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THE EMPLOYEE FREE CHOICE ACT: RESTORING ECONOMIC OPPORTUNITY FOR WORKING FAMILIES

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE EMPLOYEE FREE CHOICE ACT, FOCUSING ON RESTORING ECONOMIC OPPORTUNITY FOR WORKING FAMILIES

MARCH 27, 2007

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C O N T E N T S

STATEMENTS

TUESDAY, MARCH 27, 2007

	Page
Kennedy, Hon. Edward M., Chairman, Committee on Health, Education, Labor, and Pensions, opening statement	1
Prepared statement	4
Isakson, Hon. Johnny, a U.S. Senator from the State of Georgia, opening statement	6
Prepared statement	8
Hohrein, Errol, Former Front Range Energy Employee, United Steelworkers	9
Estlund, Cynthia L., Catherine A. Rein, Professor of Law, New York University School of Law	11
Prepared statement	12
Mishel, Lawrence, Ph.D., President, Economic Policy Institute, Washington, DC.	18
Prepared statement	20
Hurtgen, Peter J., Partner, Morgan, Lewis and Bockius, LLP	24
Prepared statement	27
Clinton, Hon. Hillary Rodham, a U.S. Senator from the State of New York	36
Alexander, Hon. Lamar, a U.S. Senator from the State of Tennessee	38
Reed, Hon. Jack, a U.S. Senator from the State of Rhode Island	39
Roberts, Hon. Pat, a U.S. Senator from the State of Kansas	41
Prepared statement	42
Brown, Hon. Sherrod, a U.S. Senator from the State of Ohio	43
Coburn, Hon. Tom, a U.S. Senator from the State of Oklahoma	45
Prepared statement	47
Obama, Hon. Barack, a U.S. Senator from the State of Illinois	47
Allard, Hon. Wayne, a U.S. Senator from the State of Colorado	50
Sanders, Hon. Bernard, a U.S. Senator from the State of Vermont	52
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	53

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Senator Enzi	59
Senator Murray	61
Letter of Support	63
Letters of Opposition	63
CRS Memorandum	72
Response to questions of Senator Hatch and Senator Coburn by Peter J. Hurtgen	73
Questions of Senator Hatch to Professor Cynthia L. Estlund	79

THE EMPLOYEE FREE CHOICE ACT: RESTORING ECONOMIC OPPORTUNITY FOR WORKING FAMILIES

TUESDAY, MARCH 27, 2007

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

The committee met, pursuant to notice, at 9:30 a.m. in Room SD–430, Hart Senate Office Building, Hon. Edward Kennedy, chairman of the committee, presiding.

Present: Senators Kennedy, Reed, Clinton, Obama, Sanders, Brown, Alexander, Isakson, Hatch, Roberts, Allard, and Coburn.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We'll come to order this morning. We regret very much that my good friend and colleague and Ranking Member, Senator Enzi, is necessarily absent this morning with a sickness in his family and we're all very hopeful and prayerful that they'll get through that challenge. I talked to him last night and he understands that the work goes on and we welcome very much our good friend here, Senator Isakson, who will take on that particular opportunity and I'm grateful to him.

The fundamental promise of the American Dream is that hard work leads to success and a better life for families. It is a vision of shared prosperity where we all work to expand the economic pie and we all reap the benefits. Unfortunately, the American dream has become a false hope for many working families. America is no longer growing together. We have an economy that works for Wall Street but not for Main Street.

Our hearings so far have demonstrated the growing insecurity faced by millions of working Americans. Men and women are working harder than ever, not receiving their fair share of the Nation's prosperity. Since President Bush took office, corporate profits have increased 65 percent, productivity is up 18 percent but household income has declined significantly and the wages of working Americans are stagnant. Six million more have lost their health insurance and their retirement security is fading as well.

Only one in five Americans today earns a guaranteed pension and the American dream is increasingly out of reach. It is trying to return to a world where workers obtain their fair share of the Nation's economic growth. The best way to do this is to give them a stronger voice in the workplace.

Unions were fundamental in building America's middle class and they still have a vital role in preserving the American dream. In 1960, the private sector union membership was at its peak. All Americans shared in the Nation's rapid growing prosperity. The rising tide of prosperity truly did lift all the boats. Now, union membership has sunk to record lows and working families are falling farther and farther behind.

Inequality is rising to record levels not seen since the gilded age and only those at the very top are profiting from our economic growth. Today we have a system where CEO's demand the inflated salaries for themselves, but fight to keep workers from having a voice on the job.

Our workplaces have become less democratic and the voices of working people have been silenced. In 2005, more than 30,000 workers were illegally fired or retaliated against for trying to exercise their right to have a union in the workplace. Every 17 minutes a worker is fired or punished illegally for supporting a union. Unscrupulous employers routinely break the law to keep unions out. They intimidate workers, harass them and discriminate against them. They close down whole departments or even entire plants to avoid negotiating a union contract. It's illegal, it's unacceptable but it happens every day.

It happens to workers like Jeff Lemon of Beaver County, Pennsylvania, who worked in the Beaver County Times Distribution Center. When he and his co-workers weren't given the raise as promised by the company, they tried to form a union as the NLRB to conduct an election. At that point the company launched its anti-union crusade. Management threatened to eliminate their jobs and replace them with outside contractors. They forced everyone to sit in meetings and listen to why the union shouldn't be allowed in. They spied on workers and they distributed information about the union at community events. They fired Jeff for his union activity.

Despite the threats and intimidation, the employees voted for the union 2 years ago. They still don't have a contract because the company keeps stalling and refusing to reach any kind of an agreement. The National Labor Relations Board ruled that Jeff was unlawfully fired for his union support and the company is appealing the ruling and refusing to restore him to his position. It could be years before he gets back the job he needs.

Stories like Jeff are all too common. The current system is broken. The law isn't protecting workers. The cops stop the anti-worker tactics that take place every day. Penalties for misconduct are so minor that employers treat them as just another cost of business. The rules of the NLRB are so biased that workers never get a chance to have their voices heard. The atmosphere has become so tainted that it is impossible for workers to make a free choice about whether they want a union.

That is why we need the Employee Free Choice Act. It will make America stronger by improving our economy and restoring security and prosperity to the American middle class. Union wages are 30 percent higher than nonunion wages. Eighty percent of union workers have health insurance compared to 49 percent of nonunion workers. Union members are almost twice as likely to have paid sick days—four times more likely to have a secure and guaranteed

pension. Unions mean the difference between an economy that is fair and an economy where working people are left behind.

The Employee Free Choice Act will fix our broken system by leveling the playing field for employees in three critical ways. It supports the right of workers to choose their own representatives, requires employees to come to the table to talk and it puts real teeth in the law by strengthening the penalties for discrimination against workers who favor a union.

These reforms will enable hard working Americans to make their own decisions about whether they want to bargain together without the threat of harassment and retribution or fear of losing their livelihood. It will empower American workers to work together to ensure fair treatment on the job and build a better life for their families.

The Employee Free Choice Act is about more than changing our labor laws. It's about giving workers basic dignity and respect in the workplace. It's the first of many steps we need to restore the voice of the American worker, which has been silenced for too long. I look forward to hearing from our witnesses today.

I just want to show very, very quickly with these charts what has happened basically to the middle class. If you look at where we were coming out of World War II up to the 1970's, you will see that all America grew together. These are the quintiles that we see from the lowest quintile, the second quintile, all the way up to the top quintile. All America, from 1947 to 1973, and this was the time of greatest union activity, all America grew, all America worked together.

Then what happens from 1973, really 1980, when we had the real assault on the unions, we saw the beginning of the disparity of the different quintiles and now if you look at what is the most recent one, you'll see where the growth is in terms of the American economy—completely different. Those at the lowest end are falling further behind. You could do a parallel chart of what has happened to the trade union movement during this period of time.

For years during the 1947 through 1973, when we had had an increase in productivity, it was shared with wages. This indicates the abuses of worker's rights that were on the rise, you see, from 2000 up to 2005—a growing incidence.

These are the National Labor Relations Board's own figures showing increasing dramatically the tax on workers who are trying to form unions, a dramatic increase in this. This chart shows the whole question of productivity. This chart goes back to 2000 but you'll see they are basically together at the time when we had the greatest time of common economic growth. As productivity went up, wages went up.

Now when we find this explosion of productivity that we see the increase in disparity. All of those are the economic indicators—all those parallels of what is happened to the trade union movement. That is one of the factors, I think, if we are concerned about what is happening to working Americans, concerned with what is happening to the middle class, it is important to make sure that their voices are going to be heard and they are going to be treated fairly.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

The fundamental promise of the American Dream is that hard work leads to success and a better life for families. It's a vision of shared prosperity where we all work hard to expand the economic pie, and we all reap the benefits. Unfortunately, the American Dream has become a false hope for many working families. America is no longer growing together. We have an economy that works for Wall Street, but not for Main Street.

Our hearings so far have demonstrated the growing insecurity faced by millions of working Americans. Men and women are working harder than ever and not receiving their fair share of the Nation's prosperity.

Since President Bush took office, corporate profits have increased 65 percent. Productivity is up 18 percent. But household income has declined significantly and the wages of working Americans are stagnant. Six million more have lost their health insurance, and their retirement security is fading as well. Only 1 in 5 workers today earns a guaranteed pension. The American dream is increasingly out of reach.

It's time to return to a world where workers obtain their fair share of the Nation's economic growth. The best way to do so is to give them a stronger voice in the workplace. Unions were fundamental in building America's middle class, and they still have a vital role today in preserving the American dream. In 1960, when private sector union membership was at its peak, all Americans shared in the Nation's rapidly growing prosperity. The rising tide of prosperity truly did lift all boats.

Now, union membership has sunk to record lows, and working families are falling farther and farther behind. Inequality is rising to record levels not seen since the gilded age, and only those at the very top are profiting from our economic growth.

Today, we have a system where CEO's demand strong contracts with inflated salaries for themselves, but fight to keep workers from having a voice on the job.

Our workplaces have become less democratic and the voices of working people have been silenced. The National Labor Relations Board's 2005 annual statistics show that, in that year, more than 30,000 workers received backpay from employers based on illegal employer activity.

This is the Board's own data. I know there have been a number of attempts to discredit these numbers, but such attacks are based on faulty data.[1] The simple fact is that unscrupulous employers routinely break the law to keep unions out—they intimidate work-

[1] An employer-backed organization misleadingly called the "Center for Union Facts," for example, has claimed that employees are illegally fired in only 1 or 2 percent of union campaigns. This report is based on data collected from the National Labor Relations Board's Case Activity Tracking System ("CATS"), not the Board's own annual statistics cited above. The committee contacted the Board about this data and was informed in an e-mail from an NLRB Associate General Counsel dated March 26, 2007 that the CATS system "is not able to provide reliable data with respect to the occurrence of unfair labor practices during union organizing campaigns for fiscal years before fiscal year 2007." The official explained that, "While the data entry screens [in the CATS system] . . . do contain a field to be selected by our personnel when an unfair labor practice case arises in the course of an organizing campaign, that field has not been utilized routinely because the data was not necessary for case processing. Therefore, that data in CATS is unreliable" for the purpose of collecting data about unfair labor practices during organizing campaigns.

ers, harass them, and discriminate against them. They close down whole departments—or even entire plants—to avoid negotiating a union contract. It's illegal and it's unacceptable, but it happens every day.

It happens to workers like Jeff Lemon of Beaver County, Pennsylvania, who worked in the Beaver County Times distribution center. When he and his co-workers weren't given the raises promised by the company, they tried to form a union and asked the National Labor Relations Board to conduct an election. At that point, the company launched its anti-union crusade. Management threatened to eliminate their jobs and replace them with outside contractors. They forced everyone to sit in meetings and listen to why the union shouldn't be allowed in. They spied on workers when they distributed information about the union at community events. And they fired Jeff for his union activity.

Despite the threats and intimidation, the employees voted for the union 2 years ago. But, they still don't have a contract, because the company keeps stalling and refusing to reach any kind of agreement. The National Labor Relations Board ruled that Jeff was unlawfully fired for his union support, and the company is appealing the ruling and refusing to restore him to his position. It could be years before he gets back the job he needs.

Stories like Jeff's are all too common. The current system is broken. The law isn't protecting workers, and it can't stop the anti-worker tactics that take place every day. Penalties for misconduct are so minor that employers treat them as just another cost of doing business. The rules of the NLRB are so biased that workers never get a chance to have their voices heard. The atmosphere becomes so tainted that it's impossible for workers to make a free choice about whether they want a union.

That's why we need the Employee Free Choice Act. It will make America stronger by improving our economy, and restoring security and prosperity to the American middle class. Union wages are 30 percent higher than non-union wages. Eighty percent of union workers have health insurance, compared to only 49 percent of non-union workers. Union members are almost twice as likely to have paid sick days, and are four times more likely to have a secure, guaranteed pension. Unions mean the difference between an economy that's fair, and an economy where working people are left behind.

The Employee Free Choice Act will fix our broken system by leveling the playing field for employees in three critical ways. It supports the right of workers to choose their own representative. It requires employers to come to the table to talk. And it puts real teeth in the law by strengthening the penalties for discrimination against workers who favor a union.

These reforms will enable hardworking Americans to make their own decision about whether they want to bargain together—without the threat of harassment and retribution, or the fear of losing their livelihood. It will empower American workers to work together to ensure fair treatment on the job and build a better life for their families.

The Employee Free Choice Act is about more than changing our labor laws—it's about giving workers basic dignity and respect in

the workplace. As former Secretary of Labor Ray Marshall wrote in a letter of support that I will include with my testimony today, this bill "is important to all Americans, not just to workers. We are not likely to have either sound public policies or fair and effective work practices if millions of American workers' voices remain unheard."

This bill is the first of many steps we need to take to restore the voice of the American worker, which has been silenced for far too long. I look forward to hearing from our witnesses today about this important bill and how we can best help America's working families build a better life and a better future for themselves and their children.

[The letter referenced above may be found in additional material.]

Senator KENNEDY. Senator Isakson.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Well first of all, I want to send our thoughts and prayers to Ranking Member Enzi who has a personal family situation that we all share in wishing him the very best on that. I want to thank Senator Kennedy for calling this hearing and allowing us to talk and get all the facts out on the table on this important issue and I particularly want to thank all our panelists for being here. I have apologized already to them because I have to jump up after my remarks and run to the Veteran's Committee to introduce three Iraqi wounded veterans from Georgia but I'll be right back then so it is not that I am not interested—it is only that I have two duties at the same time.

Particularly I want to also recognize the NLRB former Chairmen, Peter Hurtgen. Peter, thank you for being here—a Clinton appointee and long time servant to the country—we appreciate it.

Often we, as Republicans and Democrats, will share a goal, say ending poverty or making the workplace safer, but we will differ on methods of achieving it. This is not such a day. I simply do not share the desire of this bill's proponents to remove worker's fundamental rights.

Let us be clear, the legislation cleverly named "The Employee Free Choice Act," would radically change the way millions of employees decide whether or not they want a union to become their exclusive representative in the workplace. In the vast majority of instances over the past seven decades, the critical decision has been made through one of the most fundamental institutions of our democracy, the secret ballot, which is the private possession of every individual worker. In a democratic society, nothing is more sacred than the right to vote and nothing ensures truly free choice more than the use of the secret ballot.

Thousands of Americans have died and given their lives to ensure the constitutional guarantees of a right to vote and the assurance of the privacy of that vote and that it is owned by the voter, not a union, not the company and not the country.

This bill would create a tort type remedy system that would bring a smile to any lawyer's face. The vast majority of labor management disputes are voluntarily resolved. A tort type system,

while it will certainly keep trial lawyers busy, will clog the system with litigation and simply delay the resolution of claims.

This bill also seriously infringes on due process and the right to manage a private business through its mandatory injunctive provision. If an individual claimed that he was terminated because of his union sentiments, the bill would require that he return to work before the merits of his claim were resolved. We rightly outlaw employment discrimination on the basis of age, sex, religion and national origin but do not require individuals claiming to have been discharged on these bases to return to work before the merits of their claims are determined and we should not do so.

There is no basis for dramatic change. We are told that taking away private ballots is necessary because the election process, overseen by NLRB, is increasingly tilted against unions. However, the claim simply does not withstand examination. The fact is that for the last decade, unions have been winning a steadily increasing number of NLRB certification elections. In fact, in fiscal year 2005, unions won over 61 percent of the time, a rate as high as it has ever been before. We are also told that employers are making elections unfair. These charges don't stand up either.

The NLRB guarantees the right of free speech to all parties involved in union elections. Free speech, open debate, the free exchange of ideas and opinions are, like the private election ballot, hallmarks of a free and fair democratic society.

We are told we need to remove a worker's right to a private ballot because of rampant employer coercion. The law already prohibits conduct in the context of union organization that is coercive or threatening. The NLRB scrupulously polices the conduct of both unions and employers during an organizing election and can invalidate any election if either party engages is misconduct or coercion. The rate of elections invalidated because of misconduct by either side is extraordinarily low and has, in fact, been declining.

In 2005, over 2,300 certification elections were conducted by NLRB. However, the NLRB conducted rerun elections because of misconduct by either the employer or the union in only 19 cases out of 2,300.

We are told the current low membership levels in unions must be due to unfair law or unfair NLRB election procedures. Sorry, those arguments don't hold either. The NLRB has not changed in nearly 50 years. The law and procedures governing union organization are the same as they were years ago when unions enjoyed the highest level of membership among private sector employees.

In conclusion, it has never been the role of government or the purpose of Federal labor policy to affect the level of union membership among private sector employees. Federal labor laws on this issue have always been neutral. It has always been clear that it was the employee's decision and their right to decide. The private ballot is sacred. This bill passed the House without nearly enough debate and I thank Senator Kennedy very much for affording us the opportunity to express our opinions today on this important issue before this Congress and the American people.

[The prepared statement of Senator Isakson follows.]

PREPARED STATEMENT OF SENATOR ISAKSON

First, I know we all want to send our thoughts and prayers to Mike Enzi, who cannot be here today as he attends to a family situation.

I want to thank Chairman Kennedy for holding this hearing and offering us the opportunity to get all the facts out on the table.

I welcome our panel, especially the distinguished former Chair of the National Labor Relations Board, Peter Hurtgen.

Often we as Republicans and Democrats will share a goal, say ending poverty or making workplaces safer, but differ on the methods of achieving it. This is no such day. I simply do not share the desire of this bill's proponents to remove workers' fundamental rights.

Let us be clear. This legislation, the cleverly named "Employee Free Choice Act," would radically change the way that millions of employees decide whether or not they want a union to become their exclusive representative in the workplace.

Currently, this decision has been made through one of the most fundamental institutions of our democracy—the private ballot.

Many critics of the bill are almost too focused on this first part of the bill, but as I read through the legislation, it only gets worse, not better. This bill would require the government to intrude upon the private negotiations between labor and management. Essentially, a government bureaucrat will be writing the contract for every unionized employer in America. Moreover, the bill would create a tort-type remedy system that would delight any trial lawyer.

The proponents of this legislation decry the decline in the number of workers who choose to cede their rights to the unions. Less unionized workers means less members' dues. That's why we're here. Union dues, whether taken from the employee's paycheck voluntarily or taken, in some cases, involuntarily in non-right-to-work States, are the only source of union income.

We in Congress should let workers decide for themselves whether joining a union is right for them, not decide for them, as the so-called Employee Free Choice Act would require. That is why the National Labor Relations Act specifically provides in its "bill of rights" section that employees have **both** the right to form and join labor organizations **and** the right not to do so.

This bill passed the House without nearly enough debate. We will see that this proposal receives much greater scrutiny here in the Senate.

I look forward to hearing the testimony from our witnesses.

The CHAIRMAN. Thank you very much, Senator Isakson. We will now hear from our panel. Errol Hohrein has worked as a boilermaker for over 20 years. He is a Vietnam veteran and father of three. In March 2006, he began a job at the Front Range Energy in north Colorado after unsuccessfully voicing his concern to management on workplace safety issues and salaries and benefit issues. And his fellow workers decided to organize formal union with steelworkers in order to improve working conditions. He was fired shortly after the successful union election.

The NLRB recently issued a complaint finding probable cause to believe that Mr. Hohrein's termination violated the law.

I am going to introduce each person as they are recognized rather than our whole group. We look forward to hearing from you. Thank you very much for joining us.

Mr. Hohrein.

STATEMENT OF ERROL HOHREIN ENERGY EMPLOYEE, UNITED STEELWORKERS, GREELY, COLORADO

Mr. HOHREIN. Chairman Kennedy and the members of the committee—I'm sorry.

