) laid off, or saw (or will see) a reduction in his or her benefits, as a result of the company's decision. And Boeing's right to place new production capacity at a location of its choosing is not only permissible under settled Board doctrine; it is *expressly authorized* by Boeing's collective bargaining agreement with the IAM, and has been for over 45 years. Far from any IAM member suffering an adverse employment action from Boeing's decision to place the second line in Charleston, Boeing has already hired new employees and plans to hire additional employees in the Puget Sound area as the rate of production of the 787 and other airplanes increases over time. The new employees will become members of the IAM bargaining unit in the Puget Sound area. That even *more* IAM employees might have been hired, if all production were in Everett, could not possibly result in an adverse employment action with respect to any current IAM member.

Second, even if the Board were to conclude—contrary to clear precedent and supported by none—that locating the second 787 final assembly line in North Charleston somehow resulted in an adverse employment action, the Board would still be required to establish that Boeing's actions were “inherently destructive” of protected activity, or that Boeing was motivated by anti-union animus. Neither conclusion can plausibly be drawn from the facts. Boeing was predisposed to place the second line in Everett, and it would have done so had the business case been superior (or at least equal) to locating the new facility in North Charleston. While Boeing did consider the need for future 787 production stability in making its decision, that was only one factor in the decision process. Even if analyzed in isolation (which is certainly not the test), that business consideration was entirely consistent with settled precedent. The Board and the Supreme Court have long held that an employer is fully entitled to make business decisions that may blunt the effectiveness of future strikes. And, as Boeing's choice of production sites is explicitly allowed by the IAM's collective bargaining agreement, that consequence cannot reasonably be viewed as inherently destructive toward the Union.

Nor can it be credibly claimed that Boeing's actions and business decisions show anything resembling anti-union animus. Quite the contrary: The placement of the 787 second line was a multibillion-dollar decision—one that Boeing must live with for decades to come. The decision was about economic reality and the future of the company. Indeed, the company's decision to negotiate with the IAM as part of the decisionmaking process—a step the company was not required to take under its collective bargaining agreement—as well as Boeing's plan to expand work for IAM members in the Puget Sound area shows that Boeing was and is trying to work with the IAM, not to punish it, as the complaint incorrectly alleges.

For these reasons, which are discussed in detail below, the unfair labor practices alleged in the complaint make no sense on the facts and constitute a sweeping departure from clearly established law. The theory espoused by the complaint is tantamount to a claim that no American corporation may permissibly decide to locate future work at any location other than the one where union work is currently being performed, and never in a Right-to-Work State.

## I.

Among other products, Boeing makes large jet airplanes for customers around the world. Boeing is the Nation's largest exporter with \$29 billion in overseas sales in 2009.

Boeing's latest generation of commercial aircraft is the 787 Dreamliner. Built with lightweight composite materials, the 787 is one of the most fuel-efficient, technologically advanced passenger airplanes in the world. In addition to novel materials and technologies, the 787 is manufactured through a new production process involving a global supply chain. In 2003, when selecting the site for the first Dreamliner final assembly line, Boeing considered several possibilities. In addition to Everett, WA, where the first line ultimately was placed, Boeing seriously considered other locations, including the Charleston, SC area. In choosing the site for final assembly, Boeing considered a variety of factors, including construction costs, labor costs, supply chain logistics, and the overall business climate. After weighing these factors carefully, Boeing chose Everett, and began operation of the first Dreamliner final assembly line there in 2007.

The 787 became the fastest-selling airplane in aviation history. Since the 787 was first announced, customers have placed orders for almost 850 airplanes valued at a list price of up to \$150 billion. This has produced a backlog of orders extending through approximately 2020. At the same time, Boeing has faced challenges in the 787 program that have resulted in significant delays in the airplane's delivery. To execute on its large backlog for the 787, and in an attempt to mitigate the risk of additional delays to its customers, Boeing decided in 2008 to significantly expand 787 production capacity. To that end, it decided to establish a second final assembly line.

As it had done when establishing the first final assembly facility, Boeing considered multiple locations for the second line, including both Right-to-Work and non-Right-to-Work States. After extensive study of potential sites, the choice came down to the Puget Sound area, where all of Boeing's commercial aircraft are currently assembled, and North Charleston, where the aft and mid-body sections of the 787 are constructed and assembled and where, as a result, Boeing had already established a significant manufacturing footprint.

In making its decision, Boeing considered a wide range of factors designed to ensure the long-term competitiveness of the 787 program. In addition to construction and labor costs, logistics, and general business climate, Boeing factored in the particular economic incentives available in South Carolina, the benefits associated with geographic diversity in its final assembly capability, and its ability to maintain the stability of the 787 production system in the event of future strikes.

Boeing's concern for production stability was far from hypothetical. Boeing's workforce in the Puget Sound area is heavily unionized. The IAM represents approximately 25,000 Boeing employees in the Puget Sound region and has represented Boeing's production and maintenance workers there since 1934. All the assembly line workers at Boeing's various Puget Sound facilities are represented by the IAM. The IAM has struck Boeing seven times at its Puget Sound facilities since 1934, and four times since 1989. In 2008, when the IAM's last collective bargaining agreement expired, union members—including those assigned to the 787 production line—went on strike for 58 days.

At the time of the 2008 strike, the Dreamliner program was already 15 months behind schedule and under severe stress, in significant part because of "traveled work" from suppliers—work that should have been completed by suppliers before shipment, or was completed improperly, which Boeing then had to fix and address as an ongoing matter with the challenged suppliers. Given the stress on the production system, the 2008 strike had a cascading effect, delaying 787 construction and delivery far more than the 58-day duration of the strike. The 2008 strike also cost Boeing \$1.8 billion in lost revenues that year, and decreased all aircraft deliveries by 105 for 2008. Boeing's airline customers were upset, and in some cases publicly critical, including suggesting that the lack of production stability at Boeing could affect future orders.

For example, Virgin Blue Group CEO and Boeing customer Richard Branson succinctly described the consequences of the delay caused by the IAM strike as "catastrophic," and stated that "if there's a risk of further strikes in the future, he may not buy Boeing again." See Dominic Gates, *Boeing's top customer predicts big production cuts*, *Seattle Times* (Feb. 6, 2009). Mr. Branson explained the effect the strike had on his airline because planes were not available: "It was a horrible mess that Boeing was on strike. We messed up tens of thousands of passengers over Christmas. . . . We had to buy tickets on other airlines and scramble to get seats

which weren't available." *Id.*; see also Bill Virgin, *Boeing, unions should listen to Richard Branson*, *Seattle Post-Intelligencer* (Feb. 9, 2009).

In assessing its options for the second final assembly line, Boeing was legitimately concerned with, among other factors, the economic impact of potential future IAM strikes, the delivery delays that might be caused by such strikes, and the perceptions of its commercial airline customers that could affect future orders.

A.

In considering different locations for the additional assembly line (as well as sites for the second line's component and interior parts manufacturing facilities), Boeing relied on its right in section 21.7 of the collective bargaining agreement with the IAM. Section 21.7 has been in place in every collective bargaining agreement with the IAM for the last 45 years, since at least 1965. It gives Boeing the right to "**designate the work to be performed by the company and the places where it is to be performed**" (emphasis added), without any obligation to bargain with the IAM.

Boeing nevertheless negotiated with the IAM regarding placement of a second line in Puget Sound. Boeing recognized the benefits of locating the second line in the Puget Sound area, which included a skilled workforce, Boeing's deep roots in the area, and the lower construction costs of expanding an existing footprint. Notwithstanding the significant business climate, economic incentives, geographic diversity, and labor advantages associated with the potential North Charleston location, Boeing believed the balance would tip in favor of Everett if, among other things, it could stabilize 787 production with a longer-term collective bargaining agreement that would prevent strikes for an extended period. Boeing also wanted to slow the growth of future wage increases and benefit costs. As the President and CEO of Boeing Commercial Airplanes, Jim Albaugh, said in a later interview, his predisposition was to locate the expansion in Puget Sound, not Charleston.

Boeing first mentioned the second line to the IAM in the summer of 2008. In June 2009, Boeing notified the IAM that a decision on the placement of the second assembly line was forthcoming. The IAM agreed to discuss the issue, and negotiations began in earnest that August. Representatives of the IAM and Boeing met seven times between August 27 and October 21. Boeing made clear from the start that, regardless of the outcome, the issue needed to be resolved by October 15 because Boeing needed to start construction on the second line, whether in Everett or in North Charleston.

At the request of the IAM, neither party took notes of the extensive discussions, but the IAM did submit a written offer to Boeing that reflects the distance between the parties on key issues. The Union was willing to agree to extend the existing collective bargaining agreement only through 2020 (not 2022 as Boeing wanted), but set forth, among others, the following conditions:

- Boeing would have to select Everett as the site for the second 787 final assembly line.
- Boeing would have to notify the Union 6 months before making any decisions on where to place new production capacity for any "next generation" product. If the parties did not reach agreement at the end of the 6-month negotiation period, the IAM could terminate the collective bargaining agreement, relieving it of the no-strike obligation.
- Boeing could not move any bargaining unit work currently being performed by IAM members or contract with a supplier to perform the same type of work being performed by IAM members.

In addition, though not listed in the written set of conditions, the IAM's negotiators consistently insisted that any agreement would also require that Boeing remain neutral in all IAM organizing or decertification campaigns. Boeing told the IAM that it could not accept such significant changes to section 21.7 and its right to make major entrepreneurial-level decisions. The IAM's insistence on neutrality in organizing and decertification campaigns was also identified early on as a roadblock to moving forward. But Boeing continued to negotiate with the IAM, hoping to reach a mutually acceptable agreement. As Boeing CEO Jim McNerney said in a contemporaneous interview, Boeing's goals remained production stability and a slowing in wage growth. Mr. McNerney also said that the tone of the then-ongoing negotiations was constructive.

As the October 15 deadline for making the final decision approached, Boeing agreed to an IAM request for a 1-week extension of the deadline so that the Union could submit its "best and final offer." On October 20, the eve of the last scheduled meeting, Boeing's representatives made specific suggestions about what the company would likely accept, so as to better inform the IAM in preparing its proposal. Among other things, Boeing's representatives suggested that the company could ac-

cept (1) a guaranteed annual wage increase of 2 percent; (2) a cost-of-living formula of 1.5 percent; (3) cost sharing of increase in health care costs; and (4) a 2 percent annual increase in pension benefits. Boeing's representatives stressed to their IAM counterparts that the company could not accept "neutrality" or a "guarantee" to locate future work in the Puget Sound area.

The IAM's final offer came the next afternoon, October 21. In exchange for extending the existing contract to 2020 (again, not 2022, as Boeing wanted), the IAM continued to demand that (1) existing bargaining unit work could not be moved; (2) Boeing would be precluded from setting up additional or "dual" sources for 787 component production and support; and (3) the IAM would have the right to terminate the collective bargaining agreement and strike if new work were not placed in the Puget Sound area. Boeing's nationwide neutrality in any future union organizing campaigns was an "absolute necessity," according to the IAM.

The IAM's offer fell short on other grounds as well. Among other things, the IAM required three lump-sum bonuses of \$5,000 or 10 percent of earnings, whichever was greater, in 2009, 2013, and 2016. It requested an annual pension increase of \$2.50 per month for the life of the agreement, as well as general wage increases of 3 percent on top of cost-of-living adjustments.

B.

Boeing made its decision concerning the placement of the second line in late October 2009. Given its significance, the decision involved the most senior members of management undertaking a thorough comparison of the business cases for each site—Everett and North Charleston. The company's inability to reach agreement with the IAM on a mutually agreeable approach to ensure long-term production stability in Everett was an important consideration in the discussion, and it made the overall business case for North Charleston more persuasive, as did the general business climate, the desire for geographical diversity in final assembly, labor costs, and South Carolina's willingness to make available hundreds of millions of dollars of incentives. After considering those factors and others, the company chose North Charleston. Boeing publicly announced its decision on October 28, 2009.

Shortly after making its announcement, Boeing began to build the second assembly line in North Charleston on an aggressive construction schedule, and to hire workers to staff it. This was one of the most massive construction projects in the country in recent years. On November 6, 2009, Boeing awarded a contract to BE&K Building Group and Turner Construction to design, build, and deliver the 1.2-million square foot North Charleston assembly line facility, which would include the final assembly line, a delivery center, a welcome center, a central utilities building, and a support building.

Boeing estimates that it has committed over \$1 billion to date to its North Charleston operations. Construction on the second final assembly line is now virtually complete. Boeing expects to start 787 production in North Charleston by July 2011, and to deliver the first airplanes in 2012. Well over 1,000 employees have already been hired to work in the North Charleston final assembly facility and plans are in place to hire more in the next few months. A large team of managers and employees—many of whom have moved to the North Charleston area from other parts of the country—have been working tirelessly to staff the new facility.

C.

In March 2010, following a delay of 5 months after Boeing announced its decision, and with construction in Charleston well underway, the IAM filed an unfair labor practice charge with the Board. The IAM alleged that Boeing had, *inter alia*, violated section 8(a)(3) by "beginning the process of transferring work . . . to a new plant employing non-union workers in retaliation for bargaining unit workers' protected concerted activity." In late 2010 and early 2011, Boeing representatives had discussions with NLRB officials, including Acting General Counsel Lafe Solomon, about the charge. Although Boeing believed it had reached an agreement with Solomon to resolve the matter, the acting general counsel ultimately directed that a complaint be issued.

On April 20, 2011, the complaint was issued, charging that Boeing had violated Section 8(a)(3) of the National Labor Relations Act.<sup>1</sup> The complaint focused on Boeing's allegedly unlawful actions in deciding to place its second assembly line in North Charleston, as opposed to the Puget Sound area, and in describing that deci-

<sup>1</sup> The complaint also claimed that Boeing had violated Section 8(a)(1) of the NLRA, alleging the Boeing executives made "coercive" statements to IAM-represented employees, threatening to remove work from the Puget Sound area because employees had struck in the past, and that the company would move work in the event of future strikes.



sion to employees. According to the complaint, Boeing actions were taken in retaliation for IAM-represented employees for having gone on strike in 2008 and for having the continued ability to go on strike in the future.

The complaint alleged that Boeing had “decided to transfer” its second Dreamliner production line and its sourcing supply program “because [IAM-represented] employees assisted and/or supported the Union by, *inter alia*, engaging in the protected, concerted activity of lawful strikes.” *See id.* at ¶¶ 7–8. According to the complaint, these actions violated Sections 8(a)(3) of the Act by “discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization.” *See id.* at ¶ 10. The complaint found the company’s actions “inherently destructive” of employees’ rights. *See id.* at ¶ 7–8. *See id.* at ¶ 12. The key remedy sought by Acting General Counsel Solomon was “an Order requiring [Boeing] to have the [IAM] operate [Boeing’s] second line of 787 Dreamliner aircraft assembly production in the State of Washington.” *See id.* at ¶ 13(a).

## II.

Before exposing the fatal legal defects of the complaint, a correction of the factual errors, mischaracterizations, and misquotations upon which the complaint is based is in order.

### A.

As an initial matter, the complaint repeatedly alleges that Boeing “removed work” from Puget Sound (¶ 6), “decided to *transfer* its second 787 Dreamliner production line” to South Carolina (¶ 7(a)), and “decided to *transfer* a sourcing supply program” to South Carolina (¶ 8(a)).

In fact, no work was “removed” or transferred” from Everett. The second line for the 787 is a new final assembly line. As it did not previously exist in Everett or elsewhere, the second assembly line could not have been “removed” from Everett, or “transferred” or otherwise “moved” to North Charleston. Simply put, the work that is and will be done at Boeing’s North Charleston final assembly facility is new work, required and added in response to the historic customer demand for the 787. No member of the IAM in the Puget Sound area has lost his or her job, or otherwise suffered any adverse employment action, as a result of the placement of this new work in the State of South Carolina.

The Regional Director, whose office has been tasked with prosecuting this case, understands that, and has accurately and publicly described the matter. As the *Seattle Times* reported last year, “Richard Ahearn, the NLRB regional director investigating the complaint, said it would have been an easier case for the union to argue if Boeing had moved existing work from Everett, rather than placing new work in Charleston.” Dominic Gates, *Machinists File Unfair Labor Charge Against Boeing over Charleston*, *Seattle Times*, June 4, 2010.

Since no work was “transferred,” NLRB officials now appear to be transforming the theory of the complaint, via public statements, to say that the building of airplanes in South Carolina constitutes “transferred” or “removed” work because Boeing committed to the State of Washington that it would build all of the company’s 787s in that State. For example, on April 26, an NLRB spokeswoman, Nancy Cleeland, apparently told a news organization that,

“The charge that Boeing is transferring work away from union employees stems from the company’s original commitment to the State of Washington that it would build the Dreamliner airplanes in this State.”

The premise underlying that assertion—that Boeing committed to the State of Washington to build all of the company’s 787s there—is false. Boeing fully honored all of its contractual commitments to the State of Washington long before the decision to locate the company’s new production facility in South Carolina. The notion that Boeing had somehow committed to Washington State to build all 787s in that State is neither mentioned nor even suggested either in the IAM’s charge or in the complaint.

### B.

The complaint alleges that senior Boeing executives showed a purpose to “punish” union employees and to “threaten” them for their past and possible future strikes. These allegations and other public statements by NLRB officials to the same effect, which are based on misquotations, selective quoting, and mischaracterizations of statements by Boeing executives, are groundless.

For example, the complaint alleges that Boeing Commercial Airplanes CEO Jim Albaugh stated that Boeing “decided to locate its 787 Dreamliner second line in

South Carolina because of past Unit strikes, and threatened the loss of future Unit work opportunities because of such strikes.” (Complaint ¶16(e).) In addition, the NLRB’s Web site offers a “fact sheet” that quotes Mr. Albaugh as saying “the overriding factor” in transferring the line was work stoppages. In fact, Mr. Albaugh’s full statement shows that he was referencing two “overriding factors,” only one of which was the risk of a future strike, and that far from seeking to punish the union, Mr. Albaugh’s predisposition was to place the second line in Washington State.

