# Rand Paul is wrong — Biden can fire the NLRB's general counsel

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On Day One of his new administration, President Joe Biden fired Peter Robb, who had until then been serving as general counsel of the National Labor Relations Board. Robb, who was appointed by President Donald Trump, still had ten months remaining in his statutory term of four years.

Robb's early firing was unprecedented. Although one general counsel resigned under presidential pressure in 1950, none had previously been fired before the end of their terms. Biden's choice to remove Robb early immediately raised hackles among Republicans, who argued it will set "a disturbing precedent for politicizing" the general counsel's office.

But some Republicans have gone even further in their criticism. Sen. Rand Paul, joined by three other Republican senators, sent a letter to the Biden administration arguing that Robb's firing was not just unwise but illegal.

Setting aside the debate over the political wisdom of Biden's aggressive move, his administration has the better argumenton the law. The plain text of the NLRB's governing statute allows the president to fire the general counsel at any time, for any reason.

When Congress wants to protect an officer from being fired at will, it knows how to do so. The standard language is well-known; indeed, Congress used it elsewhere *in the very same statut*e that created the modern NLRB general counsel. That statute, the 1947 Taft-Hartley Act, drew a sharp line of distinction between the general counsel and the five members of the Board itself.

A Board member "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." By contrast, the Act gives no similar tenure protection to the general counsel. It simply states that the GC "shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years."

This variation is telling. The Supreme Court has explained that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Further, the four-year term of the GC does not itself imply tenure protection. Long-standing Supreme Court precedent, predating the drafting of Taft-Hartley, had already settled that merely providing a particular term length does not insulate an officer from removal before the end of that term. In the 1897 case *Parsons v. United States*, the Supreme Court interpreted a similar statute establishing that "district attorneys shall be appointed for a term of four years ..." The Court held that this language did *not* prevent the president from removing a district attorney

early. Instead, it simply meant that district attorneys could not "remain in office longer than that period without being reappointed."

Paul's letter nonetheless argues that a restriction on removing the GC is *implied* in the statute even though it is not stated explicitly. Paul points to the 1958 Supreme Court case *Wiener v. United States*, which found an implied protection from at-will removal in the statute establishing the post-World War II era War Claims Commission.

But as the court put it in *Wiener*, "the most reliable factor for drawing an inference regarding the President's power of removal" for a particular officer is "the nature of the function that Congress vested in" that officer. The Court noted that the War Claims Commission "was established as an adjudicating body" and that its decisions were intended to be based only on legal arguments, not political considerations. The quasi-judicial nature of the Commission persuaded the court that some form of tenure protection must have been intended. As the Office of Legal Counsel has explained, *Wiener*'s theory of implied removal protection is limited to "officials whose primary duties involve the adjudication of disputes involving private persons."

*Wiener* is thus an inapt precedent because it dealt with officers much more analogous to the members of the Board itself, not the general counsel. The Board, not the GC, is the quasi-judicial arm of the NLRB. As the Supreme Court summed up in a 1987 case, the "words, structure, and history of the [Taft-Hartley Act] clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line." The general counsel's prosecutorial functions are far more akin to a district attorney than to a war claims adjudicator, and thus *Parsons*, not *Wiener*, is the more on-point precedent.

As the DC Circuit has recounted, it is a "general and long-standing rule" established by a several Supreme Court precedents that "in the face of statutory silence, the power of removal presumptively is incident to the power of appointment." Nothing in the NLRB's governing statute overcomes that presumption. The president has the power to appoint the general counsel, and for that reason he also has the power to fire him.

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