The CHAIRMAN. Relax now, Errol. Errol, just relax now.

Mr. HOHREIN. OK.

The CHAIRMAN. Take a deep breath here.

Mr. HOHREIN. All right.

The CHAIRMAN. Pretend you're back out there in Northern Colorado. We are here to listen to you so just relax. Thank you very much for coming.

Mr. HOHREIN. Mr. Chairman and members of the committee, good morning. Thank you for inviting me to participate in this important hearing on workers' rights.

My name is Errol Hohrein. I live in Greeley, Colorado. I've been married for 21 years and I have two sons and a daughter. I served in Vietnam and was honorably discharged after losing a majority of my hearing as a result of an explosion. For more than 20 years, I have been a boilermaker.

Last year, I began working at Front Range Energy to help start up their $50 million ethanol distillery in Northern Colorado. Like many of my co-workers, I was hired with the promise of good pay, affordable health benefits and a safe working environment.

Workplace safety has always been a top priority for me. A boilermaker's work environment can be very hazardous. We often work with dangerous equipment, such as flame cutting torches, power grinders and large cranes. From every direction, there's risk of injury and in some cases, death. While at Front Range Energy, I began to notice potential safety risks. I went to management several times with my concerns about leaks in the ammonia tanks, leaks in steam systems and the inadequate storage of reactive chemicals. But my requests fell on deaf ears.

I quickly discovered that this was not the last of my problems at Front Range. Despite the distillery's monthly million dollar profits, the company callously reneged on their pledge of wage increases and benefits. It was theft by deception. We were shorted on wages and to make matters worse, the company's medical benefits were priced at over $900 a month—almost half of our paychecks. One co-worker wrote a letter to management about having been shorted on his paycheck and days later he was fired.

I was a union man for years. In fact, my grandfather, father, brother and all—have all been union boilermakers. I knew what a difference a union could make. I knew the value of coming together with co-workers to bargain for better work standards.

My co-workers were worried about workplace safety and fed up with the company's misrepresentations about wages and benefits and they were aware of my union background. So they came to me to ask about how we could go about forming a union. I have to say, I was reluctant at first because of how hard I knew this would be

but my co-workers were adamant about having fairness on the job. We decided to organize and form a union with the United Steelworkers to improve our working conditions.

Once the company found out that we were organizing, management began trying to intimidate us, targeting those of us who were active union supporters. They forced us to attend meetings where they slammed the union and where we were not allowed to say much. Following one meeting, I was written up for insubordination. They threatened that if our campaign was successful, our paychecks may suffer. Managers would follow me around the workplace at all times. They would not permit other workers to talk to me. They isolated me from my co-workers.

I used to hand out information to co-workers in the break room, the only place the company would allow us to do so. One day while handing out information to co-workers on the union during my break, management ordered me to stop and threatened to fire me.

We held our election on December 18 and 20, 2006 to accommodate shift schedules. On both election days, the plant manager hung out by the break room where we voted, reminding us with his presence of prior threats about what might happen if we were to vote in the union.

Despite Front Range Energy's intimidation tactics and other efforts to keep us from organizing, we won our union. But for me, victory was short-lived. The threat was real. Within days after the union election was certified by the NLRB, I was fired.

I've filed a challenge with the NLRB and it could be years before I get my job back. But my organizing efforts at Front Range have not ended. My commitment doesn't end until we get our first union contract. I'm now sitting at the USW bargaining table to negotiate. The company is all smiles, but I know better. We won't get a first contract until the Employee Free Choice Act is passed by this Congress with a mechanism that gets the job done.

I'm no troublemaker. I served my country in Vietnam, I've worked with youth as a junior high school history teacher, my wife is a special education administrator, I've raised three terrific children and I have one flaw—I tell the truth.

Labor law in this country is broken. It doesn't support working people and we're paying a terrible price for it. No matter what the Board rules in my case, I will lose. We're on the brink and no one's looking out for us. It's no secret that a union contract is the best economic program for uplifting working people in this country. What the Employee Free Choice Act does is restore the choice to bargain for a better life for people like me who have been robbed of that choice.

Our government needs to take action and do the right thing where working people are concerned. Our leaders need to pass the Employee Free Choice Act. Thank you for letting me testify.

The CHAIRMAN. Thank you very much, Errol. Our next witness is Cindy Estlund, who is a Catherine A. Rein Professor of Law at New York University School of Law and leading scholar of labor employment laws. She has written extensively on the relationship between the workplace and democracy. In recent work, she has focused on the current crisis workplace governance brought about by the decline of collective bargaining. Professor Estlund is a graduate

Lawrence University and Yale Law School. Prior to entering law teaching, she practiced law at the labor law firm, Bredhoff and Kaiser. Her recent publication, The Ossification of American Law, Rebuilding the Law of the Workplace in an Era of Self-Regulation and the book, Working Together: How Workplace Bonds Strengthen Democracy. Thank you very much, Professor, for being here.

STATEMENT OF CYNTHIA L. ESTLUND, CATHERINE A. REIN, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Ms. ESTLUND. Thank you, Senator. Good morning. The mic doesn't work.

The CHAIRMAN. If the little light is on, you're in.

Ms. ESTLUND. Got it. As Senator Kennedy just mentioned, much of my scholarship since 1989 has been on serious weaknesses in the Nation's labor laws. The most serious is the law's inadequate response to the increasingly fierce anti-union campaigns that employers have mounted with the help of high paid anti-union consultants.

The problem is both illegal and legal conduct. Far too many employers break the law. They fire union activists, threaten mass layoffs or a shutdown, they spy on pro-union workers, or bribe employees to vote no. The law's response to employer illegality has been far too little and too late. Most violations result in a slap on the wrist, maybe a rerun election many years after the union campaign has been defeated. Even anti-union discharges result, generally only in very small back pay awards after years of delay and no penalties.

Meanwhile, the employer gets the benefit of its wrongdoing by keeping the union out. As a result, union organizers can no longer assure employees that the law will stand behind them if they exercise their right to join a union. Employers can afford to treat the risk of legal sanctions as an acceptable cost of doing business. But the problem is not just employers who break the law.

Employers' control of the workplace and their power over workers gives them overwhelming advantages, built in advantages, that no incumbent has in a political election. They can ban union organizers from the workplace, including the parking lot. They can lawfully bombard employees day after day with anti-union propaganda in mandatory meetings often one on one with the employee's own supervisors.

Many employers violate the law with near impunity, but employers can and do create an egregiously hostile environment for union supporters even without breaking the law.

The Employee Free Choice Act would begin to fix this badly broken system. It would provide meaningful remedies and in appropriate cases, penalties for serious employer misconduct during the organizing process. And it would reduce employers' opportunity to mount these fierce anti-union campaigns by allowing employees to secure union representation on the basis of majority signup.

I'll focus here on majority signup, which has attracted the most attention. First, the Board has always relied on authorization cards to determine majority sentiment in some circumstances although mainly at the option of the employer. The law allows the employer to rely on valid authorization cards to recognize a new union if it

chooses and it allows or even requires employers to withdraw recognition from an existing union if the employer knows on the basis of cards or otherwise that a majority doesn't support the union. Yet, the law does not allow employees and unions to rely on valid authorization cards to secure union representation. This bill would change that.

The reason for this change is that the formal campaign has become a gross caricature of democracy in which employers hack away for months at employee's support for the union by illegal and legal means. If the only problem were employee's fear of individual reprisals based on the vote they cast at the end of the day then the secret ballot might seem to be the obvious and democratic answer. But the modern anti-union campaign, which has been honed by legions of highly paid consultants, makes the secret ballot a wholly inadequate guarantee against employer intimidation.

There are two reasons for that. First, a main goal of the employer campaign is to discover every employee's union sympathies well ahead of the election, for example, through repeated mandatory one on one meetings. After that sort of campaign, the secret ballot is a fiction. It gives a misleading semblance of democracy to something that is really very different. Second, the secret ballot is no protection at all against employee's fear of adverse consequences for the workers as a group and that is another mainstay of the modern anti-union campaign.

Employees are told the employer will close or relocate the business, that employees will lose existing benefits and that the workplace will become a site of constant conflict. The secret ballot does nothing to protect against those types of fears.

Opponents of the bill claim that secret ballots are needed to protect against union coercion in securing cards. No doubt such coercion could happen. It is illegal. It renders the cards invalid and the union loses everything as a result. That is a very powerful deterrent against union coercion. In fact, there is very little evidence of a problem in the many, many years in which authorization cards have been relied upon by the Board.

A study of recent representation campaigns found the employees experienced less pressure from any source in card check than in election campaigns and much less pressure from unions and employers in either election or card check campaigns.

The current system is badly broken. The law that governs the representation process helps to explain why a third or a half of nonmanagerial employees who don't have a union wish that they did. This bill would help restore some balance to the system and allow employees to gain the collective voice that they say they want and that they need to bargain for decent wages and working conditions. Thank you very much.

[The prepared statement of Ms. Estlund follows:]

PREPARED STATEMENT OF CYNTHIA L. ESTLUND

My name is Cynthia Estlund, and I am a law professor at the New York University School of Law. Since 1989, after several years of practicing labor law at the firm of Bredhoff & Kaiser here in Washington, I have studied, taught, and written about labor and employment law at the University of Texas School of Law, Columbia Law School, and now at NYU. I have published and lectured extensively on the law of the workplace. A significant part of my scholarship has addressed the serious weak-

nesses of our Nation's labor laws and particularly the law of the organizing and representational process.

I. WHY REFORM IS NEEDED

Congress has not revisited the core of the National Labor Relations Act (NLRA) since 1947, when President Truman was in office, the U.S. economy and its manufacturing base were unrivaled, and nearly one-third of the workforce was represented by unions. Much has changed. The system is now seriously broken, and it needs fixing.

There are many problems with the labor laws, and this bill only addresses a few of them. But it does address one of the major problems with the statute, and that is the law's wholly inadequate response to employers' fiercely aggressive and often illegal response to union organizing drives.

Any discussion of union organizing, and of fair ground rules for determining employees' choices about representation, has to begin with a few facts that the law is not going to change: The employer owns the workplace, runs the business, determines its scope and its location, establishes the rules, and hires and fires its workers. And all those things will remain true if the union wins its bid for representation. Unlike a political election, the incumbent employer that "loses" a representation contest retains its position and power over the voters.

So when workers are told that the employer strongly opposes unionization, what many are bound to hear is that union supporters will be deemed traitors and dealt with accordingly, or that the employer will move or shut down its operations to avoid dealing with a union. Many employers faced with an organizing effort explicitly threaten job loss. About half of the employers faced with a union organizing campaign threaten to close or relocate all or part of their business in the event of a union victory.[1] Employees fear job loss even without any explicit threats. A commission headed by John Dunlop, former Secretary of Labor under President Ford, reported that 40 percent of non-union, non-managerial employees believed that their own employer would fire or otherwise mistreat them if they campaigned for a union.[2] Unfortunately, those beliefs are not unfounded. Studies have found that between 25 and 30 percent of employers faced with an organizing drive fired at least one union activist.[3] A recent study using rather conservative assumptions and methods estimated that about one in five active union supporters was discriminatorily fired during organizing campaigns in 2005.[4] Whatever uncertainty there may be about the exact numbers, it is safe to say that thousands of employees have been fired in the last 10 years alone for their legally-protected union organizing efforts. Union organizers can no longer assure employees that the law will protect them if they support the union.

What does the law do about it? Of course, the law does nothing unless Board officials can prove a discriminatory motive on the part of an employer who creates and controls nearly all the relevant documents and employs nearly all the relevant witnesses. Even if those hurdles are overcome and an employee is found to have been illegally discharged, often years after the discharge, the employee may be granted reinstatement (rarely implemented when years have gone by) and backpay (minus any wages the employee has earned, or should have earned, in the meantime). In many cases that amounts to almost nothing. The employee does not get traditional compensatory damages or punitive damages, and no fines are assessed. In the meantime, the damage to the organizing effort has long been done, and the law does nothing to repair that.

When comparing these remedies to what is available under other Federal antidiscrimination statutes, one can only conclude that the law doesn't regard antiunion discrimination, a violation of Federal law since 1935, as all that bad.

One study of the U.S. labor laws for a major international human rights organization concluded that "many employers realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers."[5] The law's pallid response to illegality has led many employers to regard

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[1] Chirag Mehta & Nik Theodore, *Undermining the Right to Organize, Employer Behavior During Union Representation Campaigns*, p. 5 (American Rights at Work, 2005).

[2] *See* DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 75 (1994).

[3] *Id.* at 70; Mehta & Theodore, *supra* note 1, at p. 9.

[4] *See* John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, p. 1 (Center for Economic & Policy Research 2007).

[5] LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS, p. 16 (2000).

the prospect of legal sanctions "as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.[6]

II. HOW EFCA WOULD HELP

So what would EFCA do to change this egregious state of affairs? It would not further restrict what employers can do or say. Everything that is lawful now during the organizing campaign would remain lawful under EFCA. Employers would remain entitled to exclude union organizers from the workplace—the only place where workers can be counted on to convene—and to force organizers to buttonhole employees on their way to and from work and to beg for a bit of their precious and pressured time outside of work. Employers would remain entitled to compel workers to attend "captive audience" meetings, *en masse* and one-on-one, as often as they want during the work day, at which their supervisors or managers express opposition to unionization, predict various dire consequences of unionization, and urge workers to oppose the union.[7] I and other labor law scholars believe that these are serious problems in the law of union organizing, but this bill does not change any of this.

What the bill does do to reform the union representation process is, first, to provide meaningful remedies and, in appropriate cases, penalties for serious unfair labor practices during the organizing process; and, second, to reduce the employer's opportunity to mount an aggressive and coercive anti-union campaign by providing for the option of union recognition on the basis of majority signup.[8]

A. ENHANCED ENFORCEMENT

EFCA's enhanced enforcement provisions are designed to give some teeth to a law whose toothlessness has become an international embarassment. The trebling of backpay for an employee who suffers anti-union discrimination during the representation and initial bargaining phase operates as a rough proxy for the more generous damages remedies that exist under most antidiscrimination statutes. Given the modest amount of backpay that is typically awarded in an individual discharge case, this is the least that can be expected to deter anti-union discrimination that may be calculated to head off the prospects of unionization and collective bargaining that many employers so vehemently resist. For employers who persist, and who engage in egregious or repetitive acts of discrimination and coercion, the bill would authorize the assessment of civil penalties.

EFCA also provides for expedited investigations and injunctive relief in appropriate cases. The statute already recognizes that certain violations of the act threaten to accomplish their unlawful aims long before the law's ordinary remedial proceedings have a chance to run their course; if those wrongs are to be effectively remedied, it must be done expeditiously and by injunction. As the law stands, however, it is only certain *union* conduct—illegal secondary pressures and recognitional picketing—that trigger that extra measure of urgency.[9] Once again, the implicit premise of existing law seems to be that employer interference with the basic right to form a union is just not that serious. EFCA would introduce some symmetry to the law's remedial scheme.

The discharge of a union activist during an organizing drive is the quintessential case of a violation that must be remedied quickly if it is to be effectively remedied at all. Too often, the real objective of such a discharge is not just to rid the workplace of one employee but to intimidate his or her co-workers and stall the organizing drive itself. Prompt injunctive relief, subject to all the usual requirements and safeguards of injunctive proceedings, is the only effective answer to such direct and forceful interference with the right to organize.

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[6] *Id.* at 10.

[7] These meetings are at the center of the union avoidance strategies urged by well-paid consultants. *See* John Logan, *Consultants, Lawyers, and the "Union-Free" Movement in the USA since the 1970s,* 33 INDUS REL. J. 197 (2002). One recent study found that over 90 percent of employers hold one-on-one meetings, and 87 percent hold larger mandatory meetings. Mehta & Theodore, *supra* note 1.

[8] The bill also recognizes that many employers who lose hard-fought organizing campaigns continue their resistance by refusing to bargain in good faith over a first contract. They do so in the knowledge that the law's only response will be an order to bargain some more, and that the employees' response will often be frustration, demoralization, and the erosion of support for the union. In that light EFCA would allow recourse to arbitration to establish the terms of a first contract. The focus of my comments will be on the first two reforms: enhanced enforcement and the majority signup process.

[9] Sec. 10(l) of the NLRA, 29 U.S.C. § 160(l).

B. MAJORITY SIGN-UP

Nearly all of the controversy surrounding this bill has been generated by the provision for certification of a union not only on the basis of a secret-ballot election but also on the basis of majority signup, or presentation of valid authorization cards signed by a majority of workers designating the union as their representative. Under EFCA, elections will still take place, for example, if workers prefer a secret ballot (such that a majority does not sign cards seeking immediate recognition), or if unions and employers agree to proceed by election. But under EFCA, employees and unions would have the option of proceeding instead through majority signup.

As a historical matter, the hue and cry surrounding this provision is a bit overwrought. The NLRA has provided for recognition and bargaining on the basis of authorization cards since its inception, although mainly at the option of the employer.[10] Moreover, the law not only allows but requires an employer to withdraw recognition from an existing union if the employer knows, on the basis of valid cards or other evidence, that a majority of employees does not support the union.[11] Current law thus allows *employers* to rely on valid authorization cards in lieu of an election to displace an incumbent union, and, if the employer chooses, to recognize a new union. Yet current law does not allow employees and unions to rely on valid authorization cards in lieu of an election to initiate union representation. The implicit premise behind that contrast seems to be that it is far worse to saddle employees with a union when there is a hypothetical possibility that a majority does not want one than it is to deny employees a union when, in fact, a majority wants one. That implicit premise, to which I will return, has no basis in the policies of the act, and should be abandoned.

There is also an affirmative rationale for allowing employees and unions to opt out of the formal election process in favor of majority signup: The formal election campaign—which typically lasts about 6 weeks from the filing of the union's petition but can often be prolonged by procedural maneuvers—has become a gory battle scene in which employers chop away, by legal and illegal means, at the employees' support for the union.

In principle, the secret ballot, with its strong democratic pedigree, seems unimpeachable. And if the only problem with the electoral campaign were employees' fear of individual reprisals based on their vote, then the secret ballot might seem to be the obvious answer. But the modern anti-union campaign, as it has been honed in recent years by growing legions of well-paid "union avoidance" consultants, makes the secret ballot a wholly inadequate guarantee against coercion and intimidation. That is true for two reasons.

First, a main objective of the employer's campaign is to detect employee sympathies well ahead of the election; and, unlike most political incumbents, the employer has motive, means, and opportunity to do that. Although employers may not lawfully "interrogate" employees about their sympathies or engage in "surveillance" during off-duty time, they commonly do so anyway. And the employer can in any event direct supervisors to discover employees' union sympathies by confronting them day after day with anti-union diatribes and observing their reaction, and by watching who employees talk to at work. It may be possible for some individuals to conceal their union sympathies throughout the campaign, and then to vote "yes" in the election. But it is not normal human behavior, and it is not the nature of an organizing campaign, to maintain the secrecy of employees' union support up to the day of the election. So the secret ballot is often a fiction, if not a farce, in the context of an electoral campaign process that takes place on the employer's own turf and under the employer's determined and omnipresent gaze.

Second, the secret ballot does nothing to allay employees' fear of adverse consequences for the workers as a group; and instilling such fear is another tried and true feature of the modern anti-union campaign. The standard employer campaign includes express or implied threats to shut down or relocate the business, predictions of violence and confrontation, of lost business and degraded workplace relations, of refusal to grant concessions or even maintain existing benefits.[12] Most of

[10] Although the law has long required an election for *certification* of a union, for much of the act's history the Board would nonetheless order an employer to *bargain* with a union that presented a valid majority of authorization cards (unless the employer petitioned for an election to test the union's claim of majority status). It was first in *Linden Lumber* that employers were held to have no duty to bargain with a union on the basis of a card majority (absent independent ULPs that tended to erode majority support). *See Linden Lumber Co.* v. *NLRB*, 419 U.S. 301 (1974).

[11] *See* Levitz Furniture Co., 333 NLRB 717 (2001).

[12] *See* Logan, *supra* note 7.

these threats and predictions are currently legal and will remain so; some of them are illegal and might be deterred by the enhanced enforcement provisions of EFCA if it becomes the law. But there is no reason to believe that employers will stop making exaggerated predictions of disaster and of their own recalcitrance that lead employees to fear the consequences of forming a union. The secret ballot is no protection whatsoever against that kind of intimidation.