Mr. Albaugh’s full statement on this point was:

I think you can probably say that about all the States in the country right now with the economy being what it is. But again, the overriding factor was not the business climate and it was not the wages we’re paying people today. It was that we can’t afford to have a work stoppage every 3 years. *We can’t afford to continue the rate of escalation of wages as we have in the past. Those are the overriding factors. And my bias was to stay here but we could not get those two issues done despite the best efforts of the Union and the best efforts of the company.*

The italicized sentences, omitted from the complaint and the NLRB’s Web site, are critical omissions that directly contradict the NLRB’s apparent theory of this case. No reasonable reader of Mr. Albaugh’s interview would depict it as part of a “consistent message” that Boeing sought to “punish” its union employees. When not misquoted, it is apparent from the interview statement that if Mr. Albaugh had a bias, it was in favor of Puget Sound as the place for the second assembly line; that the company’s preference was to locate the new line in Everett; and that both the company and the union made good-faith efforts to accomplish that shared objective. On these facts, it is not even arguable that Mr. Albaugh’s statement constitutes a “message” of “punishment” to the union for past or future strikes.

The complaint also attempts to depict a statement during an earnings call by Jim McNerney, Boeing’s chairman and chief executive officer, as a threat to punish union employees. The complaint alleges that Mr. McNerney “made an extended statement regarding ‘diversifying [Boeing’s] labor pool and labor relationship,’ and moving the 787 Dreamliner work to South Carolina *due to* ‘strikes happening every 3 to 4 years in Puget Sound.’” (Complaint ¶16(a) (emphasis added).)

He did not say that at all. First, Mr. McNerney was *not* making an “extended statement” about *why* Boeing selected North Charleston; indeed, the decision about where to locate the new line had not even been made at the time he participated in that earnings call. He was responding to a reporter’s question about the cost of potentially locating a new assembly line in North Charleston, and he answered only the question regarding comparative costs that was asked. Thus, in the passages misquoted and mischaracterized in the complaint, he discussed the relative costs of a new facility in a location other than Everett, versus the potential costs associated with “strikes happening every 3 to 4 years in Puget Sound.” He did not say, as the NLRB alleged, that Boeing selected North Charleston “due to” strikes.

Nor did Mr. McNerney remotely suggest that what would later turn out to be the decision to open a new line in North Charleston was *in retaliation* for such strikes. His answer simply cannot be cited in support of the complaint’s legal theories, much less in support of the sweeping statement made by Mr. Solomon to the *New York Times* about Boeing’s “consistent message” that the company and its executives sought to “punish” their union employees.

Finally, Mr. McNerney’s answer to a reporter’s question was not “posted on Boeing’s intranet Web site for all employees,” much less posted for the purpose of sending an illegal message under the NLRA, as the complaint incorrectly and misleadingly suggests.

Nor do any of the other statements cited in the complaint remotely suggest an intent to “punish” the company’s unionized employees. Quite the contrary: these statements show, at most, that the company considered (among multiple other factors) the risk and potential costs of future strikes in deciding where to locate its new final assembly facility. In fact, Boeing reached out to the IAM in an effort to secure a long-term agreement that would have resulted in placing the second line in Everett. Although those negotiations were not successful, that effort completely undermines the proposition that Boeing executives sent a “consistent message” that Boeing’s decision was intended to “punish” the union for past strikes.

C.

The complaint seeks an order directing Boeing to “have the [IAM] operate [Boeing’s] second line of 787 Dreamliner aircraft assembly production in the State of Washington.” Notwithstanding that, the NLRB has said on its Web site that its complaint would not have the effect of closing the North Charleston facility. As a practical matter, however, if the Board were to order Boeing to produce in Everett

the additional three 787s per month that are planned for Charleston, that would of course require the production of all planned 787 capacity in Everett, leaving North Charleston with nothing to do.

### III.

The principal allegations of the complaint and the significant remedy sought—that the second line should be moved to Everett, WA—pertain to the claim that Boeing violated Section 8(a)(3) of the NLRA. To establish a section 8(a)(3) violation, the Board must, under its own precedents as confirmed by the courts, show:

- (1) that “an employee’s employment conditions were adversely affected;” and
- (2) that the adverse employment action “was motivated by” the employee’s “union or other protected activities.”

*Wright Line*, 251 N.L.R.B. 1083, 1083 (1980); *see also Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C. Cir. 2003). As a factual and legal matter, it is not even arguable that these elements can be established here.

#### A.

An adverse employment action is one that discriminates in the “hir[ing] or tenure of employment or any term or condition of employment.” *See* §8(a)(3). An employer’s conduct constitutes an “adverse employment action” only if it “actually affect[s] the terms or conditions of employment.” *NLRB v. Air Contact Transport Inc.*, 403 F.3d 206, 212 (4th Cir. 2005); *Lancaster Fairfield Community Hosp.*, 311 N.L.R.B. 401, 403–04 (1993).

An employer’s decision to build a new factory—unaccompanied by layoffs, a reduction in wages or benefits, or another change in working conditions at existing facilities—does not constitute an adverse employment action and thus cannot form the basis for a section 8(a)(3) complaint. *See, e.g., Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 (11th Cir. 1982) (“A runaway shop exists when an employer, in retaliation against union activities, transfers work from the closed facility to another plant or opens a new plant to replace the closed plant. If no transfer of work has taken place . . . then there has been no unfair labor practice.”); *see also* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 Tex. L. Rev. 921, 943 n.80 (1993) (“I have been unable to locate any decisions holding that a withholding of capital investment from a union plant, or a decision not to place new or expanded operations at the plant, was discriminatory under §8(a)(3). It appears to be necessary under Board law to show that existing unit work was eliminated, subcontracted, or relocated.”).

No IAM employees were or will be laid off, demoted, relocated, suffer a reduction in wages, benefits, or work hours, or have their job duties changed as a result of the decision to locate the second 787 assembly line in North Charleston. And the complaint does not allege that any of those adverse employment actions have happened or even that they are likely to occur in the future. The lack of any adverse employment action against IAM members is fatal to the section 8(a)(3) claim. The NLRA, by its plain terms, does not grant unions the unbargained right to have potential new work put in a unionized plant. Neither a court nor the Board has ever held otherwise.

Nor can an “adverse employment action” be based upon some sort of “diffuse” injury to a union, such as “chilling” support for the union, as opposed to a tangible injury to identifiable employees. There is simply no precedent for that novel theory suggested in the complaint. Indeed, such a standard would effectively eliminate the adverse-action element of a section 8(a)(3) violation, and would allow the Board to find an unfair labor practice based upon *any* employer action—even actions that are expressly permitted by the collective bargaining agreement, and harm no employees—that may nevertheless have the *effect* of reducing union bargaining power, or have incidental effects on unionization.

In addition to being contrary to the plain language of the statute—which speaks in terms of concrete enumerated actions—the interpretation suggested would effectively conflate the “adverse action” requirement with the provision’s distinct motive element. If that were permitted, essentially any action that is even arguably adverse to the union’s interests could be dubbed an unfair labor practice. “Chill” is plainly not a substitute for the threshold adverse action element. *See Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

As the D.C. Circuit has explained, the fact that an employer’s action may chill or diminish a union’s relative bargaining power “can have *no bearing* on the lawfulness of the employer’s [action]” under section 8(a)(3) because “it is not the role of the NLRB, and certainly not that of the courts, to regulate the bargaining power of the parties to a labor dispute.” *Int’l Bhd. of Boilermakers, Local 88 v. NLRB*, 858

F.2d 756, 766 (D.C. Cir. 1988) (emphasis added) (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309 (1965)). Were it otherwise, companies would have to be neutral regarding unionization (which is not the law), neutral towards unions in selecting job sites (which is not the law), and neutral regarding the effects of future strikes (which is not the law).

Accordingly, Boeing's decision to place an additional 787 final assembly facility in Charleston was not an adverse action under the plain language of the statute and clearly settled law.

#### B.

Separate and apart from showing an adverse action, the Board also must establish either that (1) Boeing's choice of North Charleston was "inherently destructive" of protected activity, or (2) was motivated by anti-union animus. The acting general counsel's complaint fails here, as well. Boeing's decision to place the second line in North Charleston was based upon the company's overall assessment of the business cases for each of the two locations, and was made only after extensive *voluntary* negotiations with the IAM. Boeing's desire to maintain long-term production stability for the 787 was a significant consideration, but there were other important factors, including a large economic incentive package. There is simply no case to be made for a single-minded focus upon the IAM, much less a single-minded, vindictive focus to punish the Union.

Even if it had been the case that Boeing's decision had been based solely on its concern regarding future strikes—for which there is not a single shred of evidence—such consideration would not be unlawful or even illegitimate. To the contrary, it is established law that an employer has the right to make legitimate business decisions in an effort to limit the impact of future strikes, and such decisions are—as a matter of law—not "inherently destructive" of protected activity and do not provide evidence of any "anti-union animus." Further, there is no legitimate claim that Boeing violated the collective bargaining agreement. Thus, even if the focus were limited solely to how Boeing factored into its decision the potential economic impact of future union actions, there would have been no resulting violation of the NLRA.

#### 1.

To the extent that Boeing considered labor stability issues in its decisionmaking process, it is beyond question that, as a matter of law, such consideration does not constitute "inherently destructive" conduct. An employer's conduct qualifies as inherently destructive only if it "carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co.*, 380 U.S. at 311–12. The conduct must be "so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act." *NLRB v. Brown*, 380 U.S. 278, 286 (1965). Such cases are "relatively rare." *Boilermakers*, 858 F.2d at 762 (quoting *Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979)). Where, as here, the governing collective bargaining agreement expressly permits the challenged action, an exercise of that agreed-upon contract right by the employer cannot be "inherently destructive" of protected rights.

The Supreme Court has made it clear that there is a "wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership." *Am. Ship Building*, 380 U.S. at 311 (citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)). And the Court in *American Ship Building* also made clear that,

"there is nothing in the [NLRA] which gives employees the right to insist on their contract demands, free from the sort of economic disadvantages that frequently attend bargaining disputes."

380 U.S. at 313. Indeed, the Act "do[es] not give the Board a general authority to assess the relative economic power of the adversaries and to deny weapons to one party or the other because of [the Board's] assessment of that party's bargaining power." *Id.* at 317. But that is precisely what the complaint against Boeing seeks to do, overturning 45 years of policy and precedent. In order to protect the right of IAM employees to strike to obtain their collective agenda, Acting General Counsel Solomon would deny to Boeing well-established and legitimate defensive actions long available to employers.

Boeing's decision to put the second 787 line in North Charleston, grounded in part in an interest to mitigate the effects of a future IAM strike on 787 production, is precisely the sort of defensive employer action that does not violate section 8(a)(3). In *Brown*—still a leading case in this area—the Supreme Court held that there was no "inherently destructive" conduct where an employer, in response to a strike,

locked out its regular employees and used temporary replacements to carry on business. In discussing the legitimate defensive measures that an employer may take, the Court noted “the Board[’s] conce[ssion] that an employer may legitimately blunt the effectiveness of an *anticipated* strike” by, among other tactics, “transferring work from one plant to another, even if he thereby makes himself ‘virtually strikeproof.’” 380 U.S. at 283 (emphasis added). The Court repeated that rule in much the same words in *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 416 n.9 (1982) (“[An employer can] try to blunt the effectiveness of an anticipated strike by,” *inter alia*, “transferring work from one plant to another.”).

If “transferring work from one plant to another” is *not* “so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act,” then choosing to locate *new* work at one site (North Charleston), *without* reducing work at another (Everett)—and in fact increasing work at that other site—could not possibly be “inherently destructive” either. See *Brown*, 380 U.S. at 284, 287.

It comes as little surprise, then, that Boeing’s actions do not fall within the two established categories of “inherently destructive” conduct. The first involves clear-cut discrimination between workers “based on their participation (or lack of participation)” in protected union activity. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 & 749 n.14 (7th Cir. 1989) (collecting cases). Boeing plainly did not apply differential punishments or rewards to Puget Sound area employees based on their varying degrees of union activity.

A second, narrower category of inherently destructive action involves conduct that “discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees.” *Boilermakers*, 858 F.2d at 764. There is no authority for treating an employer’s exercise of its contractual right to add new production wherever it chooses as “inherently destructive” under that category—and considerable contrary authority. Indeed, under the Board’s own decision in *Milwaukee Spring II*, 268 N.L.R.B. 601 (1984), *enfd.*, *Auto Workers v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985), even a work *relocation* is not “inherently destructive” of protected rights if consistent with the employer’s rights under the governing collective bargaining agreement. The acting general counsel’s complaint would set aside that longstanding precedent as well.

## 2.

While Boeing’s decision was based on a number of factors, including business climate, incentives, geographical diversity, labor and construction costs, and production stability, to the extent the potential impact of future strikes was considered among those factors, the facts here do not support a claim that the company’s decision was motivated by anti-union animus. As previously discussed, the statements of Boeing executives cited in the complaint fall far short of evidencing anti-union animus, however, much of the complaint takes those statements out of context, misquotes others, and selectively quotes still others. Statements of concern about future strikes are simply not evidence of anti-union animus as a matter of law. And neither do these statements reflect a backward-looking desire to punish the IAM for the 2008 strike. Instead, these statements reflect Boeing’s forthright acknowledgment that production setbacks caused by strikes are economically damaging to its aircraft manufacturing operation, and that its economic need—and its customers’ demands—for future production stability contributed to its choice of North Charleston, after the IAM’s demands in exchange for a long-term extension of the existing collective bargaining agreement proved unacceptable. Boeing operates in a highly competitive industry that runs on long-term production commitments. That business reality was one consideration in Boeing’s decision to build a new production facility in a location that will allow some 787 production to continue during any future IAM strike in Everett.

That Boeing considered as one part of its business decision the benefits of improving production stability by avoiding strikes is not improper anti-union animus. Both Supreme Court precedents and the consistent position of the Board since 1965 make plain that an employer’s interest in avoiding or mitigating the economic harm caused by anticipated strikes is a legitimate business objective. In its brief to the Supreme Court in *American Ship Building*, the Board said that an employer’s decision “transferring work from one plant to another” was a “legitimate defensive measure[.]” even if doing so makes the employer “virtually ‘strikeproof’ during the period following the expiration of a contract.” Brief for the NLRB at 17, *Am. Ship Building Co. v. NLRB*, 380 U.S. 300 (1965) (No. 255). As previously noted, the Court in *Brown* embraced and adopted the Board’s view, 380 U.S. at 283, as the Court did again in *Charles D. Bonanno Linen Service, Inc.*, 454 U.S. at 416 (employers

may legitimately “try to blunt the effectiveness of an anticipated strike”). See *Birkenwald Distributing*, 282 N.L.R.B. 954 (1987) (employer motivation to avert economic damage caused by anticipated strike was legitimate); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268, 285 (1951) (“[An employer] has, and needs, the right to protect himself by reasonable measures from harmful economic or operative consequences of a strike.”). The complaint filed by the acting general counsel simply ignores the Board’s own precedents and the controlling Supreme Court decisions.

Boeing’s public statements explaining its reasons for choosing North Charleston are consistent with legitimate defensive actions that the courts and the Board have held that employers may take without violating section 8(a)(3), and are protected statements under Section 8(c) of the NLRA, not to mention the First Amendment.<sup>2</sup> And those statements cannot be viewed as pretexts for anti-union motivation. It is simply implausible, on both economic and labor-relations grounds, that Boeing would undertake a multi-billion-dollar expansion in North Charleston simply to retaliate against the IAM for *past* strikes, rather than to improve *future* production stability for the 787. Moreover, Boeing’s decision did not involve a transfer of *any* work from its existing operations and by no means made the company “strikeproof.” Boeing remains heavily invested in, and committed to, the Puget Sound area, where all of its commercial aircraft are currently assembled, and where the IAM represents 25,000 members of the bargaining unit.<sup>3</sup>

Indeed, that Boeing reached out to the IAM to try to negotiate a long-term contract before it made its decision as to where to place the new 787 assembly line wholly undermines any suggestion that the company wanted to punish the IAM. Significantly, the complaint fails to mention Boeing’s efforts in that regard, although the acting general counsel and his staff were fully aware of those negotiations. First, Boeing had no obligation to negotiate with the IAM about the location of the second final assembly line; Section 21.7 of the collective bargaining agreement gave Boeing the unilateral right to decide where the work would be placed. In fact, Boeing’s decision to invite the IAM to negotiate, even when it was not contractually required to do so, raises an almost irrefutable inference of *good faith* and a desire to cooperate with the Union. See *Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 887 (D.C. Cir. 1978) (“[T]he fact that the companies informed the union that they were considering leasing and ‘invited discussion before their final decision’ evinces a greater commitment on their part to the collective bargaining process than was reflected by the Union.”). Even if Boeing had not negotiated with the Union and had merely exercised its rights under the collective bargaining agreement, and following its decision, simply announced it was locating a second line in North Charleston, that alone would not even arguably be evidence of punishment.

Second, Boeing’s conduct during the course of the negotiations with the IAM similarly does not support an inference of animus. Boeing could not reach agreement with the IAM due to the Union’s demands for, among other things, a neutrality agreement and a modification of section 21.7 that would require Boeing to place future work in Puget Sound or face a perhaps-crippling strike by the IAM. Because of the timeline for reaching a decision on the second line, Boeing reasonably asked the IAM for its last, best offer and even gave it additional time to make that offer. That Boeing did not accept the IAM’s best and final offer was simply Boeing’s exercise of its right not to agree to a tradeoff that was materially adverse to the interests of its shareholders, customers, and employees.

No inference of anti-union animus can plausibly be drawn from the fact the IAM was unsuccessful in its negotiation to have the second 787 assembly line established in Puget Sound. At most, an inference can be drawn that Boeing was only willing to agree to place the second line in Everett on terms it found acceptable. But where, as here, “the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of §(a)(3) is shown.” *Am. Ship Building*, 380 U.S. at 313. Put another way, the NLRA is not so slanted in favor of unions that a union’s failure to achieve its goals at the bargaining table establishes that the employer was acting from anti-union animus, rather than for legitimate business rea-

<sup>2</sup>Those statements are neither threats nor attempts to coerce or restrain IAM members from engaging in protected activities and do not violate section 8(a)(1), notwithstanding the complaint’s contrary allegations.

<sup>3</sup>The IAM voted to strike Boeing’s St. Louis facility, and other unions have struck Boeing’s other facilities, since Boeing announced its decision to place the second line in North Charleston. Boeing is unaware of any objective or subjective evidence of decreased interest in union activity by employees at Puget Sound or elsewhere. Indeed, the IAM’s membership in the Puget Sound area is about 25,000 strong, with hiring continuing, and the bargaining unit works on building component parts for and assembling Boeing’s 737, 747, 757, 767 and 777 airplanes. In those circumstances, even without control of *all* Dreamliner production, the IAM’s bargaining power remains massive.

sons. And that is true even if the failure to achieve a favorable result lessens the union's bargaining power. As the D.C. Circuit explained on this very point:

It is clear . . . that any effect on the parties' relative bargaining power—so long as it does not substantially impair the employee's ability to organize and to engage in concerted activity—is simply outside the scope of proper inquiry under sections 8(a)(1) and (3).

*Boilermakers*, 858 F.2d at 765. The notion that Boeing's contractually-sanctioned decision—an action that does not affect any terms or conditions of a current IAM member's employment—could somehow cause “substantial impairment” of the IAM's 25,000-strong Puget Sound bargaining unit's ability to organize and function, is simply not credible.

Boeing considered many factors in making its decision. And Boeing's taking into account the economic effects of a potential future strike, as one element of that analysis, was entirely proper under the law. Boeing considered the importance of ensuring stable production of the 787, not whether the IAM should be punished for past conduct.

#### IV.

Boeing's business decision to construct a new 787 production facility in Charleston was based on a number of legitimate considerations, all of which were plainly permissible under the relevant collective bargaining agreement and established law. To the extent Boeing considered the possibility of future strikes by the IAM among many other factors, Boeing was entitled to rely on the provisions of its contract with the IAM and settled precedent under the NLRA in making an economic decision where to place the second 787 final assembly line.

At bottom, the acting general counsel is seeking to change radically the balance between management and unions struck by the NLRA, as the Act has been interpreted for the last 75 years. He seeks to change the law so that what a union cannot achieve at the bargaining table it will be able to achieve through the Board. But the Act simply does not provide the Board or the courts with the authority to “assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [the Board's] assessment of that party's bargaining power.” *Am. Ship Building*, 380 U.S. at 317. To do so would amount to “the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.” *Id.* at 317–18.

Again, thank you. I will be glad to answer any questions the committee may have.

The CHAIRMAN. Thank you, Mr. Luttig.

And now our final witness is Ms. Sarah Fox, legal counsel to the American Federation of Labor—Congress of Industrial Organizations, AFL–CIO. Prior to her employment at the AFL–CIO she served for 5 years as a member of the National Labor Relations Board, also previously served on the staff of this committee under Chairman Kennedy.

Ms. Fox, welcome back, I guess, and in a different capacity. Again, your statement will be made a part of the record in its entirety and if you could sum it up we would appreciate it.

#### **STATEMENT OF SARAH M. FOX, LEGAL COUNSEL, AFL–CIO, BETHESDA, MD**

Ms. FOX. Thank you. Mr. Chairman and members of the committee, as you stated, for 5 years, from 1996 through 2000 I had the privilege of serving as a member of the National Labor Relations Board and to be part of the administration of that act, which is a statute whose passage, as several of the witnesses have testified here, really played an instrumental role in the subsequent creation of a strong and vibrant middle class.

I am going to talk today about really what is the continuing relevance of those rights and the National Labor Relations Act to the effort to restore that class. And I want to start with a little bit of legislative history. And it is a very interesting legislative history

and part of the history of this committee as well, because Senator Wagner who was the chief sponsor of the National Labor Relations Act was a member of this committee and the committee did a lot of work in developing that legislation.

There are a lot of parallels between the situation, the economic situation the country was facing then, and the current situation. Massive—it was the middle of the Great Depression, massive unemployment and millions of workers were out of work and wages were depressed. It was then the case, as it is now, that there was a widespread recognition of what you have talked about here which is that prospects for economic recovery were being hindered by insufficient consumer demand which was attributable to the lack of consumer purchasing power.

When Congress enacted the NLRA it did it in part as a very intended response to the economic crisis that reflected a congressional belief that equalizing bargaining power between workers and employers, through the practice of collective bargaining would enable workers to obtain fairer wages and a better standard of living which would in turn spur greater business activity and restore what Congress at that time would refer to as the flow of commerce. So, it is important to keep in mind that in enacting this legislation, the 1934–35 Congress sought, not just as a benefit to individual workers, but part of a positive national economic strategy. And I think that motive is as relevant today as it was then. And it is reflected, if you read the preamble of the National Labor Relations Act specifically, those concerns and that intention to raise wages, raise income, and equalize bargaining power.

We saw, after the war in particular, millions of workers join unions and through the exercise of their right to collective bargaining that had been created by this act made steady improvements in their wages, in their working conditions, in benefits which really, for decades, put them in the vanguard of a newly advancing and expanding middle class. And not only as Secretary Reich has alluded to, not only did union members benefit but because other employers also increased their wages to keep up with these trends that were being set, it benefited millions of nonunion workers as well. Many of the benefits that became standard offerings for non-union employers, healthcare, retirement, pension plans, began as negotiated benefits at the bargaining table and were key to this.

And of course today we see, after decades of decline, those things going away. We have, as Secretary Reich has said, the majority of workers experiencing stagnant or declining wages, we see the percentage of workers who have healthcare benefits or pension benefits through their employment decreasing. And we see, at the same time, just astounding increases in inequality to the point, as Secretary Reich was saying that now the top 1 percent of income earners have captured almost a quarter of national income.

It is against that backdrop that I think we need to reassess the importance of the act and put a particular emphasis on the protection of those rights. This has been a subject of a lot of debate in this Congress, in the context of the Employee Free Choice Act. I believe that compelling arguments have been made for passage of that act, and I am not going to go through them again today. But I do think that the very least we can expect is that those rights



that do exist within the tools that the National Labor Relations Board as an agency has, should be respected and that we have every right to expect that they will be vigorously enforced. Those rights are the right to freedom of association, the right to freely form unions and most importantly and significantly, the right to engage in collective bargaining for purposes of affecting wages and working conditions.

For that reason, I think I personally find it disturbing and I think many do, to see the kinds of attacks that there have been recently on actions by the National Labor Relations Board in carrying out what are their statutory responsibilities with regard to enforcement of the act. And since Judge Luttig is here today to talk about the recent issuance of the Boeing complaint, I want to focus a little bit on that and the particular firestorm that that has created.

As I understand it, the facts are that in April of this year the National Labor Relations Board, through its acting general counsel, issued a complaint against Boeing which alleged that Boeing has transferred work from its facility in the State of Washington—made a decision to transfer this work to the facility in the State of South Carolina because the employees at the—as a motivating factor that employees at the State of Washington facility had repeatedly exercised their statutorily protected right to engage in strikes.

To explain a little about how the agency works, it is really a two-headed agency. And it consists of, and it is run by six presidentially appointed persons. One end of the agency is the five member National Labor Relations Board which really acts as kind of a court in a quasi-adjudicative way to decide cases. At the other end of the agency is a general counsel who acts really as the prosecutor. He cannot initiate any kind of prosecution on his own, any enforcement action that he takes is initiated in the first instance through charges that people can file with the board. They come to the regional offices, they are investigated by personnel working under the authority of the general counsel. And if that investigation, as a result the general counsel finds reasonable cause to believe that there has been a violation of the act, he issues a complaint. He becomes the prosecutor, through his staff, of that complaint. It is tried before an administrative law judge and if either party is unhappy with the decision of the administrative law judge they have an automatic appeal to the full five member board in Washington and from there an automatic right of appeal to the Courts of Appeals. So, in that situation this is what we are facing now.

I think it is important to note that there is really nothing extraordinary about this complaint. There is a long history of cases before the board that say that an employer may not move work from one facility to another in response to the exercise of protected activity. That is exactly the allegation here. It is an allegation that the work was transferred. And the standard remedy for this—if it is found that there has been a violation—is to instruct the employer to return the work.

The CHAIRMAN. Yes. Thanks. Thank you.

Ms. FOX. And, I think I just will conclude with that.

[The prepared statement of Ms. Fox follows:]

PREPARED STATEMENT OF SARAH M. FOX

My name is Sarah Fox and I am legal counsel to the AFL-CIO. For 5 years, from 1996 through 2000, I was privileged to serve as a member of the National Labor Relations Board and to participate in the administration of the National Labor Relations Act, a statute whose passage in 1935 contributed significantly to the creation and growth of a strong American middle class. I appreciate the opportunity to testify today regarding the rights established in the NLRA and the continuing relevance of those rights to any effort to reverse what has now been a decades-long slide in the fortunes of the middle class.

Let me begin with some comments about the context in which the NLRA was enacted and the significance of that context in light of present day circumstances. In 1935, the country was of course in the throes of the Great Depression. Then, as now, millions of workers were unemployed and wages were depressed. Then, as now, prospects for economic recovery were hindered by insufficient consumer demand attributable to the lack of consumer purchasing power. The NLRA, enacted as a response to the economic crisis, reflected a congressional belief that equalizing bargaining power between workers and employers through the practice of collective bargaining would enable workers to obtain fairer wages and a better standard of living, which would in turn spur and support greater business activity and restore what Congress referred to as "the flow of commerce." In short, the Congress that enacted the NLRA viewed giving workers the right to form unions and bargain collectively not just as a benefit for individual workers, but as a positive economic strategy for the Nation as a whole. That view is as valid today as it was in 1935.

As Congress explained in Section 1 of the NLRA, which sets forth the findings and policy concerns underlying the legislation:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate business depressions, by depressing wage rates and the purchasing power of wage earners in industry . . . 29 U.S.C. §151. Section 1 therefore goes on to declare that it is "the policy of the United States" to ensure the efficient functioning of the economy by "encouraging the practice and procedure of collective bargaining" and by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.*

The new statute, as adopted in 1935 and subsequently amended in 1947, did four important things.

First, it formally established in what is now section 7 of the Act the rights of private sector employees to form and join unions of their own choosing, to collectively bargain with their employers, and to engage in strikes and other forms of concerted activity—and to refrain from such activities.

Second, it established an affirmative duty on the part of employers to recognize and bargain with representatives chosen by employees without employer interference.

Third, it defined and prohibited a series of "unfair labor practices" by employers and unions which interfere with or discriminate against employees on the basis of the exercise of rights protected by the Act.

Fourth, it established an independent agency overseen by individuals appointed by the President and confirmed by the Senate to administer and enforce the Act: These consist of a 5-member Board which, in the case of unfair labor practices, acts in an adjudicative body, and an independent, separately appointed General Counsel who, through representatives employed in Regional Offices around the country, investigates charges filed with the agency against employers and unions and, where it is determined that there is reasonable cause to believe an unfair labor practice has been committed, acts as a prosecutor in issuing complaints and prosecuting them before the Board.

Following the passage of the Act, and particularly after the end of World War II, millions of workers, by joining unions and exercising the right to collectively bargain provided by the Act, were able to win improvements in wages, benefits and working conditions that for decades put them at the vanguard of a steadily advancing and expanding middle class. Gains achieved at the bargaining table by union workers caused employers to raise wages for millions of non-union workers as well, and ben-

efits such as health insurance and retirement plans, initially negotiated for union workplaces, became standard offerings by nonunion employers too. Prosperity was broadly shared by families at all income levels.

Today, however, as previous witnesses have compellingly testified, the middle class is in serious decline, with wages for the majority of workers stagnant or falling, increasing percentages of the workforce without access to health insurance or pension benefits, and more and more workers employed on a contingent basis, with no job security. Instead of broadly shared prosperity, we have levels of inequality unheard of for more than a century, with the percentage of total income captured by just the richest 1 percent of Americans now exceeding 24 percent. Not surprisingly, these developments parallel a similar downward trend in the percentage of private sector workers covered by collective bargaining agreements, which is now back to its lowest point since the National Labor Relations Act became law.

The reasons for this decline are various, and include the hollowing out of the country's manufacturing base and the concomitant loss of manufacturing jobs; steep employment declines in other industries that have historically been highly unionized, such as mining and utilities; and the increasing percentage of the private workforce that has no right to unionize because of exclusions from statutory coverage. But there can be no question that a large part of the decline is due to fierce opposition to unionization by employers and weaknesses in the NLRA that allow employers to engage with impunity in intense and protracted anti-union campaigns—campaigns that are often accompanied by illegal threats, firings, and other forms of coercion, but even where conducted in accordance with current law, are typically designed to generate high levels of tension and conflict in the workforce that the employer can blame on the union and thereby dissuade workers from supporting a unionization drive.

The compelling case for reform of the NLRA has been made repeatedly before this committee and elsewhere in the Congress in the context of the debate over the proposed Employee Free Choice Act, and it is not my intention to rehearse those arguments here. But in the absence of reform, it is certainly appropriate to expect that those protections for workers that do exist in the Act are fully and vigorously enforced. It is in that context that the recent and increasingly vehement attacks on agency personnel for simply carrying out their statutory obligations should be considered deeply disturbing. Since Mr. Luttig has appeared to testify today regarding the complaint recently authorized by the Acting General Counsel alleging that the Boeing Co. has committed unfair labor practices I refer in particular to the uproar that has been generated over that action.

The complaint in question was issued on April 11 of this year. Briefly summarized, it alleges that the company has violated sections 8(a)(1) and (3) of the NLRA in connection with an alleged decision to transfer the assembly work for some of the 787 Dreamliner airplanes it is producing from an existing Boeing facility in the State of Washington to a new company plant in South Carolina. These allegations are based on alleged statements by company officials that they would transfer or had decided to transfer the assembly work to South Carolina because of past strikes engaged in by the workforce at the Washington State facility.

It is important to note at the outset that the issuance of the complaint does not constitute a finding by the agency that Boeing has violated the NLRA. It reflects only a conclusion by the General Counsel, after an investigation of charges against the company filed with the agency by the union representing workers at the Washington State, that there is reasonable cause to believe that a violation has occurred, which is the standard for initiating an enforcement action under the NLRA.

As Mr. Luttig's testimony makes clear, the company vehemently contests both the legal theory on which the case is based on and certain of the factual allegations on which the complaint is based—most notably whether the assembly work in question is work that the company plans to transfer from the Washington State facility to South Carolina or new work, as well as the complaint's assertions as to the company's motive for the decision. It is certainly not unusual for the Respondent in an unfair labor practice to deny the commission of unfair labor practices; indeed that is obviously true in every case that proceeds to a hearing. And like all other Respondents, Boeing will have a full opportunity at a hearing before an ALJ (which I understand has been scheduled for next month) to present its defense. If any aspect of the ALJ's decision is adverse to the company, it can file exceptions to the decision with the Board in Washington, DC, and it will also have the right to appeal any subsequent decision by the Board to a Federal Court of Appeals.

Contrary to many statements that have been made to the press and in other forums, the legal theory on which the complaint is based is neither novel nor exceptional. Section 8(a) prohibits employers from interfering with, restraining or coercing employees in the exercise of rights guaranteed by section 7 of the Act; section

8(a)(3) from discriminating against employees because of their exercise of section 7 rights. It is beyond question that the right to strike is among the rights guaranteed by section 7, and there is ample precedent in Board law for the proposition that the decision to transfer work from one facility to another because workers at the first facility have exercised a right protected by section 7 or to prevent employees from exercising. There is even a name for this line of cases—it's called the "runaway shop" doctrine.

What is exceptional about this case is not the novelty of the legal theory, but the size and power of the company that has been charged, and the magnitude of the decision that is at issue. But there is no warrant in the NLRA for making enforcement decisions on the basis of such distinctions—or on whether a particular decision will be politically unpopular.

This is most emphatically not to say that I believe Boeing to be guilty of unfair labor practices, and I would not presume to make any such suggestion. That is a judgment that can only be made by the ultimate decisionmaker after thorough examination of the facts as presented at the hearing before the ALJ, and careful consideration of the application of the law to that particular set of facts. And that is precisely why it is ultimately pointless—and destructive of the processes established by law for the resolution of such matters—for Boeing and others to attempt to litigate the case in the press or, for that matter, in Congress.

Two final points: First, the uproar in response to the NLRB's complaint has, not surprisingly, muddled the legal issues at stake. For instance, some critics are now claiming that this complaint is an attack on legally protected "Right-to-Work" laws, given that South Carolina is a Right-to-Work State. This is a red herring.

There is no question that States are expressly permitted by section 14(b) of the NLRA to enact so-called Right-to-Work laws, which prohibit unions from requiring the payment of dues or fees from individuals in the bargaining whom the union is obliged to represent but who do not choose to actually join the union. However, the legal theory on which the complaint is based has nothing to do with the fact that South Carolina happens to be a Right-to-Work State.

Boeing could have moved this work to Oregon, Illinois, New York or any other non-Right-to-Work State and the analysis, as well as the acting general counsel's duty to enforce the Act, would be the same. The issue is not where the work was allegedly relocated to—indeed that is entirely irrelevant to the legal theory of the complaint. The issue here is why the work was relocated, and whether that reason involves considerations that are unlawful under the Act.

Nor does the issuance of the complaint constitute unprecedented government intervention in legitimate business decisions. It is commonplace among labor and employment lawyers to say that employers in this country are generally free to make business decisions affecting individuals' employment status for good reasons, bad reasons or no reasons at all. But an employer may not make such decisions based on considerations that Congress has declared to be impermissible as a matter of law. This is true whether the decision discriminates on the basis of race, of gender, or religion or because the individuals have exercised rights guaranteed by section 7. And where unlawful discrimination has occurred, it is standard to require the guilty party to restore the status quo ante. As the NLRB complaint specifically states,

It does not seek to prohibit [Boeing] from making non-discriminatory decisions with respect to where work will be performed, including non-discriminatory decisions with respect to work at its North Charleston, South Carolina, facility."

As I noted at the outset of my testimony, the ability of employees to exercise section 7 rights without fear of retaliation played an important role in the growth of collective bargaining and the expansion of the middle class throughout the 40s, 50s and 60s. It is time now for Congress to focus on revitalizing those rights as a key element of any strategy to restore the middle class.

The CHAIRMAN. Thank you very much, Ms. Fox. Thank you to the rest. Thank you all for your testimonies.

We will now begin a round of 5-minute questions. I hope to set the standard by keeping mine to 5 minutes.

Secretary Reich, again I want to talk about this basic bargain that we had following World War II with workers—employers and employees, that bargain being that if you worked hard, if you had increases in productivity you would also share in that by better wages and benefits. During your time in the Clinton administration

we created over 20 million new jobs, incomes began to rise—at the end of the administration we had a budget surplus. CBO said we could pay off the national debt in 10 years. What was it that was done in the 1990s when you were there, what was it that moved the ball in that direction? What were some of the policies that helped move us in that direction?

Mr. REICH. Mr. Chairman, if you look back on the 1990s, in fact if you look back on the three decades after World War II, that era of great shared prosperity, you find three particular sets of policies. No. 1, strong unions. And we in the Clinton administration did everything we could to enforce, vigorously, the right to collective bargaining. In that three decades after the Second World War, as I have alluded to, we had a far greater portion of the American workforce in unions, giving them greater bargaining leverage to get higher wages and better benefits. That is No. 1.