Indeed, the employer's ability to bring about many of the consequences that it "predicts" will follow a union victory puts in question the very idea of a fair election in this setting. In a political election, the incumbent may predict dire consequences if the challenger prevails, but if the incumbent loses in our democratic system, that incumbent gives up power and is not around to bring about those dire consequences. In a representation election, by contrast, even if the union wins the election, the employer will still be the employer, and will still exercise control over the workplace, the employees, and their jobs.

EFCA meets these concerns not by regulating what employers can say about unions any more than current law does, but by seeking to limit the employer's opportunity to mount this aggressive campaign—that is, by narrowing the time period during which the employer is aware of the organizing drive and can mount its counter-campaign. Under EFCA, *employees and unions*—and not only the employer—would have the option of proceeding instead through majority signup. And much as the employer now must withdraw recognition from an incumbent union when a majority of employees clearly express that choice through authorization cards or other evidence, the employer would be required to grant recognition to a new union on the basis of a majority of valid cards in favor of the union.

Opponents argue that, without a formal campaign, employees will be deprived of essential information about unions. Information is good. But employers who are committed to avoiding unionization are not especially reliable sources of such information. The best way to learn what it is like to have a union is having a union. That, after all, is how employees learn most of what they need to know about their employer—by working for the employer. It is hard for an applicant to get good information about what it is like to work in a particular firm or department, and even harder to know what will happen if a new manager takes over or if a new product flops. Applicants ask the questions they feel they can ask up front (as employees can with the union). Once on the job, they may learn lots of things they did not know ahead of time, some good and some bad (as they may with the union). Employees, armed with this new information, may decide to stay or to quit; the exit option is equally available to employees who find they do not like having a union. But employees who are dissatisfied with their union—if their views are shared by a majority of their co-workers—have two options that employees dissatisfied with their employers do not: They may tell their employer that they no longer support the union, at which point the employer may or even must withdraw recognition; or, if they are union members, they may vote out the union's leadership in internal union elections.

Most of the controversy surrounding the proposed use of authorization cards is based on fears of union coercion and misrepresentation in the solicitation of cards. It is certainly possible for that to happen, just as it is possible for employers to coerce employees to sign cards seeking decertification of a union. In either case, the coercion would be illegal and the cards would be invalid, and the Board must pass on those issues before ordering certification or decertification.

But, in fact, there is very little evidence of union coercion or fraud in securing authorization cards during the very long history of Board reliance on such cards in the representation context. A recent study of both card-check and election-based campaigns found that employees experienced less pressure from any source in card-check campaigns than in NLRB elections, and much less pressure from unions than from management in either kind of campaign.[13] When it comes to adjudicated cases, there is even less reason for concern about union coercion. The HR Policy Association, an opponent of card-check recognition, identified 113 cases in the 70-plus year history of the act that it claimed involved coercion, fraud, or misrepresentation in

[13] Based on a 2005 survey of 430 workers from both election and card-check campaigns, Professors Adrienne Eaton and Jill Kreisky found the following: Among all workers in both campaigns, 22 percent said management coerced them "a great deal" (vs. 6 percent for the union). In NLRB elections, 46 percent of workers complained of management pressure, while, in card check campaigns, 23 percent reported management pressure and 14 percent reported union pressure. Fewer than 5 percent of workers who signed a card in the presence of an organizer felt that the organizer's presence made them feel pressured to sign. Fewer workers in card check campaigns than in election campaigns felt pressure from co-workers to support the union (17 percent vs. 22 percent). Adrienne Eaton & Jill Kreisky, *Fact Over Fiction: Opposition to Card Check Doesn't Add Up*, p. 2 (American Rights at Work, 2006).

the securing of union authorization cards. A skeptical review of those cases suggested that such misconduct was actually found in only 42 of those cases.[14] Either way, it is a drop in the bucket compared to the thousands of cases of illegal employer discrimination against union supporters every year.

There are two reasons why unions would not generally be expected to coerce and intimidate workers into signing cards: First, unions do not have the kind of leverage that employers have over workers. Second, union coercion and intimidation of employees is a strategy that is likely to backfire. It is no way to build trust among employees and in the union, without which a union can accomplish very little. A union does not own the workplace; it does not decide whether the employees have a job; it has no power at all in the workplace unless a majority of workers support it. Without an uncoerced majority, the union cannot accomplish anything over the long or medium term (and is vulnerable to decertification).

Again, this is not to say that unions never coerce employees to sign cards, but that there is no reason to believe that it is or is likely to become a systemic problem, especially as compared to the documented history of employer abuses during the formal electoral process to which the proposed majority signup procedure affords an alternative.

III. CONCLUSION: TAKING THE RIGHT TO ORGANIZE SERIOUSLY

There will always be some risk of abuse by both employers and unions, and some uncertainty about whether employees have been able to express their true preferences. The law should aim to minimize those risks and uncertainties on both sides. But current law, and the opponents of this bill, seem to assume that the risk that a union might be foisted upon employees in the absence of an uncoerced majority is much, much worse—orders of magnitude worse—than the risk that employees may be denied representation when a majority of employees wants it.

It is hard to see how the status quo could be justified without that unspoken premise, given the slight and ephemeral evidence of union coercion of cardsigners as compared to the overwhelming evidence of employer coercion of union supporters under the existing regime. That seems to be the unspoken premise, as well, behind existing law's reliance on valid cards to command the employer's withdrawal of support for an incumbent union and its refusal to rely on valid cards to command recognition of a new union.

If that is indeed the unspoken premise behind the status quo, it would be quite consistent with another set of facts: Surveys indicate that between 32 and 53 percent of non-managerial workers who don't have union representation wish they did, while only 10 to 13 percent of workers who do have union representation wish they did not.[15] An exceedingly generous assessment of the existing regime is that, in order to minimize the (very small) risk that workers will be stuck with a union in the absence of uncoerced majority support, it virtually guarantees that many more workers will be denied union representation when an uncoerced majority would have chosen it.

But that is not what the law is supposed to do. The law is supposed to protect employees' right to form a union and bargain collectively; that right is every bit as important as the right to refrain from those activities. In a world in which employers, who own and control the workplace and on whom employees are inescapably dependent, vehemently oppose unionization, the law must stand solidly behind employees who seek to exercise that right. The law's failure to do so has contributed in some measure to the drastic decline in union membership in the private sector, and to the well-documented "representation gap"—the wide gap between what employees have and what they say they want in terms of collective representation.[16] EFCA would take a modest step toward enabling employees to narrow that gap by forming a union.

The CHAIRMAN. Thank you very much. Our next witness, Dr. Larry Mishel, who is a recognized authority in economic policy, particularly as it effects middle- and low-income families currently

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[14] *See* Testimony of Nancy Schiffer before the House Subcommittee on Health, Education, Labor, and Pensions, Feb. 8, 2007, at p. 9.

[15] RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT, pp. 18, 20 (2d ed. 2006).

[16] Freeman and Rogers found in the mid-1990s that 63 percent of employees wanted more influence over workplace decisions than they had, and that 43 to 56 percent of them believed collective representation was a better way to achieve that than individual action. *Id*. at 12–13. A more recent California survey found that 51 percent of respondents thought it was very important, and 38 percent thought it was somewhat important to have more say in workplace decisions. *Id*.

serves as President of the Economic Policy Institute, a nonprofit, nonpartisan think tank that provides high quality research and education to promote a prosperous, fair, sustainable economy. He is a graduate of Penn State University. He received his Doctorate in Economics from the University of Wisconsin, principal author with a research volume on the state of working America, a comprehensive review of the labor market and living standards. Doctor, good to see you again.

STATEMENT OF LAWRENCE MISHEL, Ph.D., PRESIDENT, ECONOMIC POLICY INSTITUTE, WASHINGTON, DC.

Mr. MISHEL. Thank you very much. Well, thank you for the opportunity to discuss the importance of making it possible, once again, for working Americans to exercise their fundamental rights to join together in unions of their choosing.

The topic of today's hearing couldn't be more timely. Americans are facing the very challenges that unions help us to address. Most Americans are working harder and smarter than ever before but they fear their efforts are not being recognized and rewarded.

In our time, we have seen labor movements can be a force for freedom throughout the world. We often heard about it when it was the Polish Solidarity Union overthrowing communist totalitarianism. We note it with COSATU helping to overthrow Apartheid. Unions are good at home as well.

All freedom-loving Americans should favor a strong, vibrant labor movement here and abroad. I learned that as a young boy in Philadelphia when I was taught that the building next to Independence Hall was called Carpenters Hall. That is where the First Continental Congress met.

Twenty-five years ago, a very important book written by Harvard Economist James Medoff and Richard Freeman stated, unions reduce wage inequality, increase industrial democracy and often raise productivity. In the political sphere, unions are an important voice for some of society's weakest and most vulnerable groups, as well as for their own members. That remains an ample summary of the union impact on our country.

Let's first look at the union impact in the workplace. Unions promote opportunity, security and fundamental fairness. Through training programs and requirements that job openings be posted and filled fairly, unions help working Americans enjoy a fair chance to get ahead.

Unions make sure that workers are rewarded for their years of service and have regular hours that allow them to plan ahead and spend time with their families.

Sometimes a union is a matter of life and death. Twenty-eight percent of coal miners, for example, work in union mines, but only 14 percent of the fatalities in mines in recent years was in these union mines. This means that it was twice as likely to be a coal miner—if you are nonunion, you are twice as likely to die as you would if you were a union miner.

Unions ensure due process through the grievance process. An employer must establish just cause before disciplining or terminating an employee. This gives members the security to complain, to have input into how a business is operated, to challenge unsafe,

unfair, unlawful, unproductive or wasteful practices and to recommend better alternatives.

Of course, unions' most important contribution is making work pay. We know that unions, controlling for many factors, provide wages that are much higher, provide health benefits, which you are more likely to get and have better pension coverage and have more time off.

It is important to note that even nonunion employees benefit from the presence of unions because of what is called the threat effect. That is, employers, for fear of having their workers organize, pay their nonunion employees more. The clearest example of this very recently, Japanese and German transplant auto factories which for 25 years have paid UAW wages. Now that the UAW is weakened, they are building plants and paying people just $10 and $15 an hour.

How do unions affect competitiveness? Do unions hurt companies? Many people think so but 30 years of research and over 75 studies would tell you that, in fact, unions do no harm to the productivity of firms nor that union firms are more likely to lead to a plant closing or insolvency. There is very ample research on this.

Why is that the case? Well, one, unions give employees a voice in the workplace allowing them to complain, shape operations and push for change. Two, union employees feel freer to speak up and it fuels collaboration and information sharing. Why would you share with another worker what you know if you don't have security on the job?

Three, the higher pay that unions provide pushes employers to do better with their costs, investing in new technology and making new investments. And last, union employees get more training and participate in higher performance practices.

Now lets turn to the union effect on the national economy. Unions were a force from the mid 1940's through the mid 1970s, ensuring that we all grew together as Senator Kennedy's chart showed. And it's been the ever-present decline of unionization that has helped lead to the fact we no longer are growing together, we are growing apart.

The top 1 percent of income earners now have double the share of income they had just 30 years ago. The wealth of the wealthiest 1 percent is now 190 times that of the median household. It used to be just 125 to 1.

Union membership and its decline is very much associated with that. Many studies show that around 20 percent of the growth of the wage inequality in the last 30 years is due to the weaker unions and fewer unions that we have. But researchers also think this is an underestimate because it ignores the union threat effect, the effect on the nonunion workers, ignores that unions have benefits, which is even greater than on wages and because there is a cultural effect. We've had an enormous shift of norms whereby greed is worshipped and hard work is not rewarded and that has a lot to do with the change in inequality over the years.

I would also stress the disconnect between work and pay that Senator Kennedy had a chart on. Americans are working not just harder and longer but more productively. The economy has grown enormously, in large part because the American worker has been

among the most productive in the world. Output per hour of work increased 71 percent from 1980 to 2005, making possible a dramatic rise in our living standards. The rise of productivity is the rise in the size of the pie that we get to distribute.

The fact is not that it has grown 71 percent over the last 25, 27 years but that the typical worker does not have much higher wages is evidence of a gross failure of our economy to be fair to everybody.

The CHAIRMAN. I am going to let you wrap up.

Mr. MISHEL. OK, thank you. I would just point out that over the last 5 years, productivity has been almost 20 percent, but the wages of both college educated and high-school educated workers have been stagnant. Given that, the surveys show that over 50 percent of nonunion, nonmanagerial workers would choose to have a union tomorrow. It is clear that the line going down of union membership represents a gross disconnect between what workers want and what they are getting and that is why they need The Employee Free Choice Act. Thank you.

[The prepared statement of Mr. Mishel follows:]

PREPARED STATEMENT OF LAWRENCE MISHEL, PH.D.

Thank you for the opportunity to discuss how to make it possible, once again, for working Americans to exercise their fundamental rights to join together in unions of their choosing.

The topic of today's hearing couldn't be more timely. Americans are facing the very challenges that unions help us to address:

Most Americans are working harder and smarter than ever before, but they fear their efforts are not being recognized and rewarded. The growing gaps in wages and wealth threaten the productivity of our economy and the cohesion of our society. And many Americans are opting out of the democratic process at a time when the Nation needs their involvement and their ideas.

In our time, we have seen how labor movements can be a force for freedom throughout the world. Recall the achievement of Solidarity to overcome Communist totalitarianism in Poland. Recall the efforts of COSATU to overthrow Apartheid in South Africa. All freedom-loving Americans should favor a strong, vibrant labor movement both here and abroad. Here in the United States, unions can also make an historic contribution by making work pay for those who labor for low wages, by restoring the link between productivity increases and pay increases, and by providing training, health coverage, and portable pension benefits at a time when most Americans will keep moving from job to job.

We know union members can build a better America because that is just what they have done at every crucial moment in our Nation's history, from the days when the First Continental Congress met in Philadelphia . . . in Carpenters Hall.

As Harvard economists James Medoff and Richard Freeman wrote nearly 25 years ago:

> "Unions reduce wage inequality, increase industrial democracy and often raise productivity . . . in the political sphere, unions are an important voice for some of society's weakest and most vulnerable groups, as well as for their own members."

In our Nation's public life, unions have been a powerful voice for all working Americans for 150 years. In the 19th century, they won the 10-hour day and then the 8-hour day so that succeeding generations could spend time with their families. In the years before the Great Depression, the unions helped America abolish child labor, establish workmen's compensation and protect workers' health and safety on their jobs. During the Depression, union members helped to preserve democracy and restore prosperity by enacting a Federal minimum wage, overtime pay and a 40-hour week, creating social security and unemployment insurance, and thereby proving that our political system could serve the interests of the great majority of people. Labor's victories were America's victories.

In the succeeding years, union members helped America keep its promise of "liberty and justice for all." With the visionary leadership of A. Philip Randolph, the Sleeping Car Porters were the unsung heroes of the civil rights movement from the fight for the Fair Employment Practices Commission to the Montgomery Bus Boy-

cott and the March on Washington. Walter Reuther of the UAW was at Martin Luther King's side in 1963 at the March on Washington. Attorney General Nicholas Katzenbach declared that the Civil Rights Act of 1964 would not have passed but for the support and determination of the unions. And Dr. King gave his life supporting sanitation workers who walked off their jobs in Memphis to assert their human dignity. Union members led the fights for the Mine Safety Act, the Occupational Safety and Health Act, ERISA, and laws to protect migrant farm workers. The health care workers and nurses pushed for and won passage of the last improvement to our workplace safety laws in 2000, the Needlestick Safety and Prevention Act.

Through all these efforts, and so many more, America's unions made the United States a fairer, more productive, and healthier society.

Unions build our democracy as well as our economy. Union members and their families are more likely to vote than the average American, and organizations from the Red Cross to United Way benefit from the disproportionate contributions and participation of union members.

UNIONS IN THE WORKPLACE

In our workplaces, unions promote opportunity, security, and fundamental fairness.

Through training programs and requirements that job openings be posted and filled fairly, unions help working Americans enjoy a fair chance to get ahead.

Unions make sure that workers are rewarded for their years of service and have regular hours that allow them to plan ahead and spend time with their families.

Union employers are less likely to violate civil rights laws, less likely to violate minimum wage and overtime laws, and more likely to follow workplace safety standards. Twenty-eight percent of coal miners, for example, work in union mines. Yet from 2004 to 2006, only 14 percent of fatalities occurred in union mines. The odds of dying in a non-union mine were more than twice as great as in a union mine.

Unions ensure due process. In every State but Montana, employment is at will. Employers can fire employees for no reason or any reason, except those specifically proscribed by law, which usually pertain to race, religion, age, gender or ethnicity. Employees with no union to protect them can be fired on a whim, for complaining, for whistleblowing, for dressing wrong, because the foreman doesn't like them, or for their appearance. Unions, by contrast, almost always demand and win a right to due process and a requirement that the employer establish just cause before disciplining or terminating an employee. By insisting on just cause and due process, unions give their members the security to complain, to have input into how a business is operated, to challenge unsafe, unfair, unlawful, unproductive or wasteful practices and to recommend better alternatives.

In times of hardship, unions help hardworking people have access to the benefits that they have earned, such as unemployment insurance, worker's compensation, or Trade Adjustment Assistance. Unions often advocate on behalf of their members with government agencies when benefits are denied or delayed.

Of course, unions' most important contribution is making work pay and compensation more equitable.

When one compares workers whose experience, education, region, industry, occupation and marital status are comparable, those covered by a union agreement enjoy:

- 14.7 percent higher wages;
- 28.2 percent more likely to have employer-provided health insurance;
- 53.9 percent more likely to have pension coverage; and
- 14.3 percent more paid time off.

The union wage premium varies by race, ethnicity and gender, but is large for every group:

- Whites—13.1 percent
- Blacks—20.3 percent
- Hispanics—21.9 percent
- Asians—16.7 percent
- Men—18.4 percent
- Women—10.5 percent

In unionized settings there is much less inequality as people doing similar work are similarly paid, as race and gender differentials are less, as occupation differentials are less, and as the wages of front-line workers are closer to that of managerial workers. Unions also lessen inequality because they are more successful at raising the wages of those in the bottom 60 percent of the wage pool.

It is important to note that even non-union employees benefit from the presence of unions in their industry and area. Because of the so-called "threat effect," non-union employers give their employees higher wages and more generous benefits in order to prevent their own employees from organizing. The clearest example is the Japanese and German transplant auto factories, which for 25 years have paid UAW wages to their non-union employees, even in the rural deep South where wages are generally low, in order to keep them from unionizing. Now that they perceive the UAW as weakened, the transplants are beginning for the first time to pay lower wages—$10–$15 an hour less in some cases.

More generally, unions have raised the standard for most employers and the expectations of most employees by negotiating paid lunch breaks, health benefit coverage, paid vacations, and paid holidays, none of which (shamefully) is required by Federal law.

THE EFFECTS OF UNIONS ON COMPETITIVENESS

So do unions help or hurt companies? How does unionized Costco, for example, compete successfully with non-union Wal-Mart even though Costco's labor costs are 40 percent higher? How does Costco generate almost twice as much profit per employee as Wal-Mart's Sam's Club?

Decades of research show that unions can have substantial positive effects on firm performance.

At least four factors account for the positive impact on performance:

1. Unions give employees a voice in the workplace, allowing them to complain, shape operations, and push for change, rather than simply quitting or being fired. That leads to reduced cost from lower turnover.
2. Union employees feel freer to speak up about operations, leading to improvements that increase productivity. Employment security fuels collaboration and information sharing, leading to higher productivity.
3. Higher pay pushes employers to find other ways to lower costs—with new technology, increased investment, and better management.
4. Union employees get more training, both because they demand it and because management is willing to invest more to get a return on their higher pay.

Research shows that the likelihood of union firms closing or going bankrupt is no greater than for non-union firms. The bottom line is that union firms are just as productive as non-union firms. In the auto industry, for example, even though the non-union foreign transplant companies generally have newer facilities, 6 of the 10 most productive assembly plants are union.

UNIONS AND THE NATIONAL ECONOMY

One of the most important effects of unions has been on reducing inequality. The "great compression" of the mid-20th century, when a huge gap between the wages and incomes of workers on the bottom and at the top closed, began as deliberate government policy during World War II, but was maintained for 30 years by the power of unions to raise workers' wages and hold the CEOs in check. The American middle class was created in the 1940s, 1950s and 1960s, when unions were strong and guaranteed that the productivity and profit of American industry was broadly shared.