No. 2, is investments in education, job training, health, healthcare, that is human capital. In the Clinton administration we did our best. We didn't finish that agenda. In the first three decades, that era of prosperity after the Second World War, massive investments in education and healthcare, in infrastructure, that is the major investment. I mean, President Dwight David Eisenhower, Republican President, former general, nobody would accuse him of being a socialist, but some of the major investments in America, in terms of infrastructure and the expansion of higher education were commenced in that Administration. We tried, in the Clinton administration, to do that and again our efforts didn't get as far as some of us would have wanted and certainly the President wanted.

The third ingredient is a progressive tax structure. That enables average working people to have enough money in their pockets so that they can turn around and spend.

In fact, all three of these, strong unions, public investment and a progressive tax structure enable average working people to turn around and spend their money and therefore create jobs and enable the economy to expand. It is a virtuous cycle. That is the basic bargain that you alluded to a moment ago.

In terms of progressive taxes though, we have seen a movement away from progressivity. I mean again, under Eisenhower, the marginal income tax rate on the highest earners was 91 percent. I mean we are having this debate now about whether it should go back to Bill Clinton's marginal tax rate or we ought to extend the tax cuts that were undertaken under President George Bush. This is a completely displaced debate, in light of what we had in the three decades after the Second World War.

Those are the ingredients. And unfortunately we have moved, particularly in the last 10 years, although President Obama has made every effort to move us back on track, the movement of the Nation has been away from those three principal pinnacles or undergirdings of middle class prosperity.

The CHAIRMAN. Thanks, Secretary Reich.

Ms. Boushey, one of the points that I heard you make in your testimony, your written testimony anyway, is about the impact that the squeezing of the middle class has had on our families. When parents are desperately looking for work, or they are work-

ing two jobs to make ends meet, when they can't afford quality childcare, they have no savings, no retirement plans, no paid sick days, that the stresses on families can be overwhelming. Yet all too often these stresses are thought of as private problems, not public policy concerns.

Is this another area where our policy failures have contributed to the decline of the middle class? And speak about it in terms of is this just a private thing that we shouldn't worry about or is this something we ought to worry about in a public policy setting?

Ms. BOUSHEY. Certainly. Thank you.

I think there is a couple of issues. First and foremost, it really is the decline of the middle class that has led to many of these squeezes on families. As Secretary Reich talked about in his testimony, as you saw male wages declining over the 1970s and 1980s you saw a lot of families needing that second earner and having an increased labor force participation of wives and mothers, which means that today most children grow up in a family where there is no stay-at-home caregiver, and that means both that families need to provide care substitutes while parents are at work, not just for children, but also for ailing family members in the family. Who is caring for Grandma or taking her to the doctor, things like that.

And at the same time you—it is now the case that every employer, as they are looking out at their workforce, sees a workforce for whom most of those workers now have care responsibilities. But the reality is that we haven't changed our policies, at the workplace or in terms of our public policies, to address this need for workers to have flexibility and for families to have care substitutes when everyone needs to be out there in the labor force working.

So these really are not private problems, they are public problems and they are ones that virtually every family faces. There is a number of pieces of legislation that I know that this committee has considered that would address that. In particular I would point to the Healthy Families Act which would provide every worker the ability to earn paid sick days. With so many workers not having anyone to care for a sick child or an ailing family member, that is of utmost importance for families and something they can't solve on their own.

The CHAIRMAN. Thank you, Ms. Boushey. Thank you.

Senator ENZI.

Senator ENZI. Mr. Chairman, I appreciate you moving up the hearing because all the Republicans are invited to the White House this morning and—

The CHAIRMAN. Oh, what time do they have to leave?

Senator ENZI. They have to leave right now, but I think that Senator Isakson was the first one here so I will let him—I will defer my chance for questions to him.

The CHAIRMAN. And I—

Senator ENZI [continuing]. That he can maybe make the bus yet.

The CHAIRMAN [continuing]. And we moved it up to 9:15 to try to accommodate that, I am told.

Senator ENZI. Yes.

The CHAIRMAN. And I will be more than happy to accommodate Senators who—on the Republican side—have to leave to go to the White House.

## STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Ranking Member Enzi for your courtesy. Thank you, Mr. Chairman. And I do have to leave, but I really appreciate the opportunity to do two things.

First to associate myself, word by word, with the testimony or the statement of Senator Enzi. I think he hit the topics right on top of the head as far as I am concerned. I do think it needs to be expressed that the pattern of practice that has been exhibited over the last 2 years, in terms of changing the level playing field that we have had, is alarming to me as one who ran a company for 22 years, worked hard to provide jobs.

The NLRB decision is just as egregious as what the National Mediation Board did to retroactively try and change a 75-year precedent in the unionization vote requirements for transportation unions. I mean to just unfettered make those changes at the drop of a hat, to me, makes no sense at all and shows a bias that is really going to cost the American worker jobs and opportunity and is one of the reasons we are having a protracted recovery.

Since I have to go, I just want to ask one question. And Mr. Reich, I have great respect for your service to the country and I appreciate all that you have done and I have read a couple of your books, not all 10 of them, but a couple. They are good. They are smarter than I am, I can tell you that.

But I have to ask. You obviously support what NLRB is trying to do in the Boeing case. Is that right? Just a short answer, because I have got a followup.

Mr. REICH. Senator I am not going to try to prejudge that case. I think it is a distraction, quite frankly, to talk about what the general counsel has done before the NLRB has done a thing, before the administrative law judge has decided, before it has gone to appeal. I think that the preface of this hearing, as I understand it, is to talk about the fundamental problems of the middle class in this country and that is what we ought to be talking about.

But again, I am not going to pre-judge.

Senator ISAKSON. OK. Let me ask you one fundamental question, historically in your knowledge. Do you know of any time in history that the NLRB has made a decision to retroactively invalidate a capital investment of \$1 billion or any comparable sum?

Mr. REICH. Senator, I don't believe the NLRB has made a decision in this case and I am not enough of an NLRB historian to know what the NLRB has done in previous cases. But I can tell you, honestly as a history buff with regard to labor, I am shocked and deeply upset by the relentless attacks on organized labor and on unionization, on the rights of people in this country to unionize that have been accelerated over the past 2 years.

Senator ISAKSON. There is a balance, in my judgment, between reasonable regulation, reasonable compliance, reasonable government oversight, but when it goes too far then the unintended consequences do what we have tried to prevent in this country and that is jobs going somewhere else in the world because America becomes an untenable place to do business, because of an overly regulatory reach.

I apologize that I am going to stand up and walk out. It is no offense to Miss Fox or any of you, but I have to get to the White House. But I just had to have that say and I appreciate it, Mr. Chairman.

The CHAIRMAN. Actually, Senator Kirk, do I understand you are also going to the White House?

Senator KIRK. I guess I got that invitation as well.

The CHAIRMAN. Well, I will recognize——

Senator KIRK. Thank you.

The CHAIRMAN [continuing]. If people wouldn't mind I will recognize Senator Kirk then.

#### STATEMENT OF SENATOR KIRK

Senator KIRK. Thank you, Mr. Chairman.

I say, coming from Chicago, we are familiar with axioms of The Mob. And one of them is, if it takes you longer than a minute to figure out who the mark is at the table, it is you. And so we have three left wing witnesses and Judge Luttig, so I guess you are the mark here for this witness hearing today.

I am worried that this hearing sort of represents this idea, very prominent in Washington and almost nowhere else, that we are going to sue our way into prosperity. And through making America not just the No. 1 litigious society on Earth, but the No. 1 times 10 litigious society on Earth, that we can take the largest exporter in the United States and torture them with higher and higher legal costs and make sure that the Chinese airliner, which we expect will come on in 5 years will actually be lower cost and better, crippling, what is the premiere U.S. export in what is otherwise a pretty terrible export picture for the United States.

I am also worried because I am in a heavily unionized State—one of the most corrupt States in America, epitomized by the Blagojevich trial going on right now in Federal court in Chicago. I would worry that if we lock in this sue any company if they even think about leaving a heavily unionized State, then any new investment will not want to come to Illinois because you lock them into this Bermuda Triangle of we are going to whack you with the NLRB if you ever think of leaving.

If I go to South Carolina I will have the ability to participate in a continental economy and use all of the efficiency advantages the founding fathers gave. But if I make the mistake of going into one of these heavily controlled, corrupt States, then I am going to be, because of your action, locked into this State forever with no flexibility.

But Judge, could you comment on that?

Mr. LUTTIG. Senator, that is exactly right.

Senator KIRK. One part of being the mark is your microphone doesn't work either.

Mr. LUTTIG. Hello?

Mr. REICH. There you go.

Mr. LUTTIG. Senator, as part of my testimony it is the case that the action brought by the NLRB will have negative and detrimental effects not only on Right-to-Work States, but on non-Right-to-Work States as well. It is for that reason that I don't see this as a partisan issue, I don't see it as a union versus nonunion issue,



I don't even see it as a business issue. This is a complaint which should not have been brought and I believe that every member of this committee will conclude that it should not have been brought, because it will harm all States in the country and the country's economic recovery. You are correct.

Senator KIRK. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kirk.

The order of witnesses that I have in order of arrival, Senator Blumenthal, Senator Roberts, Senator Merkley, Senator Isakson, who has already gone, Senator Whitehouse, Senator Alexander, Senator Franken and Senator Kirk who we just recognized. So, that is the order.

Now I will yield to Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. I would yield to Senator Alexander, if he has to go to the White House.

Senator ALEXANDER. Thank you for the courtesy. I am going to stay, given the importance of the hearing. I greatly appreciate your offer.

Senator BLUMENTHAL. Thank you.

#### STATEMENT OF SENATOR BLUMENTHAL

Let me first of all, thank all of the witnesses for being here today and say I am troubled by the attack on the NLRB process. And I emphasize the word process because as Secretary Reich said so well, we are at a very incipient, a very beginning stage in that process. The complaint has been brought. There have been references to findings and decisions and from your own very distinguished career Mr. Luttig, there has been no finding or judgment. There has been a complaint.

You may feel—and you are an advocate and you are entitled to express that point of view vigorously and effectively, as you have done—that the complaint should never have been brought. That is an argument that, no doubt, you will present in the course of the process. And even if there is a finding that there was, in effect, a violation of law, the remedy may not be to return that second line to Everett. It may well stay in South Carolina.

I guess my question to you is, are you troubled by the kind of vehement and even vicious political attack on what should be a judicial process?

Mr. LUTTIG. Senator, I actually don't see a vicious attack on the NLRB. As you know and your colleagues know, whether an issue, a legal issue presents a public policy issue, large or small frankly, depends upon the facts of the particular case, the challenges that are made by the National Labor Relations Board and the remedy sought. Under the governing law of this case on the facts here and the claims that had been made by the acting general counsel and on the relief sought, he has brought forward, to America, a public policy issue of some import.

Cases bubble up through the Federal courts and the legal system all the time. Infrequently do they get to the level of a consequential legal decision and that is because the courts are reluctant to address the larger issues unless they are required to. In this case he has brought forward that issue. So we intend to proceed through

the process. And you are absolutely right, and as a former Federal judge I have a great respect for the process. But it is not—

Senator BLUMENTHAL. And the process could well, may well eventually involve a Federal court. Will it not?

Mr. LUTTIG. It certainly could. We hope not.

Senator BLUMENTHAL. And so aren't we doing, as Secretary Reich said so well, prejudging the outcome here and indeed threatening. In case you have missed it, some of the public statements have involved the future of the acting general counsel, as you have just heard from a member of this body, implications about impacts on jobs in the future that go to people's reputations and livelihoods. It seems to me that there is an element of prejudging here.

Mr. LUTTIG. It is not prejudging at all, Senator, and that is what—where I was trying to go to. The complaint, as filed, has presented the larger public policy issues as to the scope of the act. I believe it is wholly appropriate for there to be a nationwide discussion of it. I especially believe that it is appropriate for this committee to take cognizance over the matter now. Because actually in this case all of the facts and all of the law that would be relevant for this committee's oversight authority are in the record and in the complaint.

Senator BLUMENTHAL. I respectfully disagree, and my time has expired, but, in fact as your testimony makes clear, some of the disputes are factual disputes which have to be resolved by a fact-finding administrative law judge, not the least of them being statements by company officials, you say they were taken out of context, that the full quote wasn't provided, that there were references to strikes and work stoppages without the additional parts of the quote that supposedly would have modified it. But that is classically the kind of factual dispute that goes before a judge. Is it not?

Mr. LUTTIG. That issue goes before the judge, Senator, actually in the Federal court system, in my judgment this complaint would be dismissed on the complaint because on the facts alleged there can be no violation of law.

Senator BLUMENTHAL. Again, my time is expired and I apologize, Mr. Chairman. If there is a second round of questioning I would avail myself of that opportunity. Thank you.

The CHAIRMAN. Yes, there will probably be another round.

Senator Roberts is not back.

Senator Merkley.

#### STATEMENT OF SENATOR MERKLEY

Senator MERKLEY. Thank you very much, Mr. Chairman. Thank you all for your testimony.

Mr. Reich, the chart that you provided, and I think you have used it in at least one of your books, maybe in "Aftershock," that shows the separation between the productivity of American workers and their rising wages, is very dramatic. And about the time I graduated from high school, in 1974, those two lines diverged dramatically. And actually they have continued diverging on a very clear path, almost regardless of which administration we had.

And yet to me, that chart symbolizes the hollowing out of the financial foundations of American families. The fact that working families, over a 30-year period, have not been able to share in the

prosperity of America—the GDP didn't go up, it isn't that we didn't have prosperity as a nation, but families didn't share fully in it, in fact, they are flattened out.

In my working class neighborhood of three-bedroom ranch houses, you see it in terms of people's ability to have continued home ownership, which often depends on the ability to buy their parent's house. You see the next generation moving back into their parent's house, because they can't buy the same home that their parents were able to buy in the post World War II period.

To me, this is really a question about a vision of what type of America we want. Do we want the type of America that we built over the 30 years that you labeled the Great Prosperity, in which families participate, build their financial foundations, and educational standards improve? Or do we want an America in which the manufacturing jobs disappear, we have enormous disparities in income, and people are simply continuously struggling to get a foothold? It is obvious that I prefer the first vision.

In some ways I have summed this up by saying, we need to spend less on foreign wars and foreign bases and more on infrastructure and education. In other words, we need to build the human capital and the physical capital of our Nation, and we are falling way behind.

I would just invite you to share any comments you would like.

Mr. REICH. Senator, people often ask me, what country should the United States emulate in terms of building and rebuilding the middle class and the working class of this country. And I said, there is no other country, just go back to the three decades after the Second World War in the United States. We knew how to do it, because we did make the very investments that you are talking about.

Over the last 30 years we have been disinvesting. I mean look at what is happening now in States all over the country in terms of teachers being fired, more and more kids being crammed into classes. In public universities, such as where I now teach—at the University of California—which I believe is the best public university in the world, that is my prejudice, fees skyrocketing. Middle class and lower middle class, working class families can't even afford to send their kids. All over America our infrastructure is crumbling. That is not what happened in the three decades after the Second World War, but we have let deferred maintenance get completely out of control at a time when we could borrow the money cheaper—right now, on world markets—than we could ever borrow before. And at the same time we are seeing and we have seen a dramatic shrinkage of unionization, giving workers the bargaining power to get better wages.

And who is going to pay for all of this? As I said before, the irony here is that as more and more and a larger and larger share of the national income and wealth goes to the very top, their actual contribution, in terms of their tax rates, not just income tax rates but also capital gains, estate tax, all across the board, keeps on declining.

Senator MERKLEY. I was very struck recently by hearing the statistic that China is investing 10 percent of their GDP in infrastructure, Europe, 5 percent and America 2 percent. This, to me, cap-

tures the fact that we are not maintaining our infrastructure or expanding it and that is problematic. Right now is a moment when if we invested more in infrastructure it would do a lot to put our construction companies back to work and help put this economy back on track.

Mr. REICH. Senator, this is the tragedy. We are buying into a mythology that we are a poor country, that we can't afford to do all this. We are richer than we have ever been. We are the richest Nation in the history of the world. We can put our people back to work, we can rebuild our infrastructure, we could rebuild our educational system, there is nothing we can't do. But we have to make sure that the wealthy pay their fair share; we have to make sure that we make the right kind of investments; we have to make sure that there is sufficient bargaining power in our workforce. This is not rocket science, but the problem is things are getting and have gotten out of control.

Senator MERKLEY. Thank you.

The CHAIRMAN. Thank you, Senator Merkley.

Senator Alexander.

#### STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Mr. Chairman. I thank the witnesses for coming.

This is a hearing about the endangered middle class. I would like to speak about the middle class I know the most about, which is in Tennessee and begin with a short story. And then Judge Luttig, I have a series of questions for you.

Thirty years ago I went to my first White House dinner. President Carter was the President and he said, Governors, go to Japan, persuade them to make here in the United States what they sell here. So off I went to Tokyo with a map of the United States and I showed that Tennessee is in the center of the population of the United States and so that was important to manufacturers, that reduces transportation costs. And then it showed that every State north of us did not have a Right-to-Work law and our State did. Both those factors made an important decision in Nissan's location in Tennessee 30 years ago. After that came General Motors. After that has come Volkswagen. After that has come a number of other auto suppliers, auto assembly plants and tens of thousands of suppliers.

The middle class in Tennessee, when I started being governor was the third poorest in the country. We soon, because of the growth of auto jobs had the fastest growing incomes of any State and today one-third of our manufacturing jobs are auto jobs. And Nissan told me the other day that it will be soon selling in the United States—85 percent of what it sells in the United States it will make in the United States, which is precisely what President Carter wanted 30 years ago.

It seems to me, our job—the way to improve the status of the middle class is to create an environment in which companies can create jobs so middle class families can hold those jobs, just as has happened in our State.

Now Judge Luttig, the questions I am going to ask you I would appreciate a short answer because I have limited time. Boeing is the—how many employees does Boeing have?

Mr. LUTTIG. Approximately 170,000 worldwide, Senator.

Senator ALEXANDER. How many are in the United States?

Mr. LUTTIG. I would say 90 percent of those.

Senator ALEXANDER. So 150,000 or so in the United States? And it is the country's largest exporter?

Mr. LUTTIG. It is, Senator.

Senator ALEXANDER. And this is the first new jet assembly plant in 40 years. Is that correct?

Mr. LUTTIG. Correct.

Senator ALEXANDER. And where does Boeing sell its airplanes?

Mr. LUTTIG. Around the world, Senator.

Senator ALEXANDER. So countries all over the world?

Mr. LUTTIG. Absolutely.