For the last 30 years, as union density has declined, that compression has reversed and inequality has been on the rise. Since 1973, according to Picketty and Saez, the share of market income going to the top 1 percent has more than doubled, from less than 10 percent of all income to almost 22 percent in 2005. The ratio of the wealth of the wealthiest 1 percent of Americans to those in the middle (e.g., the median) was 125 to 1 in 1962. By 2004, it was 190 to 1.

Studies show that the decline in union membership has been a substantial factor in this rising inequality—responsible for at least 20 percent. My own research suggests the effect is larger, since most estimates ignore the union threat effect and its loss, the union effect on benefits, and as Paul Krugman points out, unions have had a cultural effect, helping impose norms that made greed and inflated CEO compensation unacceptable. When unions were strong, CEO pay was "only" 24 times the pay of average workers. Today, with unions weakened, CEO pay is 262 times the pay of average employees.

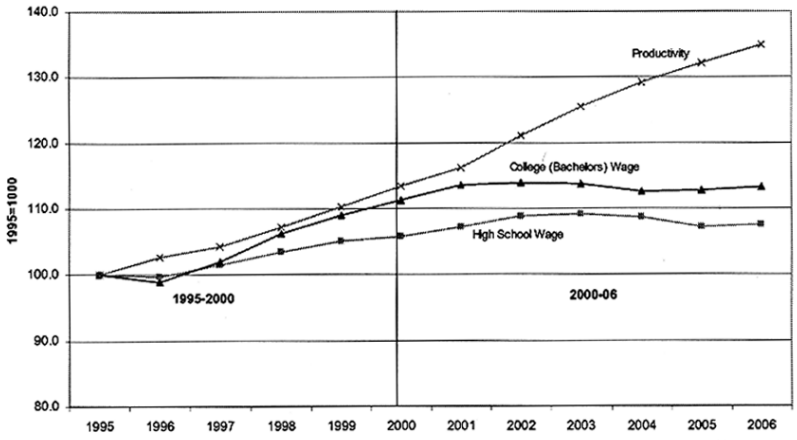
For 30 years after World War II, a rising economy truly lifted all boats, and Americans at every wage level saw their income rise together. For most of the last 30 years, and particularly in the last 5 years, with union representation at its lowest share of the labor force since the 1930's, the Nation's enormous wealth has not been fairly shared. Since 1980, the U.S. economy has grown at an annual rate of 3 percent per year, but the benefits of this growth have gone, as I noted earlier,

overwhelmingly to the best-off 10 percent and among these, especially to the upper 1 percent. Average working Americans have been getting a shrinking piece of the pie. Inequality has reached levels not seen since before the Great Depression.

Since the late 1970's, inflation-adjusted wages and income for the vast majority of Americans have risen much more slowly than the Nation's productivity and wealth. To the extent that the typical family's or household's earnings have risen, it is mostly because family members, especially married women, have worked longer hours. The typical middle class family today works more than 10 hours more per week than a similar family worked in 1979. Between 1975 and 2000, prime age families with children increased their time in the labor market by 900 hours a year—5 months more work! It's no wonder that families feel squeezed both in terms of finances and time.

Americans are working not just harder and longer, but more productively. The economy has grown enormously, in large part because the American workforce has been among the most productive in the world. Output per hour of work increased 71 percent from 1980 to 2005, making possible a dramatic rise in our living standards. But the real compensation, including benefits, of nonsupervisory employees rose only 4 percent. Productivity over the past 5 years rose almost 20 percent, but inflation-adjusted wages for workers with a college education have been flat, just as they have for those with a high school diploma. (See Figure)

The Productivity-Pay Gap:
Hourly productivity and real wage growth, 1995-2006



Mishel et al, *The State of Working America 2006/2007.* An Economic Policy Institute Book. Ithaca, N.Y.: Cornell University Press, 2007. Update of Fig. A

THE EMPLOYEE FREE CHOICE ACT

I have shown that the decline in union representation has been a major cause of two disturbing trends in our economy: the rise in inequality and the failure of average working Americans to share in the benefits of rising productivity. By reducing the opportunity for employers to intimidate and discourage workers from unionizing after they have reached a collective decision to do so, the Employee Free Choice Act can help restore and spread the benefits that unions bring to workers and the economy.

Employees understand the benefits unions bring. Research by Harvard economist Richard Freeman (that I have attached to this testimony) shows that a majority of nonunion non-managerial workers in 2005 would have voted for a union if given the opportunity. If even half of the 58 percent of employees who want a union had one, the entire economy would be transformed, and I have no doubt that the result would be a much fairer distribution of the economic wealth our Nation produces.

The authors of the Wagner Act understood perfectly well that individual employees cannot strike a fair bargain with much more powerful employers. They knew, as Sen. James Webb says, that employees need an agent. Their conclusions are still part of the National Labor Relations Act's Findings and Declaration of Policy:

"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 recurrent business depressions, by depressing wage rates and the purchasing power of wage earners . . ."

By requiring employers to accept their employees' choice of bargaining representative, deterring employer violations of the law, and by requiring arbitration of first contracts when necessary, the Employee Free Choice Act will help restore the purchasing power of average Americans and lift the living standards of the 90 percent of Americans who have endured the middle class squeeze or been left out of our economic gains altogether.

The CHAIRMAN. Thank you very much. Our final witness will be Peter Hurtgen, who is a former member and Chairman of the National Labor Relations Board as well as former Director of the Federal Remediation Conciliation Services and a graduate of Georgetown University. He also has a law degree, currently a partner of the law firm, Morgan and Lewis, where he practices labor and employment law focusing on issues regarding collective bargaining and National Relations Act. Have you recovered from that game—North Carolina——

Mr. HURTGEN. I have Senator, but I am now looking obviously to Ohio State on Saturday.

The CHAIRMAN. I was about to say that's good. I'll tell you, you can look at a lot of sporting events but rarely will you see a comeback like that game.

Mr. HURTGEN. I agree. I don't want to say I was giving up toward the end but it didn't look good.

STATEMENT OF PETER J. HURTGEN, PARTNER, MORGAN, LEWIS AND BOCKIUS, LLP

Mr. HURTGEN. Senator, thank you and members of the committee for this opportunity to talk to you today about The Employee Free Choice Act. I, as you noted, served as a member of the National Labor Relations Board from 1997, appointed by President Kennedy and confirmed by the Senate. Until August 2002, I was the Chair appointed as such by President Bush in May 2001 until I left the Board in the August 2002 and then took on the directorship of the Federal Remediation and Reconciliation Service in August 2002 and stayed in that position until December 31, 2004. I then returned to the practice of labor law on behalf of management, which is what I had done for some 30 years prior to going to the National Labor Relations Board.

I am not here to speak to the efficacy of unions or their role on our society or in our workplace. As I grant that, I have spent my entire professional career representing employers with unions and have negotiated in excess of 175 collective bargaining agreements and as I thought about my testimony today, I thought as far back as I can I think, I have never had a bargaining situation where it even produced a strike. But obviously, those unfortunate events occur and the law deals with them.

There are two features at least, however, of this proposed legislation, which I think are fundamentally flawed. This act was created in 1935. It put into place a system that took labor disputes out of the streets and out of the courts and put them into the National Relations Labor Board, an administrative, quasi-judicial agency.

That act was amended substantially in 1947, as we know, and less so in 1959. But when Congress enacted the act in 1935 and when it was amended in 1947, it could not have appreciated how the world of work has changed. How global markets for capital, for goods, for services, for employees have changed so radically, how societal changes have occurred. Indeed, how the individual rights in the workplace have transcended the collective rights starting in 1964 with Title VII. Congress has added rights to employees regularly and that has served in substantial part, ironically, probably to disserve the growth of unions, but it is what it is.

I'm not here to argue that it's not time to overhaul this statute to reflect today's workplace but the act as presented or the bill as presented in the so-called Employee Free Choice Act clearly doesn't do it. The preamble to the statute uses the term full freedom of choice and that is essentially what we are talking about in two major pieces of this legislation.

It states in part, "the Act is designed to protect the exercise by workers of full freedom of association, self-organization and designation of representatives."

It seems, frankly, to me, self-evident that the full freedom can only be achieved, as did Congress in 1935, by a secret ballot when choosing a representative.

You've heard, and it is true that employers in unions contest employee choice vigorously and it's true that sometimes that one or both parties will exceed the bounds of the law in doing that, but the NLRB has vigorously enforced the rights of employees to organize since its enactment and it continues to do so today.

It doesn't help to take these disputes over organizing out of the regulatory channels of the Board and into the back allies of card signing campaigns. That is exactly what would happen.

Right now, the Board's rules and regulations have created critical periods during which employer conduct as well as employee conduct is looked at specifically with the idea of making sure, as best it can, that employee's rights, when they go to the ballot box, which is run and operated by the government, that they will cast a free and uncoerced and unintimidated ballot. There is absolutely no way the Board or any other quasi-judicial agency, in my view, will be able to police the vigorous campaigns that will go on if this whole issue is relegated to whether employees sign a card or not.

So if we want to create a system that more likely will produce litigation and consternation and disharmony in the workplace, this is the way to do it.

If employers are attacked by unions in the organizing campaign, they are going to respond. Now, the law controls that response and it regulates it. If you take it out of those controls and regulations and simply let it go on with regard to no time period and whenever with regard to signing or not signing of cards, it will not serve the purpose of the original enactment of this law. It will not help the societal problems in the workplace that other speakers feel needs to be corrected. It will just simply create more opportunity for lawlessness than sound labor policy.

I want to spend more time, frankly, talking about the other aspect of this legislation, which on the face of it would seem more reasonable, but is seriously flawed in my view. Also on that is the

requirement that if a first contract isn't negotiated within 120 days that it will be submitted to binding arbitration. Again, we are talking about full freedom here. In this case here, that is the freedom to contract.

The U.S. Supreme Court said in its seminal decision in H.K. Porter and I've cited it in my remarks, with regard to collective bargaining agreements—the objective of this act was not to allow government regulation of the terms and conditions of employment but rather to ensure that an employer and their employees could work together to establish mutually satisfactory conditions.

The basic theme of the act was that through collective bargaining the passions, arguments and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning of that agreement, in some cases, it might be impossible and it was never intended that the government would, in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

A collective bargaining agreement is a complex, large document involving the entire workplace and its terms and conditions of employment. Nobody said it better in describing than Justice Douglas in the case of United Steelworkers versus Warrior and Gulf, 1960. This is what Justice Douglas said, the collective bargaining agreement states the rights and duties of the parties. It is more than a contract, it is a generalized code to govern a myriad of cases, which the draftsmen cannot wholly anticipate—the collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

Now it's true. The first contracts are harder. It's because they are first contracts. There will be intransigence and there will be problems that have developed because of the campaign for or against the union leading up to this certification by the Board. But the parties work through that and it is critical that they be allowed and required to work through that.

Interest arbitration. as opposed to rights arbitration, doesn't have standards for guidelines. There are no experts out there that can put an entire collective bargaining agreement together for the parties. Now that has been attempted in some States in the public sector because they do not want to allow employees the right to strike. So they replace it with interest arbitration. I have been involved in that process in Florida for 20 years.

The CHAIRMAN. We will give you a chance to wrap up if you would please.

Mr. HURTGEN. I will Senator, thank you. When you have that kind of bargaining, it isn't really bargaining. It is simply posturing to get a whole bunch issues teed up for a hearing before an arbitrator who will then try to be solemn and none of them are, and resolve these bargaining disputes. It doesn't work. It would clearly not work here. It would destroy the freedom of both parties to engage in collective bargaining. Thank you.

[The prepared statement of Mr. Hurtgen follows:]

PREPARED STATEMENT OF PETER J. HURTGEN

Chairman Kennedy, Senator Enzi, and members of the committee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I was appointed by President Clinton, confirmed by the Senate, and served as a member of the National Labor Relations Board from November 1997 until August 2002. From May 2001 until August 2002 I served as Chairman of the Board. In August, 2002 I was appointed by President Bush and confirmed by the Senate as Director of the Federal Mediation and Conciliation Service. Before becoming a member of the Board, I practiced as a labor lawyer representing management in private practice from 1966 to 1997. I returned to private practice on January 1, 2005 and am a Senior Partner in the law firm of Morgan, Lewis & Bockius LLP.

The National Labor Relations Act was enacted in 1935 and has been substantially amended only twice—once in 1947 and once in 1959. The act establishes a system of industrial democracy that is similar in many respects to our system of political democracy. At the heart of the act is the secret ballot election process administered by the National Labor Relations Board. In order to understand how recent trends in Union organizing are diluting this central feature of the act, some background is necessary.

THE NLRB'S SECRET BALLOT ELECTION PROCESS

If a group of employees in an appropriate collective bargaining unit wish to select a union to represent them, the Board will hold a secret ballot election based on a petition supported by at least 30 percent of employees in the unit. The Board administers the election by bringing portable voting booths, ballots, and a ballot box to the workplace. The election process occurs outside the presence of any supervisors or managerial representatives of the employer. No campaigning of any kind may occur in the voting area. The only people who are allowed in the voting area are the NLRB agent, the employees who are voting, and certain designated employee observers.

The ultimate question of union representation is determined by majority rule, based on the number of valid votes cast rather than the number of employees in the unit. If a majority of votes are cast in favor of the union, the Board will certify the union as the exclusive bargaining representative of all employees in the collective bargaining unit. Unlike joining a club, once a union is certified by the Board, it becomes the exclusive representative of *the entire* unit of employees, regardless of whether they voted for the union. The employer is obligated to bargain with the union in good faith with respect to all matters relating to wages, hours, and working conditions of the bargaining unit employees.

The Board is empowered to prosecute employers who engage in conduct that interferes with employee free choice in the election process, and may order a new election if such employer interference with the election process has occurred. The Board also will order the employer to remedy such unfair labor practices, for example by ordering the employer to re-instate and compensate an employee who was discharged unlawfully during the election campaign. In extreme cases, the Board may even order an employer to bargain with the union without a new election, if the Board finds that its traditional remedies would not be sufficient to ensure a fair rerun election and if there is a showing that a majority of employees at one point desired union representation. The Supreme Court affirmed the Board's power to issue this extraordinary remedy in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). When issuing a *Gissel* bargaining order, the Board will determine whether majority support for the union existed by checking authorization cards signed by employees during the organizing process.

As the Board and the Supreme Court have acknowledged, the use of authorization cards to determine majority support is the method of last resort. A secret ballot election is the "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel Packing*, 395 U.S. at 602. Despite its strong push for card check legislation, organized labor has acknowledged the superiority of secret ballot elections in determining employee choice. At a time when it was enjoying a high success rate in such elections, the AFL–CIO once acknowledged that authorization cards are not reliable indicators of employee sentiment in favor of a union. A 1961 handbook for organizers noted:

> [C]ards are at best a signifying of intention at a given moment. Sometimes they are signed to "get the union off my back." [1]

Indeed, as recently as 1998, in making the case for requiring secret ballot elections for employees to *get rid* of unions (*i.e.,* decertification), the AFL–CIO, the United Auto Workers (UAW), and the United Food & Commercial Workers (UFCW) argued to the National Labor Relations Board:

> a representation election "is a solemn . . . occasion, conducted under safeguards to voluntary choices," . . . other means of decisionmaking are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decision[s]." In addition, . . . less formal means of registering majority support . . . are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.[2]

Even the lead sponsor of the Employee Free Choice Act in the House, Education, and Labor Committee Chairman George Miller (D–CA), joined by 15 other pro-labor members of Congress wrote in a 2001 letter, in the context of Mexican labor laws, that "the secret ballot election is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." [3]

Although authorization cards adequately may reflect employee sentiment when the election process has been impeded, the Board and the Court in *Gissel* recognized that cards are "admittedly inferior to the election process." *Gissel Packing*, 395 U.S. at 602. Other Federal courts of appeal have expressed the same view:

- "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer." *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).
- "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. . . . Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing." *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967).
- "The conflicting testimony in this case demonstrates that authorization cards are often a hazardous basis upon which to ground a union majority." *J. P. Stevens & Co.* v. *NLRB*, 441 F.2d 514, 522 (5th Cir. 1971).
- "An election is the preferred method of determining the choice by employees of a collective bargaining representative." *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664 (6th Cir. 1982).
- "Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." *NLRB* v. *Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).
- "Freedom of choice is 'a matter at the very center of our national labor relations policy,' . . . and a secret election is the preferred method of gauging choice." *Avecor, Inc.* v. *NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991) (citations omitted).

Having recognized in *Gissel* that a secret ballot election is the superior method for determining whether a union has majority support, the Supreme Court in *Linden Lumber* v. *NLRB*, 419 U.S. 301 (1974), held that an employer may lawfully refuse to recognize a union based on authorization cards and insist on a Board-supervised secret ballot election. Thus, an employer may, but cannot be compelled, to forgo a secret ballot election and abide by the less reliable card check method of determining union representation. The only exception to an employer's right to insist on an election is when the employer, as in the *Gissel* situation, has engaged in unfair labor practices that impair the electoral process.

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[1] *NLRB* v. *S.E. Nicholls Co.*, 380 F.2d 438, 445 n.7 (2d Cir. 1967), *quoting AFL–CIO Guidebook for Union Organizers, (1961).*

[2] Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL–CIO in *Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc.*, Nos. 7–CA–36846, 7–CA–37016 and 20–CA–26596 (NLRB) at 13 (May 18, 1998), *quoting NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 602 (1969) and *Brooks* v. *NLRB*, 348 U.S. 96, 99, 100 (1954).

[3] Letter from U.S. Rep. George Miller *et al.*, to Junta Local de Conciliacion y Arbitrraje del Estado de Puebla, Aug. 29, 2001.

THE INCREASING USE OF NEUTRALITY/CARD CHECK AGREEMENTS IN ORGANIZING CAMPAIGNS AND THE ATTEMPT TO MANDATE CARD CHECK

One of the highest priorities of unions today is to obtain agreements from employers that would allow the union to become the exclusive bargaining representative of a group of employees without ever seeking an NLRB-supervised election. These agreements, which are often referred to as "neutrality" or "card check" agreements, come in a variety of forms. In some cases, the agreement simply calls for the employer to recognize the union if it produces signed authorization cards from a majority of employees. In many cases, the agreement includes other provisions that are designed to facilitate the union's organizing campaign, such as:

- An agreement to provide the union with a list of the names and addresses of employees in the agreed-upon unit;
- An agreement to allow the union access to the employer's facilities to distribute literature and meet with employees;
- Limitations or a "gag order" on employer communications to employees about the union;
- An agreement to start contract negotiations for the newly-organized unit within a specified (and short) timeframe, and to submit open issues to binding interest arbitration if no agreement is reached within that timeframe; and
- An agreement to extend coverage of the neutrality/card check agreement to companies affiliated with the employer.

Whatever form the agreement may take, the basic goal is the same: to establish a procedure that allows the union to be recognized without the involvement or sanction of the National Labor Relations Board. Neutrality and card check agreements therefore present a direct threat to the jurisdiction of the Board and its crown jewel, the secret ballot election process.

An even greater threat to that crown jewel is the grossly misnamed Employee Free Choice Act—which more accurately should be described as the Employee Forced Choice Act. The provisions of that proposed legislation in the House of Representatives would, in nearly all cases, eliminate government-supervised secret ballot elections and instead turn the National Labor Relations Board into a card counting agency.

The motivating force behind neutrality/card check agreements and the proposed legislation is the steady decline in union membership among the private sector workforce in the United States. Unions today represent only about 7.4 percent of the private sector workforce, about half of the rate 20 years ago. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in 2006* (Jan. 25, 2007), available at *http://www.bls.gov/news.release/union2.nr0.htm*. There are many explanations for this precipitous decline: the globalization of the economy and the intense competition that comes with it, the increasing regulation of the workplace through Federal legislation rather than collective bargaining, and the changing culture of the American workplace. While unions may not disagree with these explanations to varying degrees, they claim that the NLRB's election process is also to blame. Unions argue that the NLRB's election process is slow and ineffective, and therefore an alternative process is needed—namely, neutrality/card check agreements.

I believe there are two basic problems with this argument. First, it is not supported by the facts. The NLRB's election process is efficient and fair, as demonstrated by hard statistics. Legislative change is not needed. Second, neutrality/card check agreements limit employee free choice and are generally the product of damaging leverage exerted by the union against the employer, which redounds to the detriment of employee knowledge and free choice.

THE NLRB'S ELECTION PROCESS IS EFFICIENT AND FAIR

The standard union criticisms of the NLRB's election process are more rhetorical than factual. Unions argue that the NLRB's election process is slow and allows employers to exert undue influence over employees during the pre-election period. Both of these arguments are not supported by the facts.