Senator ALEXANDER. And I heard you say, and I read an article in the *Wall Street Journal*, by your president, that made the point that U.S. tax and regulatory policies make it more attractive for many companies to build manufacturing capacity overseas. If you didn't build—if you weren't allowed to build a new plant in South Carolina or some other Right-to-Work State, I assume you have the option of building those airplanes overseas, if you are selling them overseas. Is that correct?

Mr. LUTTIG. We do, but the acting general counsel, in a speech recently said that he would have brought the complaint even if we had located outside the United States, Senator.

Senator ALEXANDER. I assume that if a company outside the United States comes to you and says what President Carter said to me 30 years ago, persuade Boeing to make here what it sells here, you would be under lots of pressure over the next 10, 15, 20 years to make airplanes in countries where you sell airplanes. Is that correct?

Mr. LUTTIG. We will, and we are already, Senator.

Senator ALEXANDER. You will and you are already. The United States is really in a competition for manufacturing jobs such as Boeing's manufacturing jobs?

Mr. LUTTIG. A fierce competition.

Senator ALEXANDER. Yes. And how long will it take for this case to make its way through the legal process?

Mr. LUTTIG. It can be expected to take up to 3 years, if not longer, if we go to the U.S. Supreme Court.

Senator ALEXANDER. It might be 3 years. If this were to be the law, according to the acting general counsel, then any company in the United States, which has a plant in a union State might have to think twice before locating a new plant in a Right-to-Work State. Is that correct?

Mr. LUTTIG. It would have to, Senator.

Senator ALEXANDER. It would have to think that. And so it could then look at its other choice which would be to go overseas?

Mr. LUTTIG. That's correct.

Senator ALEXANDER. Do you agree with Senator Kirk's suggestion that if you live in a State like Illinois, that a company might have to think twice about locating in a State that does not have

a Right-to-Work law, because if it did, after that any future expansion would be limited?

Mr. LUTTIG. I do. And I believe that is one of the most pernicious effects of this particular complaint, Senator.

Senator ALEXANDER. So we have a situation where this acting general counsel, not confirmed by the Senate, can hold up the Nation's major exporter for 3 years, up to 3 years, while this case is decided, thereby causing middle class families in Tennessee, as we look forward to the next wave of auto suppliers which will come to our State because of a good workforce, this includes General Motors which has a UAW partnership, but this will slow down the growth of Tennessee's middle class by keeping jobs from coming in here and making it more likely they would go overseas?

Mr. LUTTIG. It will, Senator. And I would add that the acting general counsel has not ruled out a 10J Motion, which for all of us in the room just means an injunction which would mean literally the closure of the Charleston, SC plant.

Senator ALEXANDER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander.

Let's see, Senator Whitehouse? And then Senator Franken. Oh no, I'm sorry, then Senator Roberts and then Senator Franken.

#### STATEMENT OF SENATOR WHITEHOUSE

Senator WHITEHOUSE. Thank you, Chairman.

It seems to me, Secretary Reich, you mentioned the failure of the United States to maintain the traditional, progressive tax structure. The information that I have is that the top 1 percent of taxpayers pay about a little over 28 percent of the Federal taxes that are paid, that the top 5 percent of taxpayers pay about nearly 45 percent of the taxes that are paid and the top 10 percent pay a little over 55 percent of the taxes that are paid.

Now, standing alone that sounds pretty progressive. But if you measure it against wealth, the top 1 percent of the owners of wealth in this country hold nearly 34 percent of the wealth, compared to the top 1 percent of taxpayers paying only 28 percent. So nearly 34 versus 28. The top 5 percent of owners of wealth in this country control 60.4 percent of our country's wealth. And the top 5 percent taxpayers, again, 45 percent so 60 to 45. And the top 10 percent of our country's wealth owners control over 71 percent of the country's wealth, meaning that only 29 percent of the country's wealth is controlled by the lower 90 percent, which means that the top 10 percent control more than the lower 90 percent of the Nation's wealth. And yet, they pay about just a little over half of the taxes.

So, in terms of progressivity—Federal taxes, income and payroll—to what extent in determining progressivity should we be looking at wealth and income levels in evaluating whether or not the taxes that are paid by the highest taxpayers are progressive?

Mr. REICH. Senator, of course we should be looking at wealth as well as income. In fact, when looking at—

Senator WHITEHOUSE. What do those numbers cause you to conclude about the progressivity of our tax structure, that I just gave you?

Mr. REICH. The tax structure should also include, if I may amend what you just said, capital gains, because people who are very wealthy in this country are paying, many of them 15, 16, 17 percent a year of their income in taxes, but that is because it is dividend income or capital gains income. And we have a kind of a hidden scandal in this country, hidden in the sense that most people don't know about it, that we have carried interest.

Senator WHITEHOUSE. That is how hedge funds are paid.

Mr. REICH. For example, hedge fund managers are treating and are allowed, because of a loophole in the taxes, to treat their income, that is essentially capital gains, as—I'm sorry, their capital gains income that is essentially ordinary income, it just looks and smells and in every other way as ordinary income, as capital gains and have a 15 percent, therefore income tax, in fact.

Senator WHITEHOUSE. And how about CEO stock options?

Mr. REICH. And stock options feed into that. Because if I'm a CEO—

Senator WHITEHOUSE. They are also treated as capital gains.

Mr. REICH [continuing]. Who gets to choose when to start my stock options and then I cash in my stock options, that is all taxed at 15 percent.

The point you are making, and I agree with it entirely, is that if you look at all of the taxes, who pays, where the wealth is, our system is not only regressive but it is getting more and more regressive.

Senator WHITEHOUSE. The information that we have from the Internal Revenue Service is that the top 400 tax income earners in the country from the last time the IRS did this calculation, they earned, on average, a little over a third of a billion dollars each and as a group they paid, in fact, Federal taxes of about 16.7 percent.

I asked the Bureau of Labor Statistics what that equates to in our Providence labor market in Rhode Island and it is about \$29,000 and it is what a hospital orderly makes if they are single and not declaring deductions. So it seems that you have a hospital orderly making \$29,000 paying the same tax rate as the people making a third of a billion.

And then you have the middle class in between and they are paying considerably more than the ultra rich and obviously more than the lower income people. And is that part of the middle class squeeze you are talking about?

Mr. REICH. It is an enormous part of the middle class squeeze. It is the third leg of the stool that I was talking about before, in terms of No. 1, unions, we need stronger unions. No. 2, public investment in education, infrastructure. No. 3, to pay for that public investment and make sure that we have good schools and good highways and good systems of public transportation and water and sewage and so forth. We have to ask the rich to pay their fair share, otherwise the middle class doesn't have a chance.

The CHAIRMAN. Thank you, Senator Whitehouse.

Senator Roberts.

#### STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. I appreciate and I associate my remarks with the Senator from Tennessee.

My concern is with Boeing and the decision by the NLRB and Mr. Solomon who brought the suit. I know there has been some concern about publicizing this and making it an issue as opposed to a process, but I know there has been an article in the *New York Times*, it has been referred to by Jim McNerney, who is the CEO of Boeing,

I simply want to thank you Judge, and thank your CEO for all the efforts that you have done in the 10-year fight, and I mean fight, to make sure that Boeing has the contract for our tanker fleet so that we can be assured of global reach in regards to our national security. You and I both know all of the travails that we went through to get that. I wanted to pay tribute for that.

I think, as I went down all the questions that I had, that Senator Alexander in very fine fashion asked those questions or made that point, the one that I want to make sure that everybody understands is that no existing work is being transferred to South Carolina. And not one single union member in Washington has been adversely affected by this decision. Is that correct?

Mr. LUTTIG. That is not only correct, Senator, but we have actually added jobs in the Puget Sound area since the decision was made to locate the new facility—

Senator ROBERTS. There you go again answering my next question. In fact, you have stated that you have added more than 2,000 union jobs and you are still hiring. Is that correct?

Mr. LUTTIG. We are and we intend to continue.

Senator ROBERTS. Then you go on to say that the—or the CEO goes on in his article to point out the 787 production line in Everett has a planned capacity of seven airplanes per month, whereas the line in Charleston will be three additional airplanes to reach your per month capacity and that the basic reason that you made this decision was a surging global demand, in fact the demand for the new 787 Dreamliner, not acting out of spite or animus. Is that not correct?

Mr. LUTTIG. No, that is absolutely correct, Senator.

Senator ROBERTS. That is a seven to three advantage in regards to Washington and you are hiring 2,000 more and you are still hiring and you are going to continue to hire. I don't know how that could be described as being an action of spite or animus.

And then in addition, to followup on Senator Alexander's point, you have 155,000 U.S. employees? Is that correct?

Mr. LUTTIG. Approximately. Yes, sir.

Senator ROBERTS. Right. And that about 40 percent are union and that ratio has been unchanged since 2003?

Mr. LUTTIG. That is correct, Senator.

Senator ROBERTS. And you are involved in 34 States?

Mr. LUTTIG. Correct.

Senator ROBERTS. Half are unionized, half are Right-to-Work?

Mr. LUTTIG. Approximately, sir.

Senator ROBERTS. All right. Then the obvious question or conclusion reached by Senator Alexander, which I agree with, the unintended consequence, forward thinking CEO's would also be reluctant to place new plants in unionized States lest they be forever restricted from placing future plants elsewhere across the country.



Now that is speculation or whatever, it is hard to answer, but given your background, wouldn't you think that would be the case?

Mr. LUTTIG. That is true and that is why this issue should be of concern, both to Right-to-Work States as well as non-Right-to-Work States, Senator.

Senator ROBERTS. OK. Thank you so much. And my time is expired, Mr. Chairman.

The CHAIRMAN. Well they have all the money. They have all the money down there, of course.

[Laughter.]

All right. Thank you, Senator Roberts.

Senator Franken.

#### STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman. To the Senator of Kansas, I think that sort of thing should be brought up in business meetings.

I am a member of four unions. And I take some umbrage—Senator Durbin is not here, but he loves when I use that phrase, taking umbrage, about some of the things that were said after I got here. I was in the Judiciary Committee, so I didn't get to hear the testimony.

I heard words like the mark, and mob and torture and corrupt and heavily controlled and whack and that Illinois was heavily controlled by union and that is why it was corrupt and that is why those connections were made.

Minnesota has 15.6 unionization, Illinois has 15.5 percent unionization. There is nothing corrupt about Minnesota. And I really resent that implication, I really do. The union members in my State that I work with are among the finest people I know. And the unions that I worked in, including AFTRA, the American Federation of TV and Radio Artists, the Writers Guild of America, they provided healthcare for me and my family when I was working. And they added to the trade balance of this country more than almost any other industry in this country. I don't like that. And I don't like these attacks on unions. I really don't.

Now, when you see the membership in unions going down and you see the middle class getting less purchasing power, Ms. Boushey, that hurts our economy, because the middle class then is really the prime purchaser, consumers in this country. This country runs on consumers, there is a direct tie there. Right?

Ms. BOUSHEY. Certainly. A hundred percent. Consumption is about 70 percent of our gross domestic product, that is the goods and services that we all buy. If people don't earn wages that increase over time, then the purchasing power of the American public does not increase. And as we talked about earlier, American families have been able to increase their purchasing power by working longer, harder, more, and over the 2000s, as their incomes fell, even though they were working longer, harder and having more people—

Senator FRANKEN. Debt.

Ms. BOUSHEY [continuing]. They took on debt. It is not a recipe for a stable economy.

Senator FRANKEN. Let's talk about taxes for a just a second while I have the professor and Labor Secretary here. Adam Smith wrote of a need for progressive taxes. Right?

Mr. REICH. Senator, Adam Smith said the taxes on the rich should be not just the same percentage as taxes on the middle and the poor, but a higher percentage.

Senator FRANKEN. Yes.

Mr. REICH. Because he talked about equal sacrifice. That was the point. Adam Smith, equal sacrifice.

Senator FRANKEN. The concept of disposable income is what he was really talking about, too. Adam Smith—people don't realize that Adam Smith called for progressive taxes.

Now, let me ask you something else. We keep hearing this talk about balancing the budget, that not one tax ever should be raised. And I also hear that Ronald Reagan was a deity. I mean, we respect Ronald Reagan. Ronald Reagan raised taxes, didn't he? How many times, Mr. Secretary? Do you know?

Mr. REICH. Is this a quiz?

[Laughter.]

Senator FRANKEN. You are on the record, let's just put it that way.

Mr. REICH. I better be careful. I think it was twice, but I better check.

Senator FRANKEN. Yes. And then also on social security taxes as well, but income taxes twice. And that is because we were being plunged into debt. That is what was causing the deficit and that is why Ronald Reagan raised taxes twice and today he would be sent out of town on a rail.

Mr. REICH. Senator, if I may?

Senator FRANKEN. Yes. I am sorry.

Mr. REICH. These issues are all connected.

Senator FRANKEN. Right.

Mr. REICH. Taxes, unions, public investment in education, infrastructure, they are three inter-related pieces of the problem that the middle class has faced. And over and over and over again I hear, unfortunately, the assertion that we have to, in order to get jobs back, sacrifice wages. If that is the choice we have to make, and the middle class and working class of this country has to make, in order to get more jobs you have to have lower wages, then we are all really in trouble, greater trouble than we have been over the last 30 years.

The CHAIRMAN. Thank you, Senator Franken.

Senator FRANKEN. Mr. Chairman.

The CHAIRMAN. My apologies to Senator Enzi, he had yielded his time earlier and I should have returned to him, but now I will recognize Senator Enzi.

Senator ENZI. Thank you, Mr. Chairman and I do know that Mr. Reich has to leave.

I do have some questions but I would submit them in writing if you would be so kind as to answer them, I would appreciate that. I do have questions, though.

Mr. REICH. Certainly.

The CHAIRMAN. I just know Secretary Reich, I know you said that you had to leave and would you answer this is the last one.

Mr. REICH. I would be perfectly happy to answer Senator Enzi's question.

The CHAIRMAN. I just wanted you to be here for the first round, but Senator Enzi said he didn't want to have the questions.

Mr. REICH. Yes, please.

Senator ENZI. I will submit some because they are—I am an accountant, they are of a technical nature, but I know that you have technical answers. I would be happy to do it that way.

And we have ignored Ms. Fox. I have a few questions that I would like to ask her.

Ms. Fox, when you served as a member of the National Labor Relations Board from 1996 to 1999, did the board issue press releases on routine complaints?

Ms. FOX. I am afraid I am—

Senator ENZI. Probably not. Did it release fact check documents on cases that portrayed contested allegations as fact?

Ms. FOX. No.

Senator ENZI. Do you recall either of the general counsels serving with you, giving interviews to the *New York Times* or other national newspapers about a complaint they had just filed the day before?

Ms. FOX. I know that there were many times that actions of the board were the subject of news coverage and actions of the general counsel. I think, particularly in connection with the baseball strike—I know there was a lot of attention around actions, prosecutorial action.

Senator ENZI. Some in the last couple of days have called the Boeing complaint a routine administrative procedure. But the *New York Times* called it “highly unusual” and the “strongest signal yet of the new pro-labor orientation of the National Labor Relations Board under President Obama.” That paper also wrote that under President Obama's appointees the agency, “including Mr. Solomon and his staff, has sought to reinterpret and more vigorously enforce the rules governing employers and employees, from what workers can say about their bosses on Twitter to the use of Internet and phone voting in union elections.”

Who is right?

Ms. FOX. I think that it is certainly true that the acting general counsel and the board are interested in vigorously enforcing the act. Yes, I think that is true and that their actions do reflect that. I don't think that they go beyond the bounds of what their statutory responsibilities are. I think that it is a good thing for agencies that have regulatory and enforcement responsibilities to exercise those.

Senator ENZI. Senator Blumenthal portrayed this as a court process, a judicial process. I don't think it is normal in a judicial process for the prosecutor to go to the newspaper and issue a press release. And not only issue a press release to the *New York Times* but provided a fact sheet and a copy of the complaint on its Web site. They made it a public issue. If it is a routine complaint this all seems completely out of order.

And then of course, there is the acting general counsel. The acting general counsel filed the complaint on April 20th and on April 22d, he did the interview that appeared in the *New York Times*. He

stated that Boeing had a consistent message, that they were doing this to punish their employees for having struck and having the power to strike in the future.

Mr. Luttig, is that accurate?

Mr. LUTTIG. That is what the acting general counsel said to the *New York Times*, Senator. Yes.

Senator ENZI. But is that accurate of Boeing, that they are trying to punish employees for having struck and having the power to strike in the future?

Mr. LUTTIG. Of course it is not and that is not what the complaint says either, Senator.

Senator ENZI. OK. Have any of the employees been punished because of the expansion of the Dreamliner production line?

Mr. LUTTIG. No. As our CEO said yesterday on the pages of the *Wall Street Journal*, the union and our union employees are part of the fabric of the Boeing company. They have been since day one and they will be for a long time to come.

Senator ENZI. What do you think the purpose of that interview was? Why do you think it was given to the *New York Times* as opposed to a Washington State or South Carolina newspaper where the interested parties were involved?

Mr. LUTTIG. I don't know and I wouldn't attempt to surmise. It is something that this committee should ask the acting general counsel, Senator.

Senator ENZI. OK. I will just comment a little bit more on it because I don't think it is inappropriate to discuss and criticize the recent National Labor Relations Board complaint that was filed against Boeing, nor is it out of bounds for Boeing to vocalize their frustration with the process as it is being mischaracterized by a Federal agency in the press. And I think it is the height of hypocrisy to criticize Boeing for speaking out, yet offer no criticism of the acting general counsel who issued press releases, conducted interviews and released a fact check document to argue his case in the press.

I think Boeing has been a great American success story in creating middle class jobs. They have expanded in a time of recession, both in Washington State and now in South Carolina. We do need to understand both how they did that and what obstacles the Federal Government is putting in the way. And we need to do that with a number of businesses. The President said that he wanted every regulation that was being done or had been done by any agency, to be reviewed and to strike down the rules that were barriers to job creating. To my knowledge I haven't heard of one rule being eliminated.

It seems like the promises and the words and the press releases conflict with what we are really trying to do, particularly with the middle class.

Mr. LUTTIG. Senator, when I was a public official on the Federal bench in prior incarnations in the executive branch, I always believed that the public and this body should be free to criticize anything and everything I did as loudly as they wished. When the President of the United States was criticized for criticizing the Supreme Court of the United States, had he asked me I would have stood up and defended his right to do so, because it has nothing

whatsoever to do with an interference in the process. And, in fact, in this country we don't want our government entities who are wielding the awesome power of government to operate in the shadows.

Senator ENZI. Thank you. My time has expired.

Ms. FOX. Senator, if I just might have the opportunity to make one comment about this. I want to make clear that my purpose here is not to criticize Boeing, not to prejudge this issue. I don't know, I am not making a judgment. And I also want to echo what was said about Boeing. I think Boeing has been a very good employer. It has provided many, many—a part of building the middle class here.

I just wanted to make clear that what I am talking about here and what I think I am defending is the processes of the board and the legal theory on which it—and to try to make the point that the—I find the legal theory on which the case is based not extraordinary. It is certainly extraordinary that it is applied to a company as large as this, that it has the potential impact, but I don't think that the law allows for a decision about whether you are going to enforce that takes into account the size of the company.

If, under the theory, there has been a violation, I don't think the general counsel has a choice but to pursue that. And obviously there are factual disputes here and those, I have no—I am not intending to make any view of.

The CHAIRMAN. OK. Thanks. We will begin a second round.

Mr. Luttig, first of all, I want to respond to the comment made by Senator Kirk, I am sorry he is not here. I wanted to wait till my turn. He talked about you as being the mark, something about a gambling game or something at the table, I don't understand all that. I want to make it very clear that Mr. Luttig was not invited to testify by this chairman or anyone on our side, he was invited by the Republican side. I resent the fact that Mr. Kirk somehow implied that we had you here as a mark, that is not so. You were invited here because the minority side gets to approve a witness and they approved you as a witness.

Second, the amount of misinformation—I spoke about this, I didn't mean to get into this, but it has been gotten into. I didn't mean to have this as a thing on Boeing. The amount of misinformation that has come out on this is just astounding. Astounding. Astounding.

First let me respond to what my friend, Senator Enzi, said about the press releases and stuff. The National Labor Relations Board, within the last year established a new Public Affairs Office. I didn't know about it, but they established a Public Affairs Office, to put out information on their Web site and in releases on major decisions, whether they are pro-union or pro-business. In my inquiries on this, it was, as I understand it, they set it up for transparency purposes to put out information about what they were doing.

That is what happened here. That person who put that out is a career person, not a political appointee, a career person. And the fact is that quite frankly in my years both here and before when I was lawyering, prosecutors put out information all the time about cases that they are bringing before courts. Prosecutors always do that. But Senator Blumenthal knows that too. They always put out

information about the cases that they're bringing and that is what this Public Affairs office did at that time, as I am understanding.

Mr. Luttig, the very first sentence of your testimony says that the complaint is at issue before the committee. Mr. Luttig, the complaint you speak of is not at issue before this committee. That complaint is at issue before the National Labor Relations Board where it properly belongs. This hearing is about the state of the middle class, not about a case that is pending before an administrative law judge. And again, I think that is some of the misinformation that has gotten out. This has become a political thing. And quite frankly, it ought to go and proceed as it should.

The acting general counsel, who by the way is a 30-year career person, not a political appointee, had this complaint. In 75 years of the Wagner Act both businesses or unions or nonunions, anybody can bring complaints to the National Labor Relations Board, sometimes they are dismissed out of hand, if there is substance to it, they then investigate it, they take affidavits, they go out and investigate to see whether or not there is enough there to proceed to the administrative law judge.

As I understand it, the general counsel did that, they investigated the complaints, they took affidavits, they did all kinds of things. They tried to settle the case, as they do in the last 75 years, to get both sides to try to settle this. That was unsuccessful. The general counsel then decided that, I guess, that there was enough evidence there to proceed to administrative law judge.

That is where Boeing makes its case. Now it is not the fact that Boeing has been quiet about this, as you have pointed out, your CEO had an op. ed. piece in the *Wall Street Journal* yesterday making Boeing's case.

What is not right, no that is not the right term, what is not—what borders almost on unethical activity is for people in the political branch of the Congress to begin to interfere in a judicial process and to color that judicial process and to try to make it a political matter.

Now we can make statements on whether or not we think it is right or wrong, but it has gotten into the area of misinformation. There was a press conference the other day, there was a quote I saw from the governor of South Carolina who was accusing President Obama of instigating this and being behind it. President Obama had nothing to do with this, he probably didn't even know it was even going on. That is what I kind of resent is how it has become political.

And quite frankly, again, this type of trying to put political pressure to bear against the NLRB, even threats to pending nominees. Threats that somehow if they proceed with this certain nominees will not come before this committee, I think that borders. That is borderline. That is borderline.

So, again, I didn't want this to be a hearing on this Boeing issue. I did want it to be a hearing on middle class.

Now Mr. Luttig, you were a former Federal judge. Right?

Mr. LUTTIG. Yes.

The CHAIRMAN. Former Federal judge.

Now I want to get to the essence of middle class here and what we are talking about in terms of disparities. In real terms, wages

for workers grew 3.78 percent in the last 20 years, CEO pay increase 468 percent.

As executive vice president and general counsel, your compensation by Boeing, in 2008 was \$2,798,962. That was your pay in 2008, \$2,798,962. In 2009, 1 year later, it was \$3,743,647. That is a 34 percent jump in your pay as an executive in 1 year, during a recession year. Why shouldn't employees at Boeing get a 34 percent increase, Mr. Luttig? What is going on here? Why shouldn't employees also have a share of that? I just asked you the question, why should executives get these huge increases and employees being told that they can get a 3 percent increase or even less?

I checked also on the pay. The pay, I guess, in Washington is around \$26 an hour. That comes to about \$52,000 a year. South Carolina I am told the average pay is about \$18 an hour, that is \$36,000 a year. Hardly anyone getting wealthy.

Mr. Luttig, your pay went up by 34 percent. You make \$3.7 million a year. I don't begrudge that, I am just asking about fairness for workers at the Boeing plant. Why shouldn't they get increases like that, Mr. Luttig?

Mr. LUTTIG. Mr. Chairman, my compensation is a matter of public record.

The CHAIRMAN. It sure is.

Mr. LUTTIG. I have to say at this very instant I have the sense that maybe it is not enough. But that aside, Senator I am the general counsel of the company, I don't have a dog in this particular hunt. I appreciate the spirit. What I would say is that the case that I am here to address is actually about the middle class and no one should have any doubt about that.

It is about jobs for Americans and for the middle class, thousands upon thousands of jobs for the middle class. As every witness has testified, as every one of this committee has testified, jobs and job growth is what we need to come out of this recession. And it should be irrelevant to you, Senator, frankly, what I think about that issue. And I don't want to be presumptuous even to answer it, but of course I share the committee's concern about the middle class and about the wages of the middle class. And I can also tell you that the Boeing company does. And that is why we are trying to create jobs. And that is why, as one of your colleagues noted, our workers are some of the highest paid aerospace workers in the world. And we are proud of that. And if we could pay them more, we would, and when we can, we will.

The CHAIRMAN. Thank you, Mr. Luttig.

Senator ENZI. Thank you, Mr. Chairman.

I was going to explain Senator Kirk's comment about being the mark by pointing out the imbalance, that you have three witnesses and I have one. But in light of your last question I think maybe he was right on.

This is an interesting process that we do. I wish we would go to roundtables where we would bring in some people who have done some things for the middle class that had improved things to see what kind of ideas they have, so that we could actually maybe borrow from those and expand them nationwide. We bring in people from institutes and colleges and things like that. But what if we brought in some of the companies that have actually improved the

middle class and found out how they did it, why they did it, and what they would suggest for other people? I think that would be a much better process than the one where we have three witnesses to one and then beat up on each other's witnesses.

Getting back to the Boeing case, I do think that it is one of the prime examples of what is happening with the middle class. We are shutting down business, we are creating this era of uncertainty where businesses don't know what they can do, where they can do it, how they can do it. And when they are in that kind of mode they are not going to hire people.

When the country is in the situation that it is currently in, and there are so many uncertainties, it is very hard for them to go ahead and do wage increases. Part of that is due to them still evaluating and waiting for the millions of pages of regulations to come out on the new healthcare law so they can know what they have to do and what the costs are going to be. When you include the cost of benefits along with the cost of wages, you wind up with a little different picture of what is happening out in the market. And those benefits, for the most part, are not taxed. Usually the employees prefer to get money that is not taxed as opposed to money that is taxed.

But this National Labor Relations Board is fascinating to me, because the Acting General Counsel gets to make all kinds of comments and of course the company can counter the comments, but after all of that it is going to go to an administrative law judge that works for the board. And after he makes the decision, which I suspect will be in opposition to Boeing, then it goes to the National Labor Relations Board. I suspect that the company will lose there, too. Then it finally goes to Federal court. And we will get a ruling there and then maybe one party or the other will appeal it to the U.S. Supreme Court.

It is a long process and in the meantime I don't know what happens to the jobs. I assume the company can go ahead and operate this new facility, since they have a billion dollars invested in it already and a thousand people working there. But you can see where there is a lot of insecurity of the employees as well.

The press releases that have been done on this are a part of a larger effort by the Administration which is to shame employers by dragging their name through the press and influence and intimidate other employers. And I am not just making that up, I am not even using the word shame as my own word. This is from the Office of the Solicitor for the Department of Labor, their operating plan. It mentions that they will use shame as a strategy.

I think there are more positive ways for us to be working on the issues than that and I would hope that in the future we can do some of those so that we can come to some really constructive ideas for how we are going to improve the situation of the middle class in America.

I have almost used up my time and I will forgo the rest of it.

The CHAIRMAN. Senator Enzi.

Let's see now. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. I want to thank all of our witnesses, particularly Judge Luttig, for being here today. We would recommend an increase in your pay but I am not



sure whether that would be helpful or hurtful to you. So let me just say thank you.

I want to associate myself with the very powerful remarks of my colleague, Senator Roberts, about the excellence of the Boeing products and their extraordinary value to our Nation and to consumers around the world and the eloquent remarks of Senator Alexander about the importance of these jobs and the 170,000 of them around the world and 150,000 in this country. Not only jobs, but good jobs, which is so important in this country today for all the reasons that we have heard on both sides of the panel.

I am reassured, by some of your comments, because I—and I disagree somewhat and I hope that perhaps you would disagree with Senator Enzi that defeat before the National Labor Relations Board is inevitable here, because I am sure that you will make your case very effectively and I am sure that you do not posit or assume a defeat before either the administrative law judge or the NLRB. Do you?

Mr. LUTTIG. I don't want to over-lawyer this, but you have asked me the question. And as the general counsel for the company, I presumptively believe that we will lose before the ALJ and also before the NLRB, for an institutional reason which is wholly legitimate, which is the general counsel of the NLRB is charged in the same way that the ALJ is and the board. And so when he makes a consequential decision like this, if he is acting properly then he is sharing a view of the law by the National Labor Relations Board, Senator.

Presumptively I do expect to lose.

Senator BLUMENTHAL. Well, let me ask you this, you can seek to dismiss this complaint before the administrative law judge. Correct?

Mr. LUTTIG. I am not a labor law expert, but I believe you are correct.

Senator BLUMENTHAL. Absolutely. You can seek not a Rule 12 Motion per se, but there is a procedural opportunity for you to seek that remedy as you discussed earlier in response to one of my questions, that if it were a Federal court you believe it would be dismissed.

Mr. LUTTIG. I believe there is a corresponding avenue of relief equivalent to the 12B Motion. Yes, Senator.

Senator BLUMENTHAL. And in the meantime your company can proceed with its assembly line in South Carolina. Can it not?

Mr. LUTTIG. This is where it gets difficult, as you know as a former attorney general. I now have the Federal Government that is seeking to close Charleston. I would just ask you to put yourself in my position, as general counsel. When the question comes to me, should we continue to invest capital? Should we continue to hire employees? Should we continue to hire suppliers? Should we continue to drive forward toward the 7,000 employees on the site in South Carolina? You can appreciate that is an exceedingly difficult question for me to answer, Senator. But that is the position that the complaint itself has put me in. I know that you don't want to suggest in any way that I just dismiss that, I just want you to appreciate the significance of what the NLRB has done here, merely through the filing of the complaint.

Senator BLUMENTHAL. And I do. As a former prosecutor, Federal prosecutor as well as a State attorney general, I am exceedingly mindful about the importance of filing a complaint or an indictment, which often is the most consequential part of the judicial process. And believe me, I appreciate the importance of a complaint or an indictment, not only its practical effect but its reputational impact.

But ultimately you would advise your company, I assume, and I am not asking for attorney/client privileged information, that the result in a Federal court would be in your favor. Would that not be your conclusion? I assume, from the fact that you believe that the complaint is contrary to existing law, that you believe that ultimately your rights will be vindicated by a Federal court.

Mr. LUTTIG. I do, Senator.

Senator BLUMENTHAL. In the meantime, again, removing ourselves from your particular advice, the company can proceed with its assembly line, with its activities in South Carolina and indeed the remedy, even if there is a finding against you on the facts, the remedy may be completely different. But ultimately your rights can be, and in your view, will be vindicated by a Federal court.

Mr. LUTTIG. That our rights will be vindicated in one way or another before a Federal court, is correct. It does not follow a fortiori though, Senator, that the complaint does not have harmful economic affects on my company presently and until its ultimate resolution in the Federal courts, quite the opposite.

Senator BLUMENTHAL. I might just say, I appreciate both your candor and your care. Obviously the NLRB may take a different view and may find that it is well-founded, but in the meantime you are not asking us to intervene statutorily, are you?

Mr. LUTTIG. I am not here today to ask for a statutory remedy for this. No, sir.

Senator BLUMENTHAL. Are you asking that we take any specific action to intervene in this case?

Mr. LUTTIG. No. To the extent that I am doing anything affirmative here other than responding to the invitation by the committee, I am urging, and unapologetically, that this is a matter that is appropriate for consideration by this oversight committee at this time. And I don't believe that its oversight responsibility in any way conflicts with the ongoing process before the NLRB. As you all know, better than I do, every day of the week the Congress of the United States takes up matters that are being investigated and that are working their way through the administrative process of the executive branch.

Senator BLUMENTHAL. Thank you for your testimony. Thank you, Mr. Chairman for giving me a couple minutes extra time. And I want to apologize to the other witnesses that I haven't asked you any questions, but I really appreciate you being here today.

The CHAIRMAN. Senator Alexander.

Senator ALEXANDER. Thank you, Mr. Chairman.

Mr. Chairman, there has been some discussion about union, non-union. We are talking about the middle class, I am talking about jobs, auto jobs in Tennessee, that is what has helped our middle class grow over the last 30 years in family incomes. But, Right-to-Work of course means you could choose to join a union or not join

a union. If there were any news in Tennessee that made more news during the decade of the 1980s than the arrival of the Nissan plant, which is a nonunion plant, it was the arrival of the Saturn plant with its partnership with General Motors. We were delighted to have them, and they existed side-by-side, within a few miles of each other.

Employees at Nissan had a chance, three times, to create a union for themselves, they elected not to. And their wages, I assume—I don't know exactly what the difference in wages was between the United Auto workers at the Saturn plant and the nonunion workers at the Nissan plant, but they weren't enough to persuade them that they would be better off with a union.

If we are talking about raising family incomes, which is what I have been working on for 30 years, we have to start with the jobs. Now, let's talk about the jobs just a moment. Judge Luttig, you made a pretty extraordinary statement, you said you expect to lose before the administrative judge in June and to lose before the National Labor Relations Board which you assume has a shared view without the general counsel. How long would it take to get your appeal heard and decided before a U.S. Circuit Court, if that should happen?

Mr. LUTTIG. Before a United States Court of Appeals?

Senator ALEXANDER. Court Appeals, yes.

Mr. LUTTIG [continuing]. Senator, it could be 2 years and thereafter to the U.S. Supreme Court it could be as much as 2 additional years depending on when and if the U.S. Supreme Court granted certiorari on the case.

Senator ALEXANDER. Let's just take the more conservative view. For 2 years the Federal labor law in this country, as defined by the acting general counsel of the National Labor Relations Board is that if you are a manufacturer in a State without a Right-to-Work law, you better think twice before you move to a State with a Right-to-Work law. Is that right?

Mr. LUTTIG. Absolutely. The in terrorem effect of this complaint is in itself very harmful.

Senator ALEXANDER. In the case of my State, Tennessee, we have literally hundreds of companies moving—making decisions about whether to move to Tennessee or a surrounding State in order to supply the Volkswagen plant. They may have to think twice about that. I wonder if—does the Boeing company have suppliers in Washington State?

Mr. LUTTIG. Absolutely, Senator.

Senator ALEXANDER. And are there suppliers in Washington State who might be considering opening an office in South Carolina or some State in the southeast so that it could supply your new assembly plant?

Mr. LUTTIG. There are, Senator.

Senator ALEXANDER. And might not this decision by the National Labor Relations Board acting general counsel, who has never even been confirmed by the U.S. Senate, might not it cause in the board rooms of those suppliers to say, we can't make a decision or we can't move our plant to a Right-to-Work State without at least considering the expense and the trouble of this kind of litigation?

Mr. LUTTIG. It might well. And you would expect it to have that effect in a business decision making context.

Senator ALEXANDER. Do you think it is unethical for the U.S. Senate Committee on Health, Education, Labor, and Pensions to consider such a consequential decision in a hearing?

Mr. LUTTIG. Not only do I not believe it is unethical, Senator, in my opinion, it is appropriate.

Senator ALEXANDER. Do you think it is unethical for a Senator to make a speech on the Senate floor about the consequences of this unilateral decision which seems to change all Federal labor laws and could stop a flow of jobs to the—among the poorest States in our country at a hearing when we are trying to talk about raising family incomes, we are basically saying—all you suppliers who are thinking about moving to the southeast, where we have the lowest incomes in America—stop, don't do that, because this Washington single official has decided you can't relocate an expansion of your—you can't expand your business in a Right-to-Work State, perhaps at all?

Mr. LUTTIG. Of course it is not unethical, in my personal opinion, for the reasons I have set forth, Senator. I believe people, regardless of party affiliation, have an obligation to speak out against this.

Senator ALEXANDER. As a former governor of a State who is proud to have both the United Autoworkers who work at the General Motors plant and the workers who elect not to be in a union at the Nissan plant and at other plants in the State, I am going to go to the floor in a few minutes and introduce a bill which we call the Job Protection Act, which will have 35 co-sponsors who are Senators. And the purpose of the bill will be to preserve the current Federal laws, protection of State Right-to-Work laws and provide the necessary clarity to prevent the National Labor Relations Board from attempting a similar strategy as that announced by the National Labor Relations Board general counsel against Boeing to prohibit that from affecting other companies' decisions.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Alexander.

Senator Franken.

Senator FRANKEN. Yes, I just want to clarify a couple things. In a State like Minnesota, which is not a Right-to-Work State, no one has to join a union. So, I just want to make this clear to the Senator from Tennessee. You don't have to—

Senator ALEXANDER. Well, if they want a job they do.