The NLRB's election process is not slow. In fiscal year 2006, 94.2 percent of all initial representation elections were conducted within 56 days of the filing of the petition. *Memorandum GC–07–03, Summary of Operations (Fiscal Year 2006)*, at p. 8 (January 3, 2007), available at *http://www.nlrb.gov/shared_*files/GC%20Memo/2007/GC%2007-03%20Summary%20of%20Operations%20FY%2006.pdf. During that same time period, the median time to proceed to an election from the filing of a petition was 39 days. *Id.* Based on my experience over the past 40 years, these

statistics demonstrate that the Board's election process has become even more efficient over time.

Unions are currently winning well over 50 percent of NLRB secret ballot elections involving new organizing. This is the category of elections that unions are seeking to replace with neutrality/card check agreements, and it is also the same category of elections that would be replaced by the so-called Employee Free Choice Act. If anything, unions' win rate in representation elections currently is on the rise. The NLRB's most recent election report summary shows that unions won 59.6 percent of all elections involving new organizing. *See NLRB Election Report; 6-Months Summary—April 2006 through September 2006 and Cases Closed September 2006*, at p. 18. This figure is about the same as it was 40 years ago. In 1965, unions won 61.8 percent of elections in RC cases (cases that typically involve initial organizing efforts, as opposed to decertification elections or employer petitions). *See* Thirtieth Annual Report of the National Labor Relations Board, at p. 198 (1965). After 1965, unions' election win rate declined before rising back to the level where it is today:

- In 1975, unions won 50.4 percent of elections in RC cases. *See* Fortieth Annual Report of the National Labor Relations Board, at p. 233 (1975).
- In 1985, unions won 48 percent of elections in RC cases. *See* Fiftieth Annual Report of the National Labor Relations Board, at p. 176 (1985).
- In 1995, unions won 50.9 percent of elections in RC cases. *See* Sixtieth Annual Report of the National Labor Relations Board, at p. 153 (1995).
- In 2005, unions won 56.8 percent of elections in RC cases. *See* Seventieth Annual Report of the National Labor Relations Board, at p. 16 (2005).

These statistics undermine any argument that the NLRB's election process unduly favors employers, or that the recent decline in union membership among the private sector workforce is attributable to inherent flaws in the NLRB's election process. Unions are winning NLRB elections at the same or higher rate now than they have in almost 40 years. To be sure, there are "horror stories" of employers who abuse the system and commit egregious unfair labor practices in order to prevail in an election. I hold no brief for those employers. I have never represented an employer engaged in such conduct. Indeed, I have never been involved in a Board-conducted election which was overturned. As a member of the National Labor Relations Board, I vigorously enforced the law. In cases of unlawful conduct, the law provides remedies for the employer's behavior, including *Gissel* bargaining orders. But these situations are the exception rather than the norm. And, there is nothing new about the fact that some employers abuse the system. In the overwhelming majority of cases where employees choose not to be represented by a union, they do so based on the information that is presented by both sides during the campaign process.

Unions attempt to portray the Board's secret ballot election process as fundamentally unfair (except when unions are faced with a challenge to their majority status) by making unfavorable comparisons between Board elections and a typical political election in the United States. In doing so, unions frequently ignore several important facts about the NLRB election process:

- The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election.
- The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is *an* appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage.
- The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election.
- Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is permitted to visit the employees at home to campaign for their vote.
- The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union.
- The union, like the employer, may designate an observer to be present in the voting area for the duration of the election, in order to check every voter and make sure that no irregularities occur.

These facts illustrate that, far from being unfair to unions, the NLRB's election process offers unions many unique advantages.

PROBLEMS WITH NEUTRALITY/CARD CHECK AGREEMENTS

The fundamental right protected by the National Labor Relations Act is the right of employees to choose freely whether to be represented by a union. 29 U.S.C. § 157. Neutrality/card check agreements limit employee free choice by restraining employer free speech. Section 8(c) of the act protects the right of employers to engage in free speech concerning union representation, as long as the employer's speech does not contain a threat of reprisal or a promise of benefit. 29 U.S.C. § 158(c). Unions, through neutrality/card check agreements, seek to restrain lawful employer speech by prohibiting the employer from providing employees with any information that is unfavorable to the union during the organizing campaign. Such restrictions or "gag orders" on lawful employer speech limit employee free choice by limiting the information upon which employees make their decision.

A second problem with neutrality/card check agreements is the method by which they are negotiated. In my experience, neutrality/card check agreements are almost always the product of external leverage by unions, rather than an internal groundswell from unrepresented employees. The leverage applied by the union can come from a variety of sources. In many cases, the union has leverage because it represents employees at some of the employer's locations. The union may be able to use leverage it has in negotiations for employees in an existing bargaining unit, in order to win a neutrality/card check agreement that will facilitate organizing at other locations. Bargaining over a neutrality/card check agreement, however, has little or nothing to do with the employees in the existing bargaining unit, and it detracts from the negotiation of the core issues at hand—wages, hours, and working conditions for the employees the union already represents.

In other cases, the union exerts pressure on the employer through political or regulatory channels. This typically occurs by demonizing the employer. For example, if the employer needs regulatory approval in order to begin operating at a certain location, the union may use its political influence to attack the company and force the employer to enter into a neutrality/card check agreement for employees who will be working at that location. Political or regulatory pressure is often coupled with other forms of public relations pressure in order to exert additional leverage on the employer. In general, this combination of political, regulatory, public relations and other forms of non-conventional pressure has become known as a "corporate campaign," and it is this type of conduct—rather than employee free choice—that has produced these agreements.

Thus, when a union succeeds in obtaining a neutrality/card check agreement, it generally does so by exerting pressure on the company through forces beyond the group of employees sought to be organized. The pressure comes from employees at other locations, and/or it comes from politicians, regulators, customers, investors, and the public at large. It is a strategy of "top down organizing," meaning that the target of the campaign is the employer rather than the employees the union is seeking to organize. And, with the proposed legislation, unions are seeking to have the government mandate the card check portion of neutrality/card check for them.

The strategy of "top down organizing" stands in stark contrast to the model of organizing under the National Labor Relations Act. Under the act, the pressure to organize comes from within—it starts with the employees themselves. If a sufficient number of employees (30 percent) desire union representation, they may petition the NLRB to hold a secret ballot election. If a majority vote in favor of union representation, the NLRB certifies the union as the employees' exclusive representative and the collective bargaining process begins at that point. At all times, the focus is on the employees, rather than on the employer or the union.

There is no cause for abandoning the secret ballot election process that the Board has administered for seven decades. The act's system of industrial democracy has withstood the test of time because its focus is on the true beneficiaries of the act—the employees. In my view, the Employee "Forced" Choice Act is not sound public policy because it would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election. Indeed, that it would be unwise public policy to abandon government-supervised secret ballot elections in favor of mandatory card check appears to me to be a self-evident proposition. It likewise would eviscerate the proud tradition of industrial democracy that has been the hallmark of the NLRB for nearly seven decades.

THE EMPLOYEE FREE CHOICE ACT'S INTEREST ARBITRATION PROVISIONS

In addition to mandating recognition by card check rather than a secret ballot election, the act would eviscerate another fundamental tenet of U.S. labor law: voluntary agreement. As the Supreme Court held in *H. K. Porter* v. *NLRB*, 397 U.S. 99 (1970), the act is founded on the notion that the parties, not the government, should determine the applicable terms and conditions of employment:

> The object of this act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employer and their employees could work together to establish mutually satisfactory conditions. The basic theme of the act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. *But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.*

Id. at 103–04 (emphasis added). The Employee Free Choice Act would destroy this bedrock principle of the National Labor Relations Act by mandating that, if the parties are not able to reach agreement on a first contract within a 120-day period, the terms of the contract will be set by an arbitration panel designated by the Federal Mediation and Conciliation Service. As with the abandonment of the secret ballot election, I believe this interest arbitration requirement is unwise public policy. With respect to employees, it would parlay the taking away of a vote on representation with the taking away of a vote on ratification. This is because the contract mandated by the interest arbitrator renders moot employee endorsement. Likewise, it is the employer that must run the business, remain competitive, and pay the employees each week.

Newly certified unions often bear a heavy burden to make good on promises made to employees to gain recognition. In a card check situation, where there may have been little or no opportunity for the other side to be heard, expectations are likely to be even higher. But when these promises come up against reality at the bargaining table, it is often very difficult to reach agreement, especially where an employer is already offering competitive wages and benefits to its employees. When this reality is combined with a lack of any historic track record between the parties, especially where coupled with inexperienced negotiators at the bargaining table, reaching agreement on a package that satisfies the union's political needs while being economically realistic or even feasible for the employer can be extremely difficult and time consuming.

In my career to date, I have negotiated in excess of 175 collective bargaining agreements. As the Director of the Federal Mediation and Conciliation Service, I personally mediated high profile bargaining disputes involving multiple contracts covering tens of thousands of employees. These negotiations are often difficult and first contract negotiations particularly so. The genius of this system, however, is that it produces agreements, not imposed solutions to difficult issues.

These agreements are, as Justice Douglas wrote in the seminal Supreme Court case of *United Steelworkers of America* v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960):

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." (*Id.* at 578–579).

No outside agency, whether arbitration, courts, or government entity has the skill, knowledge, or expertise to create a collective bargaining agreement. If it is not a creature of the parties' creation it likely will fail of its purpose. The negotiation of a collective bargaining agreement is the search for mutually resolving each side's interests. It must be done with trade-offs and separate prioritizing. Only the parties can do that. There are no standards for arbitrators to apply. There is no skill set for arbitrators to use. Solomon is simply unavailable.

I spent 20 years of my practice in Florida where I represented many public employers in the negotiation of their collective bargaining agreements. That process, under State law, ended in non-binding interest arbitration. More often than not, the parties bargained simply to set the issues up for the arbitrator which resulted in days and weeks of hearings. The process led to hearings and imposed legislative body decisions—not agreements. Any process which ends with an imposed contract will perforce put the parties into their positioning and arbitrating shoes, not their bargaining shoes.

CONCLUSION

This concludes my prepared oral testimony. I look forward to discussing my comments in more detail during the question and answer period, but before that, I would again like to thank the subcommittee for inviting me here today, and for its attention to these very important developments regarding labor law in the 21st century.

The CHAIRMAN. Thank you very much and we will have quite a group of our Senators here so we will try and limit our time to 5 minutes.

Mr. Hurtgen, one of the criticisms of the labor laws that they allow employers to violate the law with almost no penalties. An employer breaks the law. Unless the worker is fired the employer typically just has to post a sign saying it won't continue to violate the law. Even when the worker is fired, the financial implications are small, far smaller than any other Federal employment law.

The average back pay remedy for a violation of workers' rights in 2005 was $3,800. This back pay award is of 10 years in coming. Do you think the minimal penalty structure provides a real deterrent to unlawful conduct?

Mr. HURTGEN. I do, Senator, and the answer there is that in the vast majority of cases, it does. If we focus on the relative minority of cases where it drags on and on and on and the income replacement to the employee comes at the end of too long a period of time, well then it is obvious that that's a shortcoming and if we could change and fix that, we should. But to add, as this bill does, to the litigation aspect of these issues is simply going to prolong it, sir. It isn't going to bring it to a more quick resolution.

The CHAIRMAN. Well, I heard you on that. I was interested, particularly, in the penalties.

Mr. Hohrein, comments have been made that a secret ballot is the only way to have a free ballot. What happened in your situation out there? Whether they had a secret ballot, was that a free ballot? Is that the equivalent?

Mr. HOHREIN. We had a secret ballot election and it didn't make any difference immediately. The company put pressure on the people that they believe supported the union. They not only——

The CHAIRMAN. Well how can they tell if it's a real secret ballot? What you just heard from Peter is that your cards aren't good because people are going to know the end result. What we need is really a secret ballot and that is the way this country has proceeded in the past and I want to hear that you had a secret ballot—was it really a free ballot out there? What can you say or was it—did you feel that it wasn't such a free ballot?

Mr. HOHREIN. The company questioned everyone how they were going to vote. They took people in back rooms and browbeat them, threatened them with their jobs. They explained that they wanted to know how they voted and if the union got in, they were going to suffer. They were going to lose their job or they were going to shut down the plant or they would simply just replace everybody in the plant if that is what they had to do. They had absolutely no respect for this election. They intimidated people right up to and including the time of the election.

The CHAIRMAN. Let me ask the Professor one additional question. What has happened over the period of the last 30 years from the

time when we had this strong union procedure to what we have now. What has altered or changed the circumstances that has brought us to the current situation?

Ms. ESTLUND. Well employers do seem——

The CHAIRMAN. If you can, answer in a minute or so because I have one final question.

Ms. ESTLUND. Employers do seem much more anxious to avoid unionization and they have brought in and actually created a huge industry of anti-union consultants who have intensified and raised the level of sophistication of these anti-union campaigns. Millions, millions, millions of dollars are going into these anti-union consultants who guarantee victory. So on the question of penalties, one anti-union consultant told employees at a seminar what happens if you violate the law. The probability is that you will never get caught. If you do get caught, the worst thing that can happen to you is you get a second election and the employer wins 96 percent of second elections. So the odds are with you. That's the kind of deterrent that the law provides currently.

The CHAIRMAN. And even if they have findings to go to the courts, the District Courts, and ruled against the NLRB in a number of these cases as well. Is that correct?

Ms. ESTLUND. Yes, that is absolutely right.

The CHAIRMAN. Let me ask you—there has been a number of companies that signed up, Professor—we have Cingular, the CEO for Cingular in 2002 signed up for this kind of a card, a reflection of members and they decided to go union and they have retained the industry leadership in a very competitive wireless communication field. CWA won. Kaiser Permanente has done something similar—after years of clashing—they decided to permit this process to move forward and have had remarkable success.

I have the list of a variety of different companies that have done it. Perhaps you would just comment about what has happened in places where they have tried and where they have abided by the outcome of this. What has happened at some of the larger companies, medium companies, and small companies? Has it been in their economic interest? Have they had a greater kind of productivity? Have they shown they've been increasingly competitive? What can you tell us?

Ms. ESTLUND. Well I think I'd have to rely on the company's own judgment as to whether it has been good for them. It appears to have been a very good process and that is what this law tries to do—it tries to get employers to accept the employees' right to join a union and the fact of collective bargaining as a fact of life. Once companies accept collective bargaining as a fact of life, they can sit down cooperatively and work out agreements and arrangements that work best for their particular workplace. That is the genius of collective bargaining.

The CHAIRMAN. Thank you very much.

Senator Isakson.

Senator ISAKSON. Mr. Hohrein, in that example you were using, where the company was intimidating, I guess it was Front Range Energy, is that correct?

Mr. HOHREIN. Yes sir.

Senator ISAKSON. Who won that election?

Mr. HOHREIN. The union won that election.

Senator ISAKSON. I was thinking that my colleagues here—we go through this process every 2 years of electing our leadership. The Democrats do it and the Republicans do it. Senator Alexander was a candidate for the WHIP this year and I remember the day after the election, he said, I'm writing 27 thank-you notes to 25 people because going into the election and talking to them one on one, he felt like he had 27 votes but when the secret ballot occurred and we all get to vote secretly, the election went the other way. I say that because——

Senator ALEXANDER. It was 24.

Senator ISAKSON. Oh, it was 24, I'm sorry. I have been in races where the night before the election, the polls were telling me good news and the next day I got bad news. That's because people will respond differently when you ask them face to face or you can poll them on the telephone but they all have the insurance policy of the secret ballot, which they own.

Mr. Hurtgen, you were an appointee of President Clinton?

Mr. HURTGEN. That is correct.

Senator ISAKSON. And you also served under President Bush? I think you made a statement—the law is what it is but there may be some things that do need to be overhauled. Do you have any suggestions on that?

Mr. HURTGEN. Well, not in the moments that I have here, Senator. I think it probably needs a fundamental overhaul and that means that we shut down and look at what the workplace is really like today and what role unions can play and how they will play it and always keeping in mind that we have employee interests that need to be served but we have our competitive employers in a furiously competitive world that has to be served as well. So our system of labor and employment regulation and dispute resolution has to be brought into the 21st century and one piece of that legislation or another isn't going to do it. I think it needs an overhaul, sir.

Senator ISAKSON. In 2005, there were over 2,300 NLRB elections. In 19 of those elections, a re-vote was needed. That's 19 out of 2,300. That's .8 of 1 percent. Has that declined over the years since the passage of labor law or is that pretty indicative of what it has always been?

Mr. HURTGEN. I can't give you an accurate answer to that question, Senator, but I can tell you from my own experience both as a practitioner as well as a member of the Board, the number of elections that have to be rerun has always been small. But I can't tell you how those percentages are changing over time.

Senator ISAKSON. Dr. Estlund, you might be able to help with this particular question because I think and I may have heard it wrong so please, pause if I did. I think in answering one of Senator Kennedy's questions, you were referring to rerun elections overturning the first election, is that correct?

Ms. ESTLUND. The standard, the worst that can happen in the case of illegality is that there has to be a rerun election and employers win 96 percent of the rerun.

Senator ISAKSON. Of the reruns.

Ms. ESTLUND. That was quoting anti-union consultants.

Senator ISAKSON. Does NLRB act on its own violation or can any organized labor union who is petitioning for a vote and has a vote and loses, can they petition immediately to have a rerun, based on grounds of coercion?

Ms. ESTLUND. Well, the problem, Senator, is that it takes off 10 years for these unfair labor practice charges and charges of tainted elections, to work their way through the process. So by the time the Board gets around to invalidating the first election, years have gone by and the organizing drive is just long gone. The turnover in the workplace, just the natural turnover in the workplace as well as the forced turnover—employers' efforts to rid the workplace of union supporters means that the organizing drive is just long dead and gone by the time that rerun election comes along.

Senator ISAKSON. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Clinton.

STATEMENT OF SENATOR CLINTON

Senator CLINTON. Thank you very much, Mr. Chairman and thanks so much for holding this hearing about this important legislation. I really appreciate all the witnesses being here and I'm struck by the testimony—

My goodness. Bring in a union electrician.

[Laughter.]

I'm struck by the testimony from both Dr. Mishel and Professor Estlund about the direct connection between the upward movement of American living standards and the creation of the American middle class and the successful effort to unionize our workforce starting in the 1930s and moving through the 1960s and now we can see a drop off and what Dr. Mishel appropriately calls Middle Class Squeeze, in part because workers——

[Laughter]

The CHAIRMAN. Do you want it turned off? Hold just a second. I don't know whether that's going to be the answer. Maybe if we're all very quiet, we can hear.

Senator ALLARD. You can come over here on this side and we'll be happy to have you use one of our mics.

[Laughter.]

We're very generous that way.

Senator CLINTON [continuing]. And I really would like to emphasize a few points. Too often, we get into this conflict—are we pro-union or pro-employer? What are we really—whose side are we on? And I think we're all on the American side and it seems to me that we had a real decline in the unionized workforce and a number of us are concerned about what that is doing to not just labor standards but living standards. So we're trying to figure out, what is the best way to get back to a level playing field with a balance of power that worked so successfully through much of the 20th century.

Dr. Mishel, I'm struck by—in your written testimony, the section about your decades—the decades of research that has been done. A substantial effect unionization can have on performance and you pointed out that it seemed at first to be a mystery. How did unionized costs go, for example and keep successfully with nonunion Walmart, those Costco's labor costs are higher. And I think it is im-

portant to just reiterate those four basic findings that have been proven not just by personal observation but by decades of research as to why that seeming contradiction would, in fact, be understandable.

Mr. MISHEL. Thank you very much, Senator. First of all, the point that for the vast middle class to benefit from economic growth, to have a strong vibrant labor movement is essential to that, that point you first made. I would note that in the last year for which we have data, from 2004 to 2005, the bottom 90 percent of the population did not receive any income growth. Only the upper 10 percent and the upper half of the upper 1 percent received a 16 percent rate of growth. Some of that is because of great capital gains. They own wealth. They get income from that but those who are primarily wage earners have not seen growth for many years.

Employers, on the other hand, are doing spectacularly well with their profits. Capital income is a share of total income being really the highest in many years. So yes, workers can get a union. Unions can help equalize wage income within the union sector and in the economy as a whole and they don't hurt productivity because workers with a voice don't quit. There is lower turnover. Workers with a voice help their employers be more productive. Unions that force higher wages have employers who tighten up on management, increase investment and improve technology and last, unionized employers use high performance workplace practices and get training and so the idea that somehow unions get work rules that make employers uncompetitive is just not true.

Senator CLINTON. And Professor Estlund, you have mentioned that available data indicates that far more workers claim coercion from employers during an election than claim coercion from their coworkers with card check. Again, I think there is this assumption that if your coworker just came up to you and said, You really want a union, don't you, so please sign this?, that that would be more intimidating than somebody saying, you're going to lose your job if you sign that. I mean, I think your job is a huge impediment to people feeling free to express their opinion. But, would you say that the data is consistent with what seems to be common sense that the employer holds a lot more sway than a coworker does?

Ms. ESTLUND. Absolutely. In fact, maybe more surprisingly, the data suggests that workers feel much less pressure from the union than from the employer, even in a card check election, which the concern has been expressed that only the union is able to put pressure. That's just not true. The employer is in that process. This is not a secret process. The employer has the opportunity and has used the opportunity to exert pressure on employees as well as to give them information. So yeah, employees experience less pressure in card check than in election campaigns from any source but much less pressure from unions than from employers, even in card check.

Senator CLINTON. Is it your experience that the friend-to-friend, worker-to-worker situation is less coercive than the employers' attempt to try to influence the outcome of an election?

Mr. HOHREIN. The employer is a potentate. They hold all of the control. I am the example of union coercion in the plant. I asked people a simple question. I said, if you had the opportunity, would

you vote for a union and they either said yes or no and that was the extent of that coercive conversation.

Senator CLINTON. Well, Mr. Chairman, I think it's important to put this in a larger context and to look at the benefits to our economy by increasing the share of unionized workers in the private sector because we are moving around and it has been my experience. A lot of people on the front line and doing the work have a lot of wisdom about how this would work—because there is no real way to get that way first. So again, Mr. Chairman, thank you for the hearing.

STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Mr. Chairman. Mr. Hurtgen, these proposals seem to me to be really breathtaking in their scope in terms of changing labor law in this country. I mean, one gets rid of the secret ballot for union elections. Two seems to fundamentally get rid of free collective bargaining, at least that's my impression and Senator Isakson already reminded us of the experience that we have here in the Senate. We all have it in our everyday lives, in our clubs and when we elect people. Here, when we elect our leadership. Sometimes over a period of time that you can line up 27 votes and then on election day, when secret ballot comes, you end up with 24 and the objective—the objective is to really find out what a majority wants to do.

It seems to me that the secret ballot is essential to that in a union election. So I wondered if you could say something more to me about the origins of the secret ballot in union elections, why it was thought to be fair. Common sense would say to me that it would be one of the last things we would want to throw out. But why was it put in in the first place?

Mr. HURTGEN. Well, Senator, I haven't reviewed the debates from 1935 when the Wagner Act was originally introduced and passed, but I have seen quotes or statements from it that even then, discussion was had about maybe there needn't have to be a secret ballot election. It was indicated back then that the secret ballot was far preferable to any other way of determining employee choice. It has always been lawful for an employer to recognize a union based on cards signed but it has always been felt to be highly less desirable. The unions themselves, as recently as 1998, when I was a board member, there was a case before us, Levitz Furniture and the AFL/CIO, the United Auto Workers as well as United Food and Commercial Workers, in their brief to us at the board said, a representation election is a solemn occasion conducted under safeguards to voluntary choices. Other means of decisionmaking are not comparable to the privacy and independence of the voting booth and the secret ballot election systems provides the surest means of avoiding decisions, which are a result of group pressures and not individual decisions.

In addition, less formal means of registering majority support are not sufficiently reliable indicia of employees' desires on the question of union representation to serve as a basis for requiring union recognition.

Senator ALEXANDER. But may I go on?

Mr. HURTGEN. That's what the unions said.

Senator ALEXANDER. But may I go on to another question—I was trying to imagine the outcry if we suggested that in our Presidential election, for example, we said to the Democratic party and the Republican party, go out and spend the rest of the time between now and November 2008 getting people to sign cards about how they want to vote, what they want the result to be. We don't do that. We do as we do in union elections. We are very careful about making sure the ballot is secret and that they are counted carefully.

I felt like you didn't have quite enough time although Senator Kennedy was generous with time to you, to say everything you want to say about binding arbitration. Again, that seems to me to be as breathtaking in its scope as the abolition of the secret ballot. Free collective bargaining in my idea has always been the idea that once a union is recognized by a majority vote, by secret ballot, then it becomes the exclusive bargaining agent and it's bargaining. It's not vocation by an outside party—this changes that.

Mr. HURTGEN. Yeah, it does and it changes it fundamentally, Senator. To add to what I said previously, I think I would only say that the collective bargaining agreement is a complex set of tradeoffs and prioritization by employers and by unions and the first time they do this, it is very difficult, understandably.

There are two silent parties at that bargaining table besides the employer and the union involved. It's the employer's competitors and it's the other employers' union contracts that that union has secured in that industry and that business and it is critical to the employer in those negotiations that they not lose ground to their competitors and it's important to the union that it doesn't give up something that it has secured from other employers with whom it has a contract.

So both sides have a motive to be particularly intransigent on some items. But the beauty of collective bargaining is that if it's done in good faith, it will produce an agreement and it will produce the tradeoffs and the prioritizations that are necessary and no outside entity, whether it is an arbitrator or a court or the Labor Board or any other entity, no outside entity can do that for the parties. They have to do it themselves. That's the nature of the bargain and if they do it in bad faith, the board will remedy that and order them to do it until they get it right. Now, that's unusual but it happens but the vast majority of collective bargaining negotiations in this country are done with difficulty but they get done.

The CHAIRMAN. You're up, Jack—Senator Reed.

Senator REED. Thank you very much, Mr. Chairman.

The CHAIRMAN. And you'd follow Senator Brown.

Senator REED. I'll be brief as well as short.

[Laughter.]

STATEMENT OF SENATOR REED

I think it is important to underscore the point that Senator Kennedy made in his opening remarks—that the growing inequality of income and wages and of opportunities in this country has to be addressed and one of the contributing factors to that is the declining unionization and Chairman Bernanke made a speech in Omaha in February and he pointed out, whatever the precise mechanism

through which lower rates of unionization affected the wage structure, the available research suggests that it can explain between 10 percent and 20 percent of the rise in wage inequality among men during the 1970s and 1980s and frankly, I think since the 80s, it has accelerated.

So if we're really committed to equality of opportunity and more equal distribution of the success of our productive enterprises, I think we should be committed to allowing a better procedure for selection of representation and I think this act might offer that.

Professor Estlund, one of the points that struck me when you made your statement is the fact that the notion of the secret ballot is really more fiction than reality because there is a deliberate attempt on behalf of many organizations to hire very sophisticated people and use techniques, legal techniques, to determine precisely how people will vote before they are going to vote, influence them in positive or otherwise ways to vote against unionization. This is very much unlike what is done in our ideal secret ballot where people are not individually persuaded. Is that a fair estimate?

Ms. ESTLUND. Yes, imagine Senator if in your first run for election, the incumbent employed all the voters and got to spend 8 hours a day job owning them about why they should vote against you. It's not like anything that we normally associate with a secret ballot election. Job owning the worker, trying to find out how they're going to vote and inducing them to fear what is going to happen in general and that whatever the result of the election, your incumbent would stay in office. They are still around to bring about the terrible consequences that they predict will happen if the union is in place.

So unfortunately, the secret ballot becomes a kind of trapping of democracy that—it's more of a parity of democracy. That's the only point in the process that the NLRB actually supervises, is the casting of ballots but given all that has often come before, it's not something we would recognize as democracy.

Senator REED. And you've made the point, too and I think Dr. Mishel also has that there is less apparent complaints in the card check process than there is in the ballots. Is that based upon data analysis? It's not just——

Ms. ESTLUND. Yes, it's based on a 2005 survey that was looking at 2002 elections, both formal elections and card check procedures and what they found was less coercion overall in the card check process but less coercion from the union than from the employer, both in card check and in the election process.

Senator REED. Dr. Mishel, I just want to ask a question. If more reliance is going to placed on the card check, are there things that should be done to make that a fairer system? I mean, after all, I think we'd like to feel that any system we employ gives a fair chance, not only to members seeking representation by unions but also the management to make their case.

Mr. MISHEL. Research has shown there's never been a wider gap between employee desire for union representation and their ability to get representation right now. It's hard to think of a more broken system. But I'm actually quite enlivened by the discussion here today, the commitment to free collective bargaining by fellow panelists and some of the senators. I would suggest that there are 30

percent of workers in this country that are denied free collective bargaining in the public sector. We must forthwith legislate that there be collective bargaining for all public employees and that all public employees subject to not allowing free collective bargaining and the right of strike that are subject to arbitration, such as in Florida, or Wisconsin where I went to grad school or New York State where I was a Professor at Cornell. We need to abolish these forthwith. Thank you.

The CHAIRMAN. Thank you very much.

Senator Roberts.

He's inviting your employees to organize.

STATEMENT OF SENATOR ROBERTS

Senator ROBERTS. Senator, did you have to mention the final four when you started out? Was that something that you had to mention?

The CHAIRMAN. I hoped we had gotten one by you but——

Senator ROBERTS. But we're going to unionize the University of Kansas basketball team by a not-so-secret ballot to see if we can't get something done.

[Laughter.]

We have a Tyson's plan out in Holcomb, Kansas. We have about 35,000 people in a very large operation, who aren't unionized and at this particular plant, they pay the highest wages and the benefits of any plant of the 300 that they have. This is a very big operation. And they put this method to the test after some union organizers and I don't mean to use that as a majority by any means but it was largely a steelworker's rep who came out to Holcomb, Kansas after finding it, from Kansas City and they submitted enough signed cards to the NLRB. This was the second time around, once in 2000 and then now and it was only 30 percent because of the nature of the complaint and requested a secret ballot vote.

The workers overwhelmingly rejected the effort to unionize at the plant by a 3 to 1 vote, 2,466 workers, 1,610 voted in a private way to reject the unionization.

I think it is clear from these results that the employees who had initially signed cards in front of the union organizers and their persuasion, changed their minds once in the privacy of an election booth. Now I wasn't present there. I don't know about the pressures that were brought to bear by the so-called professional people there at Tyson's, et cetera, et cetera.

But if the Employee Free Choice Act was in place, 1,610 employees would be represented by a union against their wishes. That was more than the first time around, when about 80 percent in 2000 voted the same way. So I guess my question would be to Ms. Estlund, if this legislation were enacted, would there be a way that an employee could request that their card not be counted if they change their mind?

Ms. ESTLUND. Absolutely. The law would provide that the NLRB has to pass on the validity of the cards before they can change the status quo. So one thing to point out——

Senator ROBERTS. If an employee wanted to change their card after being presented the card by their peer group, which of course,

is a pretty powerful instance, could the employee, without any NLRB or meetings, could they change that?

Ms. ESTLUND. Before the process is finished, yes. They can change their mind during that process. One interesting thing to note is that there is a way in which card check is a better protection of the minority than the election and that is because you have to get over 50 percent of the entire bargaining unit, not just 50 percent of those people who show up at the voting booth and as you all know, voter turnout makes a difference.

We have to keep in mind that first of all, this law will not abolish secret ballot elections. They will take place under a variety of circumstances. We also should keep in mind that there is nothing either inherently suspect or dramatically new about reliance on cards. Until 1947, employers did not have the right to reject majority signup and to refuse to recognize a union that presented a majority of cards and even now——

Senator ROBERTS. The only point that I would make and my time is expiring and I apologize for interrupting. I have to lower taxes for Massachusetts and the Finance Committee here in about 5 minutes. So at any rate, you have a situation where we're 50 percent—actually it wasn't, it was 30 percent but because of the nature of the complaints, why the NLRB said okay, let's go ahead and have this but you have for 50 percent in one case and 30 percent on a card check in another place and then 80 percent votes going the other way. I can't imagine any kind of arm-twisting that would have produced that and were this the case, I think that the democratic process that we all want to see would have been subjected to something that shouldn't have happened. I thank you very much and I apologize for interrupting.

[The prepared statement of Senator Roberts follows.]

PREPARED STATEMENT OF SENATOR ROBERTS

Thank you Chairman Kennedy and Senator Isakson for calling this hearing. Thank you also to the witnesses for taking time from your busy schedules to provide your insight regarding the National Labor Relations Board.

I want to start by affirming that I support worker's rights. The 1935 National Labor Relations Act (NLRA) created a set of rules to protect employees in the workplace. During that time, card-check was used as the sole source to form a union. In the next 10 years that followed, it became clear this system was flawed. Union organizers were becoming notorious for intimidating workers to sign cards. Workers demanded a change, and in 1947, the NLRA was amended to include secret ballot elections.

The Employee Free Choice Act as passed by the House would undo this fix, and allow us to return to the failed policy of card-check unionization. I am deeply concerned with this legislation. I believe the secret-ballot is essential in protecting employees from intimidation from both employers and unions. In fact, NLRB reports that only about 1 percent of secret-ballots have been re-run due to allegations of misconduct. Put simply, the secret ballot works.

The folks at the Tyson's plant in Holcomb, Kansas recently put this method to the test. After union organizers were successful in

submitting enough signed cards to the NLRB, they requested a secret ballot vote. Workers overwhelmingly rejected the effort to unionize at the plant by a 3 to 1 vote. Out of 2,466 workers, 1,610 voted in a democratic and private way to reject unionization. It is clear that from these results, employees who had initially signed cards in front of union organizers, changed their minds once in the privacy of an election booth. If the Employee Free Choice Act was in place, 1,610 employees would be represented by a union against their wishes.

The card check portion of the bill is not the only troubling part of the Employee Free Choice Act. Additionally, the bill demands government arbitration if a contract is not successfully negotiated in a certain amount of time. Consequently, instead of the employers and unions working together to reach an agreement, government arbitrators with limited knowledge of the company or the employees, will be making binding contract decisions.

After reading through the bill in its entirety, it appears as though the Employee Free Choice Act is grossly mistitled. The legislation actually strips workers of their fundamental right to vote in secret. While claiming to be a benefit to workers, it seems as though the only benefits gained are enjoyed by union leadership.

Now I would like to ask a few questions to the witnesses:

Mr. Hurtgen: From your experience at the NLRB, do you think we could see a repeat of what happened in the 1930's with union intimidation if this bill were to succeed?

Mr. Mishel: In your testimony, you talk about democracy, and how unions have restored democracy and allowed weak and vulnerable groups to be heard. If the Employee Free Choice Act were enacted, that plant I talked about in Holcomb Kansas would be unionized right now despite the fact that only 25 percent of workers actually want it. How is this a democratic process?

Ms. Estlund: If this legislation were enacted, how could an employee request that their card not be counted if they changed their mind?

Mr. Hurtgen: Why do you think unions have experienced a drop in membership over the years? Do you think it is because of the secret-ballot election?

The CHAIRMAN. Senator Brown.

STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Chairman Kennedy. I want to expand on the Chairman's charts on the shrinking middle class and what's happened in the postwar years, especially what has happened in the last 30 years to declining wages and increasing productivity. I want to illustrate with a story about—a few years ago, on my own expense, flew to McCallum, Texas and with a couple of friends, rented a car and went across the border to Reinosa, Mexico and I visited an auto plant that looked just like an auto plant in Lorraine, Ohio or anywhere else in our country except it was newer and probably had even more updated technology. The floors were clean, the workers were working hard, the technology was new. There was one difference between the American auto plant and the Mexican auto plant and that is, the Mexican auto plant didn't have a parking lot because the workers don't make enough to buy the

cars they make and you can go to a Nike plant in China and the workers don't make enough to buy the shoes they make or you can go to a Disney plant in Costa Rica and the workers don't make enough to buy the toys for the kids that they make or to a Motorola plant in Malaysia and the workers don't make—one after another and that's there, this is here. That's a place where they don't have free trade unions.

This country, as Senator Kennedy's chart earlier, showed that what our history was, was that productivity—as workers' productivity went up, wages typically went up with workers' productivity. The lines were generally historically pretty parallel. If workers are making more money for their bosses, then they make more money. They share in the wealth they created and we have seen in the last few years in this country, productive workers are not sharing in the wealth they create to the degree that they used to and that's why the middle class or fundamentally, that's why the middle class has shrunk.

Unionization is not the whole answer, to be sure but we surely can trace, as Senator Kennedy did, the declining rates of unionization with a declining connection between productivity and wages. So I would like Professor Estlund—you had talked about the highly paid consultants coming in and getting better and better and more and more sophisticated, more and more refined in their techniques. You didn't give us much detail. Would you sort of run through—take 2 or 3 minutes if you would and run through what exactly these consultants, these law firms, these firms that specialize in union activity for management side, what they do.

Ms. ESTLUND. Well, first of all, something over 80 percent of employers hire anti-union consultants so we shouldn't think this is an isolated or unusual phenomenon and I wouldn't want to suggest that all anti-union consultants or all consultants in this situation act identically but there is a very, very strong pattern of encouraging and guiding employers step-by-step through a really relentless process of first of all finding out who supports the union. People suggest having multiple meetings per day with employees that they fear are supporting the union.

So when we ask, what kind of arm-twisting would it take, well, these consultants have it down to an art. They guarantee victory and they tell employers exactly what kind of arm twisting——

Senator BROWN. They literally say, we don't get paid unless we win, in some cases?

Ms. ESTLUND. Yes, right, exactly. They give sort of a money-back guarantee that you will win this election because we'll show you how to do it. We've done this. We've got time-tested techniques and it's relentless pressure on the workers and some of it is legal; some of it is illegal. But it's quite possible to create an egregiously hostile environment. Under any discrimination statute, we would call it the worst kind of hostile environment, actionable with damages. Here, it's considered to be management's prerogative.

Senator BROWN. What is legal that they do in addition, in these meetings? What can they legally do?

Ms. ESTLUND. Well, first of all, the fact that they can compel employees to come to these meetings on pain of discharge and they can basically tell them they can't—the pro-union employees in

these group meetings, as Errol reported, are not allowed to speak. So they can have these captive audience meetings, both in groups of workers and one on one with the employees' own supervisors, hammering away on why a union would be bad, not just why you're going to get fired for supporting a union but why you and your coworkers will be living in a hellish environment if the union gets in—nothing but conflict, violence, strikes—we won't give an inch. A great deal of that is entirely lawful. It's considered to be management's prerogative in running its business. We don't see things that way under any other discrimination law.

Senator BROWN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Coburn.

STATEMENT OF SENATOR COBURN

Senator COBURN. I just want to respond, having had three elections of the Teamsters in plants that I ran. Your testimony is entirely erroneous. There are very specific rules under which employers have to follow. You cannot threaten to fire. You cannot threaten to close a plant. You cannot threaten to demote. If you do, that complaint can be—and every time that's happened and that gets adjudicated, the employer loses. So let's be fair about what employers can and can't do. There is a very strict bar set of what employers can and cannot do.

Senator Kennedy, would you please list—put that chart of yours back up on productivity and wage growth? Because I think it's very important. One thing we haven't talked about—how do we explain this? How do we explain what is happening? I'm going to offer an explanation. It's called 12 million illegal aliens, is one of the reasons that we haven't seen the wage rise in this country because you have 12 million people competing for jobs that otherwise wouldn't be here, which would raise the demand for workforce, which would markedly increase salaries in the lower/middle income. That's one of the reasons why we have to address the immigration problem that's in front of us.

I want to also follow on a little bit of a line. If the State of Oklahoma allows initiative petitions and we have a requirement that you have to have so many hundred thousand signatures and if you do that, then you can have a ballot initiative. If we were to correlate that with what we're proposing in the Employee Free Choice Act, what it would say is a vast minority of the people of Oklahoma could change the law without it ever going to a ballot because we could say you could have an Employer Free Choice Act in the State on an initiative ballot. The legislature would never have to put it on the ballot. The people would never have to vote and whoever could come up with an initiative, we'd take away the right to vote.

I also want to go back and ask this question. Of the firms that have now agreed to card check, none of those firms that I'm aware of agreed to binding arbitration at 120 days, did they?

Ms. ESTLUND. I don't know what they did but these are firms that apparently are willing, if the workers accept—want to have a union, they are willing to sit down. That's not the problem.

Senator COBURN. I understand but that is their choice to do that and they can do that today without any change in the law. As a matter of fact, they're doing it today without any change in the

law. But none of those firms who agreed to do that, agreed to have binding arbitration within 120 days. And that's a very big difference. If you told those firms, you're going to an Employee Free Choice Act and you can agree to do that but if you do that, you have to have binding arbitration. If you can't negotiate the labor agreement with your employees, then in 120 days, we're going to find one for you.