Senator FRANKEN. That is not true at all.

Senator ALEXANDER. You can't work at the United Autoworkers plant at the Saturn unless you are a member of the union.

Senator FRANKEN. In Minnesota there are only 15.5 percent of people working in Minnesota who are in unions, so no one is requiring you, in the State of Minnesota to join a union. And that is just not true, that is just a misunderstanding. And in a Right-to-Work State you can be in a union, the union can represent you, you just don't have to pay union dues. That is the distinction.

That is what we are talking about. But I want to talk about the middle class.

Senator ALEXANDER. I am afraid to speak.

Senator FRANKEN. Let me go to Ms. Boushey, because that is what I thought this was about.

Would it be fair to say the middle class is under more pressure today than it has been in 60 years?

Ms. BOUSHEY. Yes. Entirely.

Senator FRANKEN. And the disparity of income is higher now in the United States than it has been since the Great Depression. Right?

Ms. BOUSHEY. Yes. And it has been rising.

Senator FRANKEN. OK. And that in and of itself has an affect on our prosperity does it not?

Ms. BOUSHEY. Yes. With a hollowed out middle class we have less families that are able to provide the kind of stable demand that creates good consumers for businesses at its most basic level. And then we also, with a hollowed out middle class you don't have a population that can make the kinds of investments in their own human capital in education, because they can't afford it. You don't have the stability to support entrepreneurship. You have a good young kid from a low-income family or, from a hollowed-out middle-class family that has a good idea but they don't have the economic stability to become tomorrow's entrepreneurs. It creates a lot of instability to not have a large and thriving middle class.

Senator FRANKEN. And there are so many pressures on middle class families now. For example, to get a college education, to send your kid to college. My goodness, I talk to college kids all the time and I had a group from the MNSCU system, which is the Minnesota State Colleges and Universities, and these were leaders in it. And I asked them all, there were about 20 in my office, I said to them, how many here work 10 hours—at least 10 hours a week. Everyone. How many here work 20 hours a week? Most of them. All going to school. How many here work 30 hours a week? Quite a few of them. How many here work full-time while going to school? A number of them.

Ms. BOUSHEY. Certainly. We have seen enormous rises in college costs over the past few decades. And at the same time we have also seen a change in how kids finance that, away from grants, in terms of financial aid, toward loans.

It used to be the case, 20, 30 years ago that a kid could work full-time all summer at a minimum wage job and earn enough to send themselves to their local public university that next school year. In fact, that is what my mother did. And now, today, ever since the college costs have been increasing—the last time I looked at this, which was in about 2005, a kid would have had to have worked more than full-time, full year at the minimum wage in order to have afforded a year of public school tuition at their local university.

Senator FRANKEN. This is why we have kids——

Ms. BOUSHEY. Exactly.

Senator FRANKEN [continuing]. Taking 6, 8 years to graduate college.

Ms. BOUSHEY. Exactly.

Senator FRANKEN. Let's look at the world now versus the world after World War II, because I think this is kind of important. After

World War II we had a different situation—Japan and Europe were devastated. We had the world markets to ourselves in a way, right?

Ms. BOUSHEY. Right.

Senator FRANKEN. That is why GM and Ford and those companies could give you a job for life and they could give you good benefits, because they had the world markets to themselves. We are in a different world now. Right? And some of the solutions that were available to us then aren't available to us now in the same way. And we are going to have to be smarter about it, I think, because we are in a global economy.

That means that we have to be smart about the way we do trade, and we are competing with countries overseas and workers overseas. Boeing may want to go overseas and that is a realistic look at this. But, it seems to me that we also need to look at what we are doing, our public policy in terms of the middle class, and in order to build prosperity, make sure that the middle class is in a position to help drive our economy. And we aren't doing that.

I know my time has run out, Mr. Chairman, and I think we are at the end of the hearing. There is so much to talk about here. I am a little sorry that we spent quite so much time on the Boeing case. I know it is important and it is a little microcosm of something, but I think we really should be talking about these kinds of things like investments, investments in infrastructure, investments in education and about tax policy, about revenue.

We were talking about deficits, because I will just repeat it one more time, Ronald Reagan increased the marginal tax rate twice when he was President. Ronald Reagan. And if we are going to be able to invest in the things that create prosperity we are going to have to put everything on the table here.

Many of the Republicans are at the White House right now talking to the President about this very thing. And we have to really, really take this seriously and not be so ideological, in either way, because our future prosperity and the prosperity of our kids and our kids' kids, is at stake right now.

Thank you, all of you, for testifying. And Judge Luttig, thank you. How much do you think you should be paid? How much?

[Laughter.]

Mr. LUTTIG. I will be glad to give you our CEO's address after the hearing.

[Laughter.]

Senator FRANKEN. Oh, OK. Thank you. Thank you, I will put in for you. OK?

Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Franken.

Again, let me try to—I don't want to get on this case, but more and more misinformation comes out. The essence, as I understand it, of the complaint by the International Association of Machinists, filed with the NLRB was that the company was making a decision to move an assembly line or start an assembly line in South Carolina in retaliation for the union exercising a protected right, that protected right being the right to strike. Now I don't know whether that is so or not, but that is the essence, as I understand it, of the complaint which the general counsel's office investigated and evi-

dently found enough substance there to further the process to the administrative law judge.

Now again, the law is quite clear, a company and the union contracts—the company can move a plant wherever it wants. It can open a plant in Timbuktu, it can do anything it wants. What it can't do is move a plant, move an assembly line in an illegal action.

Think about it this way, let's say a company has a plant in southern California. They hire a lot of Hispanics. Let's say the CEO of that company all of a sudden he doesn't like those Mexican Americans, he doesn't like those Hispanics, he says, we are going to open a branch of our plant in Fargo, ND because there are less Hispanics there.

No. 1, he can open a plant in Fargo, ND, if he wants to. What he can't do is open a plant there because he doesn't want to hire Hispanics or African-Americans or women or Jews or Catholics or anything like that. That is in essence the case we have, as I understand it, from the complaint by the IAM, International Association of Machinists, that they exercised a protected right under the National Labor Relations Act, which is the right to strike, that the company has retaliated against that in moving their line or opening a new line in South Carolina.

As I said, I am not about to prejudge the case, but it wasn't because it was a Right-to-Work State or any other thing. That has nothing to do with this case. I happen to represent a Right-to-Work State, this doesn't have anything to do with Right-to-Work or non-Right-to-Work or union shop or anything else. It has to do with whether or not the company decided to do this as retaliation for a protected activity.

I might just add as a subset to that, that strikes are not always just because of the union. Sometimes strikes happen because of management too, not just the union.

Now again, Mr. Luttig, you said that it was the proper purview of this committee to either investigate this or to have a hearing on it. Well, I don't think so. Now to come out here, people are free to ask questions and make statements. I have made my own, you have made yours, other Senators have too. It is not the purpose of this hearing. I would point out that in a case *Pillsbury Company vs. The Federal Trade Commission*, the Fifth Circuit Court of Appeals overturned a decision by the FTC because a Senate hearing was held on the merits of the case and that violated the due process rights of one of the parties because of nonimpartiality.

Mr. Luttig, did you or anyone at Boeing ask any Member of Congress to exert pressure on the NLRB to either not issue the complaint or withdraw the complaint after it was filed?

Mr. LUTTIG. No, Mr. Chairman.

The CHAIRMAN. Did any of your paid lobbyists in Washington contact any Member of Congress either personally or through telephonic means or other means to ask Members of Congress to exert pressure on the NLRB to withdraw the complaint?

Mr. LUTTIG. I am the general counsel, I do not have responsibility for our Washington legislative team, Mr. Chairman. I would have no information as to that.

The CHAIRMAN. But your response is that no one at Boeing, neither you nor anyone at Boeing contacted a Member of Congress to exert pressure on the NLRB to withdraw this case or to modify it?

Mr. LUTTIG. I think it is clear, Mr. Chairman, that I don't believe that it would have been inappropriate had they done so.

The CHAIRMAN. Miss Boushey, I wanted to pick up—I have 9 seconds left—and ask you a quick question. Tell me about your background and how did your family—how were they able to help you do the things that you have done and become an attorney and go to law school and get an education. How were they able to do that?

Ms. BOUSHEY. Thank you for the question.

I actually grew up a mile from the Everett Boeing plant, which is the subject of some of this conversation here today. My father was a shop steward and machinist for over 25 years at that plant and worked on the 747. So, in many ways I would not be here today if it wasn't for that good middle class job and importantly, that union that represented my father at that plant, growing up.

I am certainly very grateful to that company because they do create good jobs for people in Washington State. And I think that one of the things that has sort of been a little frustrating over the course of this hearing is there has been a discussion, that somehow it is some workers against other workers, that somehow nonunion workers are better than union workers or something just because they are willing to perhaps work for lower wages. But those workers in Washington State at that plant certainly do a good job and I think it is important to honor that as well.

One of the things that I know, as an economist, and one of the reasons that I became an economist was to understand the enormous power that companies like Boeing have over communities. Whether or not Boeing succeeds or fails has a huge impact in Everett, WA and in communities around the country and what happens to those families. One of the things that we know from empirical work is that workers who have the right to organization and that are in unions are typically paid better, they get better benefits and that that really was a key component of what created the middle class in this country and certainly was a key component of what created the middle class in that part of Washington State where I grew up.

And in listening to this conversation and thinking about the movement of this assembly line to South Carolina, certainly it is important for workers all over the country to have access to good jobs, but we should not be doing this in a way that is a race to the bottom in a way that undercuts unions or solid middle class jobs in one part of the country, pitting them against another.

The CHAIRMAN. Thank you.

Senator ENZI.

Senator ENZI. Thank you, Mr. Chairman.

One of your questions might better have been asked of me. No one from Boeing talked to me, I contacted Boeing to ask if they could present a witness at this hearing because this is a concern nationwide. A lot of companies are worried about whether they can expand, where they can go, who they can hire.



You made a very forceful statement about perhaps Boeing taking an illegal action and taking away a right of workers. Judge Luttig, do the Washington State employees still have the right to strike?

Mr. LUTTIG. Absolutely, Senator.

Senator ENZI. Do the employees in South Carolina have the right to form a union?

Mr. LUTTIG. They do.

Senator ENZI. If they form a union do they have the right to strike?

Mr. LUTTIG. They do. It is this, Senator, the genius, if you will, of the National Labor Relations Act is that it recognizes both the right to join a union and the right not to join a union. But it also recognizes the rights, if you will, of employers and the rights of employees. Again, the genius of it is that it attempts to balance all of those so that all of those respective rights are protected. And that is exactly the context in which we operate every day of the week.

But, Senator, this is not about unions or nonunions. This is not to hurt our union. As I said, the union is part of the fabric of the Boeing Company. Forty percent of our workforce has chosen to join unions. We need those unions and we in turn can create jobs for those unions and for their families. That is all that my case before you is about.

Senator ENZI. I thank you, particularly for that answer, which is a good one to conclude on, I believe. I appreciate your willingness to come here and testify knowing that sometimes these hearings are a little brutal.

I appreciate everybody's answers today. It was very helpful. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Miss Fox, I wanted to ask you about my presentation on the essence of the case on retaliation. As I understand it, that was the essence of the case filed, on retaliation for a protected activity. Of course people can join unions and of course they can strike. But you talk about chilling effects, chilling effects, if in fact, a company decides to move a line or do something and it is in fact found, as a matter of fact, that it was in retaliation for a strike, is that not covered by the National Labor Relations Act?

Ms. FOX. Yes, and that is—when I have said previously that this is not a novel legal theory, that if it were to be found that that was the case, there have been other cases where—and they have been cited, I believe, by the general counsel in exactly those circumstances where it is proved or established that that was the reason for a decision to transfer work, that it has been found previously to be a violation of the act and the remedy ordered has been to restore the work.

The CHAIRMAN. It is one of the core parts of the National Labor Relations Act?

Ms. FOX. Yes, it is. And just to underscore also, the theory of this complaint has nothing to do with where the work was moved. The theory would be the same if the work had been moved to another unionized State, if it had been moved to the next county. I think that Mr. Luttig mentioned the fact that the general counsel has publicly stated that it would be the same if they moved to another

country. It is confusing to me or puzzling to me how this could be turned into something that is about Right-to-Work States versus unionized States.

The CHAIRMAN. I share that. I don't know how that is—again, what I am concerned about in this is that I cited the Fifth Circuit Court case, if in fact this does wind its way to the Circuit Court of Appeals, I guess precedence, Mr. Luttig, could take over and they could look at this and say,

“Gee if we have a Senate hearing or if this gets into the political thing and people are making all kinds of political charges and stuff, they could find that they would overturn any decisions or dismiss it because of violation of due process rights.”

And that is my concern about turning it into a political matter.

And like I said, we spent a lot of time on it here this morning, but people have a right to do that if they want. I wanted it more to be focused on what is happening to the middle class in America.

Again, I don't know if this is correct or not, I am told it is, that the average hourly wage in Puget Sound is \$52,000 or \$26 an hour, 2,000-hour year, about \$52,000. In South Carolina it is about \$18 an hour, that is \$36,000 a year. So same person, doing the same job in Everett, WA making a little bit more, quite a bit more as a matter of fact, than a person working in South Carolina. This has all the appearances to me as a race to the bottom and that again, is what is happening to the middle class here.

Second, I would also say that I read the CEO's, Mr. McNerney's op. ed. that was in the *Wall Street Journal* and also Mr. Luttig's statement here. In your statement you said that at about the same time that the IAM provided Boeing with its final position South Carolina confirmed Boeing's eligibility for several hundred million dollars in incentives. I assume that is tax incentives, I don't know, but I assume it is. That means it is taxpayer supported.

I also asked and found out that Boeing, a great company—by the way, I make no bones about it, I have been a big supporter of Boeing products I think all the time I have been here in the Congress, both in the House and in the Senate, as opposed to Airbus, but I don't want to get into that.

But, when Mr. McNerney, the CEO, makes veiled threats about moving things overseas I find that the Boeing Company is the recipient of \$19.5 billion in taxpayer's money, contracts with the Federal Government, \$19.5 billion, it would seem to me that Mr. McNerney, rather than making veiled threats about moving a plant overseas ought to say,

“Look, we are grateful to the taxpayers of this country for the \$19.5 billion in Federal contracts that we have and the last thing that we are ever going to do is take our plant overseas, we are going to stay here in America.”

Now that would send a signal to companies that we are going to stay here, we are not going to move overseas because we recognize the benefits to American workers.

Mr. LUTTIG. Mr. Chairman?

The CHAIRMAN. Yes.

Mr. LUTTIG. Mr. McNerney did not make a veiled threat at all on the pages of the *Wall Street Journal*. He was making the observation, which is absolutely correct, that there is a flight of American business overseas and that is a matter of grave public concern. Second, the government is one of our largest customers and we are very proud to be the supplier of aircraft and other technology for the U.S. Government and we appreciate it very, very much.

The CHAIRMAN. Let me read what he said, this is Mr. McNerney,

“More worrisome though are the potential implications of such brazen regulatory activism on the U.S. manufacturing base and long-term job creation. The NLRB’s over reach could accelerate the overseas flight of good, middle-class American jobs.”

Then at the last paragraph he says,

“U.S. tax and regulatory policies already make it more attractive for many companies to build new manufacturing capacity overseas.”

Now if that is not kind of veiled implications that Boeing could also, I would like to see a sentence in there say that, Boeing is an American company, we get \$19.5 billion from the U.S. taxpayers in contracts and we are staying in America.

Mr. LUTTIG. You have that statement from me today on behalf of the Boeing Company, Mr. Chairman.

The CHAIRMAN. I appreciate that very much.

Mr. LUTTIG. You are welcome.

The CHAIRMAN. That is good. We want companies like that to stay in America and we want them to build here and not to talk about moving things overseas. I appreciate that very much.

Senator Enzi.

Senator ENZI. Mr. Chairman, I think he might have been making comments on a broader view than whether Boeing would move or not. Boeing, I think, is the last of the American airplane companies. We are talking about Chinese companies and French companies now and so I appreciate Boeing being an American company.

But, you mentioned the taxes that South Carolina is providing on this. I am familiar with States trying to attract businesses to their State and Wyoming doesn’t have, and I hope everybody listens to this, we don’t have any personal income tax, we hardly have any corporate income tax. That makes it harder for us to attract businesses to Wyoming, because we can’t give those concessions that the States that have those can give. And they don’t give those concessions unless they anticipate getting the revenue back, sometimes in the short-term but always in the long-term. They can’t sell their citizens on attracting a business by giving concessions unless they can show how that is going to make a difference for their State. This company is going to employ, well I think they have 1,000 people working on the building and stuff right now and almost 4,000 people that will be there full-time. That is a lot of taxes that they are going to collect. I don’t think the State of South Carolina really considers that to be a taxpayer expense or the people would not have gone along with it.

We ought to be concerned about the number of companies looking at this case that may or may not move to different States in the

United States or that may move overseas. We have certainly had enough manufacturing jobs go overseas that we ought to be really careful to see that we are not encouraging that.

The CHAIRMAN. I just hope that companies will look at this and say,

“If workers exercise their protected rights and their legal rights, that our company should not retaliate against them because that is a covered right by the National Labor Relations Act, whether they belong to a union or not. We should retaliate against them because that is a covered right by the National Labor Relations Act, whether they belong to a union or not it doesn’t make any difference.”

That is what I hope comes out of this.

Senator ENZI. I hope that no company ever threatens retaliation. When the coal mines came to Wyoming they were United Mineworkers mines, but the employees, it is the employees, not the companies, decided that that was not a good idea. I think they are still unionized, but they are all local unions, there are no national unions there.

I guess we ought to issue a word of warning to the union bosses as well, that they can over reach and cause the detriment to themselves. And that may be part of the reason why we have gone from, as Mr. Reich has stated, 31 percent of the people being in unions down to, I think in the private sector it is less than 7 percent. We can keep debating this if you want to, but I am ready to go.

[Laughter.]

The CHAIRMAN. We can keep debating it and any time you want to talk about coal mining just let me know. My father was a coal miner for over 20 years, before there were unions. You want to talk about what life was like for coal miners before there was the United Mineworkers Union, talk to me. I will tell you what my dad went through and I will tell you what a lot of his coworkers went through before there was a union that protected their rights and their safety and their health. Talk to me about it some time. I will tell you what my dad went through in the 1920s and the 1930s, as a coal miner in the State of Iowa.

With that, thank you all very much. I just would say that this committee is going to continue to have hearings on the middle class. I think we got a little sidetracked but into a narrow shoot today, I didn’t mean for that to happen, but it did. That is all right.