Mr. MISHEL. Senator, there is an old saying that the majesty of the law prohibits both beggars and rich people from sleeping under bridges and the fact is that the workers who need the binding arbitration of first contracts are not necessarily the ones where the employers now will permit majority signup. So you're basically——

Senator COBURN. I understand but the point is——

Mr. MISHEL. The point is, the people who need the arbitration——

Senator COBURN. The point that was made is we held up an example of firms that are doing that today and yes, they are. They have the right to do that today. But they did it not under the coercive nature of knowing that in 120 days, somebody is going to write a contract for them. Somebody outside of their best interest and their employees' best interests, maybe. We don't know.

Finally, when it comes to job owning, the experience that I had in three episodes of organizing attempts is we erred on the side to be sure that we didn't and quite frankly, the NLRB rules are very pro-union when it comes to what you can say and what you can't. And I'll give you some specific examples. Three hundred and fifty employees in Petersburg, Virginia—the union told them they'd get an immediate $3.00 an hour raise if they voted in the union. I couldn't comment on it under the laws of the NLRB. I couldn't comment whether you would or you wouldn't. I could make no comment under the law about that claim. Now, you tell me if that's a fair set of rules.

I don't doubt your testimony, Professor, that they violate that. I'm not doubting that. I'm sure that happens a lot. But the idea that job owning is a threat to organizing is something that hasn't changed in years. It's whether or not we enforce it and maybe the problem is that we need heavier enforcement from the NLRB on the processes.

The final point I would make is one of the reasons I think that we haven't seen the amount of unionization that many in this Congress would like to see is because basically, the unions don't offer what they used to offer. One reason is, many of the things that unions offer, we've now put into law. There are Federal statutes that require segment after segment after segment after segment of things that used to be negotiable are no longer negotiable because they are Federal law. So I would think our best efforts would be more likely successful if we spent time improving the value that the union offers to the employee rather than changing the voting.

Mr. Chairman, I'd like to enter in a response from the Congressional Research Service about secret ballots that we requested and also an opening statement, if I could.

The CHAIRMAN. Good. It will be so included.

[The prepared statement of Senator Coburn follows:]

[The Congressional Research Service response can be found in additional material.]

PREPARED STATEMENT OF SENATOR COBURN

Chairman Kennedy, thank you for holding this hearing. This is an extremely important issue for our economy and I'm glad we will be studying this bill closely before acting on it.

The testimony is puzzling because the positions are so opposite. Usually in testimony you can find some common ground or some place to begin, but not so with this issue. You have witnesses telling us that the situation is as different as night and day which should cause us to really scrutinize this bill.

The other thing that doesn't make sense is why this legislation is needed. The data from the National Labor Relations Board shows that when union elections occur, unions are winning nearly 60 percent of the elections. That seems like a pretty good win ratio. I'm not sure if the aim of this legislation is to increase that win percentage to 75 percent or 90 percent or what but what the NLRB data shows is that 60 percent is as high as it has been historically over the past few decades.

The general voting public does not seem to support this legislation. A 2007 survey found that 87 percent of voters agree that workers should continue to have access to a secret ballot election. Eighty-nine percent say that a worker's vote on whether to organize a union should be kept secret and the same amount believes the secret ballot is a better process than card check. In addition to that, a Zogby poll shows that 56 percent of all non-union workers would oppose bringing a union to their workplace. The same Zogby poll shows that more than 70 percent of workers are content with their job and 64 percent say they have opportunities to advance with their present employer.

The survey indicators suggest that this bill may just be a political payoff to special interest groups because it doesn't look like the unions need help winning the elections or that workers see a great need for unionization. There's been a lot of talk up here about doing things that are just for political purposes so I hope we won't rush this and we will take our time to really scrutinize the substance of this bill.

The CHAIRMAN. Just as a comment on my chart, I thought we had about 135 million people in the labor market, if we're going to address the immigration but if there are 3 or 4 million that are undocumented that are working, I'll be surprised. Out of a 135 million, to explain that chart because it's undocumented, I find that's a stretch but the Senator—we may differ on that.

Senator COBURN. Well, it's called the in-elastic supply demand curve associated with either an excess or a decrease of workers.

The CHAIRMAN. I'm familiar with that. I still don't see how that applies to that particular chart. I think we both have expressed ourselves and we have Senator Obama.

STATEMENT OF SENATOR OBAMA

Senator OBAMA. Thank you, Mr. Chairman. Thank you to the panelists. It's been a very informative conversation and I appre-

ciate the testimony that was provided. This may have already been mentioned prior to my arrival but I just want to make sure that we highlight this point.

Under current law, employers are not only allowed to but required to withdraw recognition from an existing union if the employer knows, on the basis of valid cards or other evidence, that a majority of employees does not support a union. I'm just reading off your testimony. Current law thus allows employers to rely on valid authorization cards in lieu of an election to displace an incumbent union and if the employer chooses to recognize a new union.

So I just want to be clear on this, that the way the law is currently structured, if an employer decides, you know what? We want to go without a secret ballot and collect a bunch of cards showing that in fact we want to de-certify, that's permissible, am I right?

Ms. ESTLUND. Yes, that's right. I think if you step back and look at the way the law regards authorization cards, it looks like the assumption behind the law is that we just have to be a whole lot more careful about letting employees get a union than we have to be about denying them a union.

Senator OBAMA. Right. OK, just another aspect in your testimony, Professor, that I want to highlight. The HR Policy Association, an opponent of card check recognition, identified 113 cases in the 70-plus year history of the act that they claimed involved coercion, fraud or misrepresentation in securing union authorization cards. Is that accurate?

Ms. ESTLUND. That's my understanding and fewer than half of those actually, upon closer scrutiny, seemed to actually involve union coercion. It's obviously a drop in the bucket compared to the history of employer coercion.

Senator OBAMA. OK. One of the difficulties of this kind of hearing is that the facts often don't get in the way of ideology and we have a situation here where some people feel very strongly that unions aren't the important contribution to the economy or an impediment in economic growth and there are those of us like myself who think that that chart that Senator Kennedy put up describes in vivid illustration the fact that as workers have gotten less bargaining power, they are less able to extract a fair share of the enormous gains in productivity and wealth creation that this country has enjoyed.

So I do want to give any of you a chance to address what seems to be a discrepancy. It may just be that Senator Coburn, when he was running that plant, was following the rules to the letter and that's not the typical experience. But does anybody want to talk to his point that in fact, the problem here may just be simply one of enforcing the existing rules as opposed to a need to change the rules?

Mr. HURTGEN. Senator, I thank you for the opportunity to elaborate. I think what Senator Coburn said is exactly correct. The vast majority of employers take seriously the current law concerning what they can and cannot say during these campaigns and they stay within the limits of the law. Now, Professor Estlund disagrees with some of the legal statements employers can make and that is, of course, a debate that reasonable people can have. But Senator

Coburn's experience mirrors my experience of over 40 years. Employers don't set out to violate the act.

Senator OBAMA. Mr. Hurtgen, let me just stop you there because I want to make sure that I pinpoint the issue that you're raising here. What you're arguing is that the employers are abiding by the letter of the law. Is that your basic argument?

Mr. HURTGEN. That's correct.

Senator OBAMA. So if that is the case and yet despite the majority of employers observing the letter of the law, it turns out that we still have an overwhelming number of workers who would like to join unions finding themselves unable to do so, then it would suggest to me that we need to change the law to make it a little easier for them.

Mr. HURTGEN. You put the rabbit in the hat, Senator, when you say the overwhelming majority of employees want to join a union. The issue is how do you decide that?

Senator OBAMA. Are you disputing then or do you think that the statistics that have been presented in terms of the number of workers who, when polled, say that they would like to join a union versus the number of workers who are actually in a union—do you think those numbers are being doctored? Or do you think——

Mr. HURTGEN. I don't attribute any inappropriate conduct by the takers of those polls but they are difficult to interpret and I can't extract macro poll numbers and say therefore the employees of this particular bargaining unit in this employer's workplace, in this city or county or town, should have a union. That's for them to decide. That's my whole point. They should have a secret ballot to make that decision and if you're right and the others are right, that the overwhelming number of people who are given that opportunity would see it your way, then they'll vote yes.

Senator OBAMA. So you don't think there are any structural barriers at all for workers to join a union at this time?

Mr. HURTGEN. I don't think the National Labor Relations Act as such, provides structural barriers, no sir, I don't.

Senator OBAMA. Mr. Hohrein.

Mr. HOHREIN. The company I work for, Senator, had no respect for their people, had no respect for the law. They violated the law constantly. Their attorney that was the labor buster actually told them not to allow even the discussion of union in the workplace, even though that's legal. They simply violated my rights and the rights of those people in that plant to have a legitimate union campaign and I would really like to emphasize that unless something happens in this country pretty soon, we're going to see some dire straits for working people and I really appreciate the opportunity to let you know that.

Senator OBAMA. Mr. Chairman, I know I'm out of time but I just want to make one last point, if the committee will bear me. Mr. Hurtgen, I guess one last point I'm just curious about in your view, when you've worked with the National Labor Relations Board. Is it fair to say that if you are a worker trying to start a union drive and you get fired, even if it is illegally, that you getting recourse through the legal process is difficult and that if you are somebody who is earning maybe $30,000 a year, you might be going 6 months without a paycheck, a year without a paycheck, 2 years without a

paycheck. Is that under existing law? Is that a fair characterization?

Mr. HURTGEN. It is possible, Senator but I counsel that in the vast majority of such cases, if that employee—himself, herself or through some representative, gets to the Regional Office of the National Labor Relations Board, that Office of the Board will jump right on it and do the best they can for the employee.

Senator OBAMA. How long do you think it would typically take?

Mr. HURTGEN. Ninety-some percent of the cases get settled at that level in weeks. Now some don't. Some last 6 months, some last longer and you are correct. In those few cases, an employee can wait too long to be reimbursed. I understand that. I accept that.

Senator OBAMA. Mr. Chairman, thanks.

The CHAIRMAN. As was pointed out, Senator, we have 31,000 cases settled this year so it's not a small amount.

Senator Allard.

STATEMENT OF SENATOR ALLARD

Senator ALLARD. Mr. Chairman, thank you and I want to join you in welcoming our Colorado—Greeley residents, Errol Hohrein, here to the panel. It's good to see you and I know it's not always easy to come all the way to Washington to get your point of view across and I'm glad you made that effort to be here.

In Colorado, we had a rather contentious bill go before the Democratic Governor recently and he vetoed a State effort to pass a very similar piece of legislation that we have before us in this committee right now. In my view, the governor, Governor Ritter's efforts protected 92 percent of Colorado workers who aren't members of unions and now, union leaders are—well, let me go—before I go, let me make this point. I support what everybody said about the value of a secret ballot. I think it protects the employee or the worker from coercion from both sides, from coercion from the employer or even coercion from maybe his fellow workers who may feel very strongly about unionizing—he may not share those views.

So, now what's happened with the veto by the Governor of this particular piece of legislation in Colorado, union leaders are threatening to move the Democratic Convention from Denver if they don't get their way and the question that comes up, well, couldn't such actions be cited as one act of union coercion on State lawmakers? And another question, I think, that comes up, if such unions make such able threats to State governments, what keeps them from making coercive action upon workers who choose not to join the labor organization? Anybody want to answer that? Maybe Dr. Mishel, maybe you'd like to respond to that.

Mr. MISHEL. Can you say that again? What was the coercion that the unions were doing?

Senator ALLARD. Union labor leaders are threatening to move the Democratic Convention from Denver if they don't get their way. That is, they're upset because Governor Ritter vetoed a very similar piece of legislation that is before this committee.

Mr. MISHEL. So you think it is inappropriate for anyone to apply their economic power in pursuit of——

Senator ALLARD. Is that coercive? Is that coercive action?

Mr. MISHEL. I don't know. Is an employer lock out coercive? Is an employee strike coercive?

Senator ALLARD. Yes, but it's affecting public policies, a public policy that has been for the people of Colorado, have voted in this Governor Ritter and he—this was a promise that he made during the campaign and now people are upset because the majority of people in Colorado maybe have a different view than 92 percent of the workers who don't belong to a union.

Mr. MISHEL. Well, it's my understanding that the Governor promised to sign that piece of legislation before he was elected when he sought the support of the unions involved. I would just say that there is a law in our land that says you help your friends and punish your enemies and I think most people pursue that and I don't see the problem. I also don't understand why everybody seems to think that if you have a secret ballot election at the end of a process, no matter what else the process, it must therefore, act as a sufficient factor to be called free and fair. Our State Department calls all sorts of elections around the world not free and fair.

Senator ALLARD. Mr. Chairman, can I reclaim my time, please? And I'm sorry we have to do that but I do have limited time and I need to get moving. But I do happen to feel that a fundamental right is to have a secret ballot and I would hope that we would not take that away, no matter what the circumstances, whether it is a local community election or a homeowners association or whether it's unionization or whatever because I think the rights of the individual are more protected in that environment than any other environment and I recognize the fact that there might be extenuating circumstances beyond that, that could affect that vote and I'm not sure how we control those. But I do get concerned when that type of action is taken, when lawmakers in the State of Colorado had decided to pursue a different route.

The other question I wanted to ask, Mr. Chairman, is that if we look back historically on the last few years, our economy has done well. In fact, wages have gone up and some sources even said that wages have gone up a little bit more than actually the cost of living has been. Now if wages are such a good deal—I mean, if being in a union is such a good deal, why is union membership declining?

Ms. ESTLUND. One thing to realize is that the natural process of creative destruction in the economy means that unions have to organize hundreds of thousands of workers every year just to maintain parity. When we look at what happens when——

Senator ALLARD. You mean, the growth—the workforce is growing so rapidly?

Ms. ESTLUND. Well, it's a combination of firms—unionized firms going out of business and of course, every new firm that starts up starts out nonunion. A firm never turns union until a majority of people have made their voice clear through a process that the law recognizes. So that means that unions are constantly falling behind unless they are organizing. So that's part of the problem but when we see what has happened to people who do try to organize a union and the employer making it as clear as possible that they will still be there to make sure that the union can't get them anything, that terrible things will happen, that's certainly part of the explanation

for why unions have not been able to keep up. It's not the entire explanation.

Senator ALLARD. Mr. Chairman, thank you. I see my time has expired.

The CHAIRMAN. Thank you.

Senator Sanders.

STATEMENT OF SENATOR SANDERS

Senator SANDERS. Thank you. This is an important hearing and it's a discussion that we should be having far more often because the reality of American society today is that despite an increase in worker productivity, huge increases in technology, the middle class is shrinking.

There are millions of workers today who are working longer hours for lower wages than was the case 20 years ago. Poverty is increasing. In the last 5 years, five million more Americans slipped into poverty and what we don't talk about as often as we could—Professor Mishel raised that issue, is the growing gap between the rich and the poor and the fact that the United States has, by far, the most unequal distribution of wealth and income of any major country on earth.

Now, why is that? Well, a lot of reasons why but one reason is that we have people here in Washington who have fought vigorously against raising the minimum wage and are still fighting against that today, despite an obscene minimum wage of $5.15 an hour. Another reason is our disastrous trade policies, which have allowed corporate America to throw American workers out on the street, go to China and hire people there at 30 cents an hour and intimidate workers, that if they stand up for their rights in any way, that plant is going to shut down, move to China, move to Mexico and the last aspect I think is precisely what we're talking about today. That is, the attack on workers rights and the attack on the ability of workers to form unions. You know, this is a beautiful hall right here in Washington, DC. This is not reality. This is not the back room of a factory with some guy who is working 40 or 50 hours a week, is brought into a room and to say, listen, if you stand up for that union, you're going to lose your job. Oh, I know that it's illegal but that illegal activity is taking place every day all over this country and has for many, many years. And if some worker—after years of effort—goes to the National Labor Relations Board and makes his claim, having not had a paycheck, what happens to that worker? There is a slap on the wrist and the employer understands that and will continue that process.

I'm very glad this legislation is before us now. In 1992, soon after I became a Member of the Congress and the House of Representatives, I introduced that legislation. I would like to ask Professor Estlund, is this concept a new concept or do other countries, allies of ours, other industrialized countries like Great Britain, Canada, have similar approaches?

Ms. ESTLUND. Yes, there is quite a lot of experience with majority sign up in Canada and the best I can ascertain talking to people who are very knowledgeable about the process is nobody seems to be aware of any problem or any significant problem of union coercion in sign up and it's not surprising because the union just

doesn't have the leverage over employees that the employer does and in this—this bill has an extra layer of protection that the Board has to pass on the validity of the cards. So a majority signup is first of all, already valid for things like getting rid of an incumbent union. It's already good enough if the employer chooses to recognize——

Senator SANDERS. But this approach has also been used in other countries, am I correct?

Ms. ESTLUND. Yes, it has.

Senator SANDERS. All right, let me ask you this, Professor or anyone else can jump in. Union workers form a union. They negotiate. They sit down and try to negotiate a first contract. How often is the case where an employer says, in so many words, well, we're going to talk and we're going to talk and we're going to talk and we're going to talk. And you know what? You are never going to get that first contract. Is that uncommon?

Ms. ESTLUND. I'm really glad you asked that because the problem that the first contract arbitration responds to is really a terrible one. The idea of first contract arbitration is really to get the parties to take seriously the obligation to bargain because as things stand now, employers can do exactly what you suggest. They can stall. All they need to do is get to impasse. The region impasse—they can implement their proposal. All the workers can do is threaten to strike and that may be exactly what the employer wants because at that point, the workers can be permanently replaced.

Senator SANDERS. And this is not uncommon. I know of one instance in the State of Vermont where this process has gone on and the workers became demoralized.

Ms. ESTLUND. Absolutely. And in fact, the anti-union consultants include, in the event that you lose an election, will make sure that you don't ever get stuck with a contract. We'll walk you through the process of avoiding a contract.

Senator SANDERS. So you can go through dragging out the contract and then working on a re-certification.

Ms. ESTLUND. And at the end of the day, a refusal to bargain in good faith results in an order to go bargain some more.

Senator SANDERS. Right. Mr. Chairman, let me just conclude by saying that this is an excellent panel and I thank all the panelists for being here. Workers in our country are being beaten over the head. A gap between the rich and the poor is getting wider. Employers are getting away with murder and frankly, the time is long overdue for this Congress to start to stand up for the working people of this country and if our friends on the other side want to filibuster this bill, let them. But I think the time is now to pass action that to make it easier for workers to form unions so they can earn a living wage. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Hatch.

STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman. I have appreciated all four of you and your testimony here today. Professor Estlund, I noticed you had not a lot to say about compulsory bind-

ing interest arbitration of first contracts. Have you negotiated, and if so, how many first contracts have you negotiated?

Ms. ESTLUND. I haven't negotiated any, Senator.

Senator HATCH. Not any. Well, you're aware that many union negotiators have resisted even voluntary interest arbitration to address protracted bargaining disputes, such as the recent West Coast port strike, where the parties were at an impasse at the bargaining table. Now, we're informed that many local unions do not support the compulsory binding first contract interest arbitration provision in H.R. 800. Are you aware of that as well?

Ms. ESTLUND. That is often the case that unions will resist first contract arbitration.

Senator HATCH. Sure. Let me turn to you, Mr. Hurtgen.

Mr. HURTGEN. Yes, Senator?

Senator HATCH. I only have limited time but it seems to me you are uniquely qualified as having been a member of the Board, certainly to address the subject of compulsory binding interest arbitration of first union contracts. Now, I gather from your testimony that you are strongly opposed to that provision, that as it is listed in H.R. 800.

Mr. HURTGEN. That is correct, sir.

Senator HATCH. You practiced labor law in Florida for over 30 years, between 1966 and 1997 and I think if I recall it correctly, you negotiated somewhere like 175 collective bargaining agreements, both in the private and public sectors during that time.

Mr. HURTGEN. That is correct, Your Honor—Senator, excuse me. It's been a while since I've done this. I would say——

Senator HATCH. It's been a while since I've done this, too.

[Laughter.]

Mr. HURTGEN. I negotiated probably 20 to 30 collective bargaining agreements in the public sector in Florida and the vast majority of them were not negotiations like we conceive of it because the process ended in a hearing before an arbitrator called a Special Master, whose decision was final and binding on the parties except it had to go to the legislative body of the employer, the school board, the county commission, the city commission, the council, whatever.