But we will have other hearings on the middle class, on jobs, on the job structure in America, on job training, education, on pay, on what is happening to the pay of middle class Americans and how my chart showed, why is it that during the tiers of the Great Prosperity that there was an equivalency. The tide raised all boats equivalently, 2 point something percent. But in the last 30 years the boat has been tipped over and those at the top have gotten huge increases, percent increases, a lot of money, but those at the bottom have lost. Why real wages today are about where they were almost 30 years ago, real wages.

These are things that this committee should be looking into and I intend to continue to have hearings on that broader issue of what is happening to the middle class and families and pay in this country.

Senator ENZI. I would hope we would have some hearings on what to do about it rather than—

The CHAIRMAN. I hope through the hearings that we will generate some thoughts on what to do about it. We heard from Mr. Reich, I think he had some suggestions on it and I hope that we do come up with some suggestions and I think we might.

With that, I thank you all for being here. And the record will remain open for 10 days for statements and questions.

And again, the committee will stand adjourned. Thank you all very much.

[Additional material follows.]

## ADDITIONAL MATERIAL

### RESPONSE TO QUESTIONS OF SENATOR HARKIN BY J. MICHAEL LUTTIG

*Question 1.* Currently, there is a surge line in Washington State that assembles Dreamliner planes. In a newsletter, Boeing stated that “[t]he 787 surge line is part of a detailed plan to transition incrementally from a production rate of two airplanes per month to 10 airplanes per month in 2013. Having this capability will enable the 787 program to mitigate risks as it introduces the 787-9 and starts up final assembly in North Charleston, SC. When the second line in South Carolina is up and operating, the surge capability in Everett will be phased out.”

Is there airplane production—on the surge line or any other line—that is currently located in Washington that will be transferred if Boeing follows through on its decision to locate the second assembly line in South Carolina?

Answer 1. There is not, currently, a surge line in Washington State that assembles Dreamliner planes. I am also advised that there is no airplane production currently located in Washington that will be transferred when Boeing follows through on its decision to locate the second assembly line in South Carolina.

*Question 2.* You stated in your testimony before the committee that you did not ask any Member of Congress to exert pressure on the NLRB regarding the complaint against Boeing.

Did you or any other employee or representative of Boeing tell Lafe Solomon or any employee of the NLRB that you intended to ask Members of Congress to intervene or attempt to influence NLRB regarding the complaint? Please describe those conversations in detail.

Did any employee or representative of Boeing discuss with a Member of Congress the possibility of threatening the NLRB’s budget or threatening the status of a pending nominee before Congress to discourage the NLRB from prosecuting Boeing? Please describe those conversations in detail.

Answer 2. See response in next question.

*Question 3.* Congressional Republicans have asked the National Labor Relations Board to turn over any documents in its possession about the decision to issue a complaint against Boeing.

Did you or any employee or representative of Boeing draft, consult, or in any way participate in the drafting of any of these requests?

Answers 2 and 3. Once Acting General Counsel Lafe Solomon withdrew the settlement offer that he had made to Boeing after the IAM expressed its disapproval of that settlement offer, and after Mr. Solomon and his staff informed Boeing that he intended to take the unprecedented and legally unsupported action of moving forward with a complaint that he was informed would have the effect of shutting down Boeing’s new Dreamliner production line in South Carolina, Boeing reached out to many interested stakeholders, including Members of Congress—as I told Mr. Solomon we would. The Acting General Counsel’s action here is contrary to decades of established law, and it is entirely appropriate for the Nation’s elected representatives to scrutinize and exercise their oversight authority over a Federal agency when it acts outside the bounds of its statutory authority. The complaint filed by the Acting General Counsel, and the remedy it expressly seeks, have significant policy and practical consequences. In fact, the mere filing of this complaint has understandably caused a national uproar because of what is already its chilling effect on the willingness of businesses to build new factories and expand businesses in both Right-to-Work and non-Right-to-Work States alike, and its curtailment of the needed job creation that follows on such business expansion.

As I mentioned in my testimony, Congress is certainly well within its authority to examine an agency action with such profound policy consequences, as it has done since the filing of the NLRB’s complaint. That said, how Congress chooses to engage the NLRB issue ultimately is a matter only for its Members to decide.

While I appeared before the committee at the request of its Members, I believe firmly that it is my Company’s right—and indeed, its obligation to its employees and shareholders—to speak out on this matter, and also to raise its concerns to our Nation’s elected representatives. We will continue to do so, given the profound potential implications of the Acting General Counsel’s action here on my Company, its employees, and our shareholders.

*Question 4a.* In response to questions about the amount of money Boeing receives as a Federal contractor, you testified at the hearing that Boeing is an American company and will keep its jobs in the United States. While final assembly of Boeing

commercial planes takes place in the United States, many of the component parts of the Dreamliner are manufactured in other countries.

What percent of component parts used in manufacturing the 787 Dreamliner will be created outside the United States?

Answer 4a. I have been advised that the domestic content of the 787 Dreamliner is roughly 70 percent.

*Question 4b.* What percent of the component parts in Boeing commercial aircraft were created outside the United States in 1991 versus 2011?

Answer 4b. I have been advised that in 1991 the average foreign content on all Boeing commercial aircraft was 12.3 percent, and in 2010 (the latest available data) the average foreign content on all Boeing commercial aircraft was 14.6 percent.

*Question 4c.* What percent of the total labor costs for building and assembling the Dreamliner are spent in the United States?

Answer 4c. I have been advised that a majority of the total labor costs for building and assembling the Dreamliner is spent in the United States.

*Question 4d.* How many U.S. jobs would be created if Boeing only sourced their component parts from the United States?

Answer 4d. Any response on the Company's part would be speculative.

*Question 4e.* What is Boeing's average total compensation per employee in Washington State and South Carolina?

Answer 4e. Because both the cost-of-living and the mix of work performed by Boeing employees in Washington State and South Carolina differ in so many ways, it is not possible to meaningfully compare their compensation.

That said, Boeing seeks to provide a competitive total pay and benefits packages to employees throughout the country, including employees in Washington State and South Carolina. Pay and benefits not only include wages and incentive plans, but also include, among other benefits, pension, savings, and healthcare benefits. While our compensation information is proprietary, our employees enjoy pay and benefits which are extremely competitive and in the upper tier of our peer companies. Boeing's competitive compensation practices are widely recognized throughout the industry. Year after year, Boeing receives thousands of applications for positions from citizens of all 50 States.

In addition to base salary, we have a broad-based employee incentive plan, the EIP, that paid our BSC employees an additional 14 days of pay for contributing to our financial success as a company in 2010 (additional 5.4 percent of annual pay). Very few companies have this type of broad-based incentive opportunity. In addition, our health care plans provide outstanding coverage and are in the top quartile nationally. Our savings plan, which includes a company match on employee contributions and an additional company contribution, is also in the top quartile of top companies nationally. When you look at the various pieces together (base + incentive + health care + retirement), the total value provided to both our Washington State and our South Carolina employees is extremely competitive and in the upper tier of our peer companies.

We are proud of our investment in our employees, and in what they are achieving to drive Boeing's success.

#### RESPONSE TO QUESTIONS OF SENATOR ENZI BY SECRETARY REICH

*Question 1.* As an economist, what is your view of the national debt, currently at more than \$14.3 trillion today, a 35 percent increase since January 2009? Should we be concerned about this.

Answer 1. Over the long term, the debt problem must be addressed. In the short-term, however, I worry that spending cuts or tax increases could slow the recovery. Consumers are reluctant to spend, given the decline in the value of their major asset (their homes) and the difficulty of borrowing—and given their fear of job and wage loss. Businesses are reluctant to invest in additional capacity or add more jobs without enough customers to justify such expenses. The resulting shortfall in aggregate demand is making this recovery painfully slow, and maintaining high levels of joblessness. State and local governments are adding to the problem by cutting their expenses and/or raising taxes. This is the worst time for the Federal Government to cut spending. On the other hand, it's still a good time for government to borrow, since the yield on Treasury bills continues to be 3 percent or below.

*Question 2.* You stated frustration with the decline in unionization in your opening statement. During the Clinton administration, in which you served, did overall unionization rates increase or decrease?

Answer 2. Unionization increases during the Clinton administration declined—continuing a trend that began in the late 1970s. The major reason for declining unionization is the necessity for businesses to cut costs in the face of increasing competition, both foreign and domestic. But other countries—notably Germany, whose economy continues to outpace our own—have maintained much higher rates of unionization in the private sector, giving their workers greater bargaining power to secure higher wages. Those higher wages, in turn, have contributed to buoyant demand.

*Question 3.* During your tenure as Secretary of Labor, what steps did the Administration take to encourage unionization?

Answer 3. We enforced the labor laws, made sure workers knew their rights under the law, and encouraged management-labor cooperation toward higher productivity.

*Question 4.* Do you support repeal of section 14(b) of the National Labor Relations Act? Why or why not?

Answer 4. I would like to see it repealed. So-called “Right-to-Work” laws have not improved labor conditions. Wages in Right-to-Work States are 3.2 percent lower than those in non-Right-to-Work States, after controlling for demographic and socioeconomic variables as well as State macroeconomic indicators, according to the Economic Policy Institute (briefing paper February 17, 2011). Using the average wage in non-RTW States as the base (\$22.11), the average full-time, full-year worker in a RTW State earns about \$1,500 less annually than a similar worker in a non-RTW State. At the same time, the rate of employer-sponsored pensions is 4.8 percent lower in RTW States, according to the same study. Nor do Right-to-Work laws boost economic growth. After Oklahoma adopted a Right-to-Work law (Oklahoma is the only State to have adopted a Right-to-Work law in the past 25 years), there was no improvement in employment; the manufacturing sector shrank dramatically, and the number of new companies coming into the State fell by one-third in the decade following adoption. Indeed, there is reason to believe that “Right-to-Work” laws may undermine growth by reducing or restricting consumer demand.

#### RESPONSE TO QUESTIONS OF SENATOR ENZI BY HEATHER BOUSHEY

*Question 1.* Why didn’t the stimulus bill create the lower unemployment rates promised by the Administration?

Answer 1. The stimulus bill did indeed create lower unemployment. Unemployment levels would have been much higher without the Recovery Act. Economists Alan Blinder and Mark Zandi have estimated that without the American Recovery and Reinvestment Act and other fiscal policies, unemployment would have reached over 11 percent, rather than the 10.1 percent it reached in October 2009, and job losses would have totaled 12.4 million, rather than 8.8 million.<sup>1</sup>

The Administration’s unemployment estimates were generated in December 2008 and by the end of January, before the Recovery Act was signed into law, it was clear that the estimate of how deep the Great Recession would be was already too optimistic. Economists were not predicting we would be losing jobs to the tune of 20,000 *per day* in January 2009 and this is why the Administration’s estimates were too rosy, not because the Recovery Act did not perform as hoped. Basically, their baseline was not as grim as it should have been.<sup>2</sup> According to the Congressional Budget office, ARRA increased the number of full-time equivalent (FTE) jobs by 1.6 million to 4.6 million compared with what would have happened otherwise, including more than 571,000 full-time equivalent (FTE) jobs in the first quarter of 2011.<sup>3</sup>

The Recovery Act included tax cuts equal to about \$282 billion, alongside increased funding for infrastructure and energy independence, help for States strug-

<sup>1</sup> Alan Blinder and Mark Zandi. “How the Great Recession Was Brought to An End.” (Washington, DC: Economy.com, 2010), available at <http://www.economy.com/mark-zandi/documents/End-of-Great-Recession.pdf>.

<sup>2</sup> Heather Boushey. “Accomplishments of the Recovery Act.” (Washington, DC: Center for American Progress, 2011), available at [http://www.americanprogress.org/issues/2011/02/boushey\\_arra.html](http://www.americanprogress.org/issues/2011/02/boushey_arra.html).

<sup>3</sup> U.S. Congressional Budget Office. “Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from October 2010 Through December 2010.” (Washington, DC 2011), available at <http://www.cbo.gov/ftpdocs/120xx/doc12074/02-23-ARRA.pdf>.



gling with falling revenues, and aid to those hardest hit by unemployment.<sup>4</sup> Together, as the new law was implemented, it saved and created millions of private-sector jobs, averted an even worse economic crisis for working families, and helped avert an even bigger Federal budget deficit by growing the economy.<sup>5</sup>

*Question 2.* Looking at Bureau of Labor Statistics data from 1995 to 2007, how much did U.S. businesses increase their capital services input vs. labor hours?

Answer 2. U.S. private nonfarm businesses increased their capital services by 6.0 percent and their labor hours by 2.2 percent from 1995 to 2000, and further increased their capital services by 3.2 percent and their labor hours by 0.1 percent between 2000 and 2007.<sup>6</sup>

*Question 3.* What role has the impact of technology on productivity growth and the increasing use of capital compared to the contribution of labor played in compensation trends?

Answer 3. Over the past few years, we have seen an increasing divergence between productivity and wages as productivity is increasing steadily while wages remain stagnant. This indicates that workers are not realizing the gains of productivity and that corporations are instead spending increasing amounts on things other than increases in their workers' wages.<sup>7</sup>

*Question 4.* Since 1985, have the average annual work hours for lower wage workers fallen more or less than those for higher-paid workers?

Answer 4. Since 1985, the average hours of work for the quintile of workers earning the least have grown from 2,343 to 2,465, or by 5.2 percent. In the same time, the average annual hours of work for workers in the top quintile of earners have grown from 3,612 to 3,765, or by 4.2 percent.<sup>8</sup>

RESPONSE TO QUESTIONS OF SENATOR BLUMENTHAL BY SECRETARY REICH, HEATHER BOUSHEY AND SARAH FOX

*Question 1. Secretary Reich, Ms. Boushey and Ms. Fox:* As you each mentioned in your testimony, the growth of middle class was, in large part, due to the growth of the unions. I am deeply concerned by the Federal Government either looking the other way with regard to labor laws, or enabling businesses to deprive many employees of their right to join a union or receive labor protections. Certainly, misclassification of workers is one practice that deprives workers of the wages and benefits that they deserve. As Attorney General, I investigated businesses in Connecticut that misclassified their workers as independent contractors rather than employees. I am pleased to join Senators Sherrod Brown and Harkin in their effort to pass the Payroll Fraud Prevention Act that would limit the misclassification of workers. This practice, however, is far too prevalent.

Can you discuss how misclassification of workers has shifted more power to the employer? How has this impacted employees' ability to advocate for fair treatment, adequate pay and reasonable benefits?

Answer 1. Misclassification of workers is a significant and, in my view, growing problem that has shifted power to employers and undermined employee protections. Too many employers have taken advantage of unintended loopholes in labor laws, or of structural changes in the economy, to classify people as independent contractors or supervisors exempt from labor law protections, when in fact they are employees who the laws were designed to protect. These misclassifications make it far more difficult for employees to form unions and otherwise join with other employees to ensure that labor laws are being enforced. And they reduce employees' ability to advocate for fair treatment, adequate pay, and reasonable benefits.

*Question 2. Secretary Reich:* We have seen far too often that workers need unions to fairly negotiate with businesses. I believe that this should be a right of all workers. I am deeply concerned by the National Labor Relations Board's decisions in October 2006, referred to as the Kentucky Rivers decisions. In 1935, the

<sup>4</sup> Boushey, "Accomplishments of the Recovery Act".

<sup>5</sup> U.S. Congressional Budget Office, "Estimated Impact of the American Recovery and Reinvestment Act on Employment and Economic Output from October 2010 Through December 2010."

<sup>6</sup> Bureau of Labor Statistics. "Preliminary Multifactor Productivity Trends, 2010." (Washington, DC: Bureau of Labor Statistics, 2011), available at <http://www.bls.gov/news.release/prod3.nr0.htm>.

<sup>7</sup> Lawrence Mishel, Jared Bernstein, and Heidi Shierholz, *The State of Working America 2008-9*. (Ithaca, NY: Cornell University Press. 2009).

<sup>8</sup> Ibid.

National Labor Relations Act defined a supervisor as a person who has the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Expanding that definition unfairly denies many employees the right to organize.

Can you discuss how these decisions and possibly other laws, regulations or rules have lessened the power of unions? What impact has this had on the middle class?

Answer 2. Expanding the definition of “supervisor” beyond the plain meaning and intent of the National Labor Relations Act, as did the NLRB’s the Kentucky Rivers decisions of 2006, robs employees of the right to organize that is the bedrock of that Act. This—alongside inadequate penalties on employers who violate employees’ rights by intimidating or firing them for attempting to organize unions, and employer threats to retaliate against striking workers by permanently replacing them—have severely undermined the power of unions. In my view, all three should be rectified: Congress should negate the NLRB’s Kentucky Rivers decisions and return to the meaning of “supervisor” contained in the Act; Congress should increase penalties on employers who intimidate or fire workers who attempt to organize unions; and Congress should bar employers from threatening to retaliate against striking workers by permanently replacing them.

#### RESPONSE TO QUESTION OF SENATOR BLUMENTHAL BY HEATHER BOUSHEY

*Question 1.* Can you discuss how misclassification of workers has shifted more power to the employer? How has this impacted employees’ ability to advocate for fair treatment, adequate pay and reasonable benefits?

Answer 1. Misclassification of workers (treating them as independent contractors when they are in fact employees) disadvantages the employee in several ways. First and perhaps most importantly, misclassification allows employers to deny key worker protections and benefits to their employees such as unemployment insurance (UI), worker’s compensation, social security benefits, temporary disability, and minimum wage and overtime protections.<sup>1</sup> This shifts power to the employer because it strips the employee of access to income security and wage-related protections, forcing them in many cases to accept a position without benefits at a sub minimum wage rate, and subjecting them to abusive overtime practices.

Because of the increasing prevalence of worker misclassification as an illegal cost reduction tactic, employees in organizations that employ this tactic find themselves extremely disadvantaged in attempting to negotiate for increased pay, reasonable benefits, and fair treatment.<sup>2</sup> When classified as an independent contractor, an employee who attempts to negotiate for any of these runs the risk of termination in a depressed job market. Because independent contractors receive none of the traditional employment protections, many workers are forced to choose silence or risk losing their job.

[Whereupon, at 12:11 p.m., the hearing was adjourned.]

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<sup>1</sup>James M. Bickley. “Tax Gap: Misclassification of Employees as Independent Contractors.” (Washington, DC: Congressional Research Service, 2011), available at <http://www.workforceatm.org/sections/pdf/2011/TaxGapMisclassificationofEmployeesasIndependentContractors.pdf?CFID=1779052&CFTOKEN=42387785>.

<sup>2</sup>Ibid.