Senator HATCH. Sure. But the public sector bargaining process in Florida ends in a nonbinding interest arbitration. So I'm going to ask you just a few questions about that experience and whether or not it should be required. In other words, "binding" on all private sector employers unions and employees for first contracts. Now we all know what is provided in H.R. 800 concerning compulsory binding first contract interest arbitration. But I just want you to confirm a few of the effects of that provision.

Now it is my understanding that because the first contract imposed by the Federal Government through compulsory arbitration is binding on the parties under this bill. The employees who are subject to the government's imposed wages, benefits and other terms and conditions of employment will have no right to a ratification vote to approve or reject a contract, is that correct?

Mr. HURTGEN. I think that is correct, Senator.

Senator HATCH. As they would under law.

Mr. HURTGEN. Well, they would have that under the current law. In fact, that is the requirement that they choose to ratify or not.

Senator HATCH. That is if the contract was negotiated without governmental interference.

Mr. HURTGEN. That is correct.

Senator HATCH. In other words, it doesn't matter, according to the words of this bill, what the employees think or want, once the Federal Government has spoken, the contract is binding for 2 years, like it or not, is that correct?

Mr. HURTGEN. That is correct.

Senator HATCH. Let me ask you this. Because the government imposed contract is binding on the parties, the employees will not be allowed to strike to enforce their contract demands if the parties reach impasse, is that correct?

Mr. HURTGEN. Well, I think that's unclear, Senator. Clearly, I think it would be the case after the contract, so to speak, is imposed is that they would not be able to strike because the imposed contract is binding upon them as it is the employer.

Senator HATCH. But if they have a right under current law to——

Mr. HURTGEN. They do have the right under current law to strike until they get the terms they want.

Senator HATCH. But they would not be permitted to strike during the duration of the contract.

Mr. HURTGEN. That is correct.

Senator HATCH. That's my point. Now, since the government-imposed contract would be binding for 2 years under the "contract bar" doctrine, neither the employer nor the employees would be permitted to challenge the union's continuing majority status through an NLRB supervised secret ballot de-certification or de-authorization election for the term of the contract.

Mr. HURTGEN. That is correct.

Senator HATCH. Now, as I view it, that's an additional 2-year denial of the right of workers to a secret ballot election to express their views on the union, is that correct?

Mr. HURTGEN. That is correct.

Senator HATCH. And I want to ask just a few—do I have some time here? I'm running out. I want to ask a few questions about the effect of compulsory binding interest arbitration on the national labor policy of free collective bargaining.

First I want to establish the difference between interest arbitration and grievance arbitration. Is it correct that in grievance arbitration—Mr. Chairman, could I have just a little bit more time? I know you're tired and weary and worn out from all these questions.

Mr. HURTGEN. And he's not even having to answer them.

The CHAIRMAN. There is no reason you shouldn't have 10 more seconds.

[Laughter.]

Senator HATCH. You've always been very generous to me.

The CHAIRMAN. All right. A couple more minutes.

Senator HATCH. Thank you, sir. I appreciate it. In grievance arbitration, the answers to the dispute are to be found within the "four corners" of the pre-existing contract. The arbitrator's job is interpreting and implying what the parties have agreed to.

Now, interest arbitration, on the other hand, is an arbitrator's judgment imposed on the parties in the absence of a contract as to what in his opinion the parties should have agreed to or would have agreed to, absent arbitration. So such determinations imposed on the parties will be affected by the arbitrator's own economic or social theories often without the benefit or understanding of practical, competitive economic forces. You would agree with all of that, wouldn't you?

Mr. HURTGEN. Yes, I would.

Senator HATCH. It is for that reason that most employers shudder at the thought of an outside government arbitrator with the power of the company's economic life and death in the balance. Do you understand that?

Mr. HURTGEN. I would accept that. I'd add that I think if not most, many unions would agree with that statement.

Senator HATCH. Now, do you agree with Elkouri and "How Arbitration Works," do you acknowledge that that is a premiere basic text on arbitration.

Mr. HURTGEN. Right.

Senator HATCH. And according to that text—I ask whether you agree or disagree with the following statements about compulsory binding interest arbitration—"Broadly stated that one, it is incompatible with free collective bargaining. Two, it will not produce satisfactory solutions to disputes. Three, it may involve great enforcement problems and four, it will have damaging effects on the economic structure." Do you agree with that, sir?

Mr. HURTGEN. I agree with that.

Senator HATCH. Professor Estlund, do you agree that Elkouri and Elkouri is the premiere basic text in arbitration?

Ms. ESTLUND. I do want to correct a misstatement that I made. I don't know of any union that has ever resisted first contract arbitration, interest arbitration. In a mature collective bargaining agreement, it's not the ideal answer.

Senator HATCH. It is the difference between having the right to do that and having it imposed on you, isn't it?

Ms. ESTLUND. It is and if there were not a problem with employers avoiding serious collective bargaining, then I don't think this proposal would be on the table. This is responding to a problem of employers continuing their anti-union campaign past the certification period.

Senator HATCH. Well, I would like to ask both of you a number of questions about what Elkouri versus Elkouri, the premiere basic text on arbitration has to say because it certainly rips this part of the bill apart and I'm very concerned about it as well and there is a number of parts of this bill that I'm very concerned with. I do believe in collective bargaining and I do believe that unions should have a right to compete. I do believe that under current law, they have a lot of rights. Now, if there are abuses in this process, of course, I think most times, the law is there to take care of them but I understand some of the concerns that you have, Professor Estlund but I also understand what you've said, Mr. Hurtgen. Is there any further comment on what I have said?

Mr. HURTGEN. Trying the Chair's patience, no.

Senator HATCH. OK. I don't want to try his patience anymore either. I've been there before.

[Laughter.]

The CHAIRMAN. Your time is up.

[Laughter.]

Thank you. I just have a final one for Professor Estlund. In your testimony, you point out that prior to the 1970s, employers were required to bargain with a union that presented the evidence of majority support. Other countries, such as Canada, still have this system in place even today, signing authorization cards are a lawful and common way to form a union and employers will recognize the union on this basis. So based on these experiences of majority signup, has any compelling evidence emerged that coercion by their fellow workers will interfere with employees' free choice? And if you have a direct knowledge about how the Canada system is working.

Ms. ESTLUND. Well, I don't want to get too much into the details but I do understand that they have not had really any significant problem and people who have looked at the record in this country with the use of majority signup, have not found a significant record of a problem. The studies that have been done suggest that very few people report being pressured by a union and why should we be surprised? What does the union have to hold over them? It just doesn't have—if the worker comes up before the Board later and says, I was pressured, that puts the union's whole victory—so unions are very strongly deterred against that sort of coercion and they really have no leverage over the employees as compared to the employer so that's just not where the problem is.

The CHAIRMAN. Thank you very much.

Senator Isakson.

Senator ISAKSON. Thank you, Senator Kennedy. I just wanted to make a couple of observations. This has been a great hearing and I appreciate all of the witnesses. A couple of things that have come out in my mind, just for us to reflect on.

First, Mr. Hohrein—Hohrein (How-rein), is that correct?

Mr. HOHREIN. Hohrein (Hoe-rein) by pronunciation.

Senator ISAKSON. Hohrien?

Mr. HOHREIN. Hohrein.

Senator ISAKSON. Hohrein, I'm sorry. I always hate it—I've got Isakson and people always blow that one so I hate to do it to somebody else. Your testimony demonstrates that the current law works pretty well because you had what was apparently an adversarial situation and the vote ended up going in favor of the union, is that correct?

Mr. HOHREIN. We won the union vote but that is not the case. If we had 75 percent of the people that were signed up as far as the petition drive and by the time we got to the vote, it was 11-12. An awful lot of coercion went on in between and it wasn't on the union side.

Senator ISAKSON. But the point I was making was with regard to the current law we have. You had an adversarial relationship between the company and the employees and the employees won in terms of unionization.

Second, Dr. Mishel, I appreciate the comment about rewarding friends and punishing enemies. I don't believe it is a principle. I believe it is a practice. I ran a company for 22 years and employees are not necessarily enemies and employers are not necessarily enemies, which is my other point that I want to make because there is a lot of good, on both sides.

Last, one observation, having run a business, one of the key things when you look at the Senator's many charts, about productivity and wages, I do want to point out, the corresponding increase—and I went through this in my company—Bill Gates did more to increase the productivity of the American workplace and technology than any single thing. It displaced some workers and it dramatically increased others, so granted, I'm not arguing that your chart may not be indicative but I am saying, there are external factors that came out of a great free enterprise system, like the generation of Microsoft software and the computer and technology that naturally are going to increase productivity disproportionately to what increases might take place in wages. I just wanted to get that comment in there.

Mr. MISHEL. Senator, may I just point out that I was quoting Samuel Gompers. I know you've studied him well. He was the founder of the American Labor Movement in the 1800s and it was his phrase that the way you practice politics is to reward friends and punish enemies.

Senator ISAKSON. And I appreciate that point because that kind of ratifies what I was saying. When unions started growing, they grew out of what was a very adversarial relationship between employers and employees and because of what has happened over the years, that's not necessarily the rule in employment. It can't happen where you have adversarial relationships but it's no longer the rule like it was then.

Mr. MISHEL. Well, he was discussing the practice of politics, which I guess you're more familiar with than I so I'll leave it at that.

Senator ISAKSON. It's always adversarial. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I thank our panel very, very helpful and very informative.

Senator ISAKSON. Can I ask one more question?

The CHAIRMAN.Unfortunately, I have to leave.

Senator ISAKSON. Yes, I know you have to leave.

The CHAIRMAN. The committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR ENZI

I want to thank Chairman Kennedy for holding this hearing and offering us the opportunity to get all the facts out on the table. This is an important issue and, unlike the process my colleagues faced in the House of Representatives who were entirely shut out of the process, I am encouraged that the Chairman is willing to open up the card check bill to greater scrutiny here in the Senate. I believe this hearing is an important first step in that direction.

Legislative initiatives are invariably driven by real world facts and real world experience. Therefore, we should begin any review of the cleverly named "Employee Free Choice Act" by first examining some basic facts. This legislation would, in part, radically change the way that millions of employees over nearly seven decades have decided whether or not they want a union to become their exclusive representative in the workplace. In the vast majority of instances this critical decision has been made through use of the most fundamental institution of our democracy—the private ballot. In a democratic society nothing is more sacred than the right to vote, and nothing insures truly free choice more than the use of a private ballot.

Beyond assaulting free choice and the right to vote, this bill would gravely damage the freedom of contract that has been a hallmark of our private sector labor/management relations. Our system recognizes the reality that in labor/management relations, as in other contractual situations, the parties that must live by the contract are the parties that must make the contract. Can you imagine either buying or selling a house and being told that someone from the government would decide the terms of the sale; and, even if you didn't agree, you'd be forced to go through with the deal? Whether it is buying a house, or negotiating a labor contract, this notion is simply untenable.

Lastly, the bill would substitute a tort-like remedy system for the make-whole remedy system that has served well since the inception of the NLRA. The vast majority of labor/management disputes are voluntarily resolved. A tort-type system, while it will certainly keep trial lawyers busy, will clog the system with litigation and simply delay the resolution of claims. The bill also seriously infringes on due process and the right to manage a private business through its mandatory injunction provision. If an individual claimed that he was terminated because of his union sentiments, the government would require that he be returned to work before the merits of his claim were resolved. We rightly outlaw employment discrimination on the basis of age, race, religion, sex, and national origin, but do not require individuals claiming to have been discharged on these bases be returned to work before the merits of their claims are determined and we should not do so here.

So then, what are the facts that would cause some to so quickly cast aside such fundamental guarantees as the right to vote, the right of free speech, the right to adequate legal process and the right to form private contracts? There is only one fact—labor unions represent a steadily declining percentage of the private sector workforce. Today, union membership among private sector em-

ployees stands at its lowest level in decades. The Labor Movement needs members because members' dues, whether taken from the employee's paycheck voluntarily or taken, in some cases, involuntarily in non-right-to-work States, are the only source of union income. Make no mistake about it. That is the only fact that is driving this proposed legislation.

You don't have to take my word for it. The labor unions' own research association said it plainly in an article titled "Union Members Hit Harder by Job Loss Numbers." As they wrote, "The push for card check recognition is absolutely critical to reverse the decline in union membership." (Labor Research Association, July 27, 2005)

There is not a Member in this body, on either side of the aisle, who would ever sanction depriving individuals of the right to vote when electing their governmental representatives. Why would we ever even consider depriving individuals of the right to vote over the issue of their workplace representatives? Why would we ever say to the working men and women of this country that democracy ends at the factory gate and individual rights have no place on the shop floor? Why would we have the Federal Government dictate the terms of private labor agreements? And why would we allow the Federal Government to interfere and reverse personnel decisions before discrimination is proven? What are the facts that could possibly support these radical notions?

First, we are told that taking away private ballots is necessary because the election process overseen by the National Labor Relations Board is increasingly tilted against unions. However, that claim simply does not withstand examination. The fact is that for the last decade unions have been winning a steadily increasing number of the NLRB certification elections. In fact, in fiscal year 2005 unions won over 61 percent of the time—a rate as high as it has ever been. When you are shooting better than 61 percent from the three point line, it's a little difficult to claim that the game is unfair, or that you need to have the line moved closer to the basket.

Then we are told, well wait a minute, that's not quite it. The real problem is that employers are making elections unfair. This claim doesn't stand up either.

The National Labor Relations Act guarantees the right of free speech to all parties involved in union elections. Free speech, open debate, and the free exchange of ideas and opinions are, like the private ballot election, hallmarks of a fair and democratic society. The law, however, also prohibits conduct in the context of union organizing that is coercive or threatening. The NLRB scrupulously polices the conduct of both unions and employers during an organizing election and can invalidate any election if either party engages in misconduct affecting the results. The rate of elections invalidated because of misconduct by *either* side is extraordinarily low and has, in fact, been declining. In 2005, over 2,300 certification elections were conducted by the NLRB, yet the NLRB conducted re-run elections because of misconduct by *either* the employer *or* the union in only 19 cases.

Finally, we're told, you still don't get it. It's because employers are increasingly committing unfair labor practices. Well, guess

what, that's not true either. The number of allegations—and I stress the word allegations since the majority of claims are withdrawn or dismissed for want of any evidence—of employer unfair labor practices has been steadily declining for the last decade. In fact, last year, it was at the lowest level in many, many decades.

Surely, however, the current low membership levels must be due to an unfair law, or to unfair NLRB election procedures. Sorry, those arguments hold no water either. The National Labor Relations Act has not changed in nearly 50 years. The law and procedures governing union organizing are the same today as they were in all the years when unions enjoyed their highest level of membership among private sector workers. Such argument further ignores the fact that union's election win rates are dramatically higher today than they were 10, 20, or 30 years ago, and allegations of employer misconduct are dramatically lower than in those same times.

According to opinion poll after opinion poll, the low levels of union membership are the result of the public's perception of unions, not some problem with the law surrounding organizing that hasn't changed in decades. Those polls indicate that workers find unions increasingly irrelevant, too costly, too detached and too political. The unions have not kept pace with the modern workforce. Whether true or not, that is the public's view, and that is the problem for unions—not some manufactured problem with the underlying law.

One final thought is important to bear in mind as we consider this issue. It has never been the role of the government, or the purpose of Federal labor policy to increase or maintain the level of union membership among private sector employees. Federal labor policy on this issue has always been neutral. That is why the act specifically provides in its "bill of rights" section that employees have **both** the right to form and join labor organizations **and** the right not to do so.

Our Federal labor policy has been consistently based on "rights" not bolstering union membership levels. This new proposed policy of government intervention to increase unionization will be constructed on a pile of discarded rights—the right to vote, the right to privacy, the right of free speech, and the right to contract.

I believe the Senate will stand with me to protect these most fundamental rights and to continue fostering a national labor policy that is balanced and neutral.

I look forward to hearing the testimony and engaging in a healthy exchange of ideas and differences.

PREPARED STATEMENT OF SENATOR MURRAY

Mr. Chairman, thank you for holding this hearing, and I want to thank our witnesses.

Over the past few years, our country has had really impressive economic growth, and I want to make sure that every American shares in that prosperity. One way to do that is to ensure workers have the option to organize.

Unfortunately, today, in too many workplaces, workers who try to exercise their legal rights are blocked by an unbalanced system that can trap them in unacceptable working conditions.

The Employee Free Choice Act will make the promise of employee choice a reality and will restore balance to the relationship between employers and employees.

First, the bill ensures that employees who want to organize can do so without interference.

Second, this bill ensures there's time for reasonable negotiations, but it does not allow one side to act in bad faith and string employees along in a never-ending process that's designed to block their ability to self-organize.

Third, this bill will hold bad actors accountable if they break the law. According to "American Rights at Work," every 23 minutes in America, an employer fires or retaliates against a worker for their union activity.

We shouldn't tolerate illegal discrimination and retaliation against workers who are just trying to exercise their rights. If a corporation violates the rights of its employees and is charged by National Labor Relations Board, this bill will impose stricter penalties. This will ensure that breaking the law doesn't just become part of "the cost of doing business."

I'm pleased that this bill gives employees the opportunity to vote by secret ballot if they so choose. For too long, some corporations have had control over the balloting process, and this bill gets the balance right by making sure employees have the free choice to use a secret ballot.

One thing this bill does not change is the access to employees that exists today. Currently, employers have full access to employees during the workday. Unions do not. This bill leaves that relationship unchanged.

We all know that a fair labor market can only exist when corporations and employees have a voice in the system. Unionized workers earn 30 percent higher wages, are twice as likely to have employer health coverage, and are more likely to have paid sick days and a pension. Clearly, unions empower workers to access better benefits and provide a better life for their families.

In my home State of Washington, we've seen proof that companies can remain competitive and profitable and still follow the law and respect worker rights. Cingular Wireless is a national wireless phone company that gave its workers in Bothell, Washington the free choice they're entitled to. As a result, nearly 1,000 workers in my hometown decided to organize, and Cingular won praise for its responsible, respectful approach to employee choice.

It's time to empower our workers and give them their voice back. I sincerely hope we can work together to restore free choice to employees by moving this bill forward quickly in our committee.

LETTER OF SUPPORT

LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS,
THE UNIVERSITY OF TEXAS AT AUSTIN,
AUSTIN, TEXAS 78713–8925,
March 21, 2007.

Hon. TED KENNEDY,
Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR SENATOR KENNEDY: I regret very much that a scheduling conflict precludes the opportunity to accept your invitation to testify on the Employee Free Choice Act (EFCA), which I strongly support.

There is abundant evidence that free and democratic societies and broadly shared prosperity require strong and democratic organizations to represent employees at work and in the larger society. This is one reason all democratic countries, including the United States, have declared the right of workers to organize and bargain collectively to be fundamental human rights.

Unfortunately, despite our support of this declaration, U.S. labor law actually makes it very difficult for American workers to bargain collectively, even though polls show that nearly 60 million of them wish to do so. Indeed, unlike most other advanced democracies, the United States requires workers to engage in unfair high-stakes contests with their employers to gain bargaining rights. Numerous studies, including those by the Commission on the Future of Worker-Management Relations (the Dunlop Commission) have documented the failure of American labor law to adequately protect workers' bargaining rights. The National Labor Relations Act's (NLRA) major weaknesses include:

- giving employers too much power to frustrate workers' organizing efforts, often through unlawful means;
- weak penalties for illegal actions by company representatives; and
- employers' refusal to bargain in good faith after workers vote to be represented by unions.

By strengthening the right of workers to select bargaining representatives without going through lengthy and unfair election processes, facilitating first contracts, and creating stronger and more equitable penalties, the EFCA would cause the NLRA to be much more balanced.

The EFCA is important to all Americans, not just to workers. We are not likely to have either sound public policies or fair and effective work practices if millions of American workers' voices remain unheard. It is significant that stagnant and declining real wages for most workers, along with growing and unsustainable income inequalities, have coincided with declining union strength.

Good luck with this important legislation. Please let me know if I can help in any way.

Sincerely,

RAY MARSHALL.

LETTERS OF OPPOSITION

ASSOCIATED BUILDERS AND CONTRACTORS, INC. (ABC),
MARCH 26, 2007.

Hon. EDWARD M. KENNEDY,
Chairman,
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
Washington, DC.

Hon. MICHAEL B. ENZI,
Ranking Member,
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
Washington, DC.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: On behalf of Associated Builders and Contractors (ABC), and its more than 24,000 contractors, subcontractors, suppliers and construction-related firms across the country, I am writing to ex-

press our strong opposition to the "Employee Free Choice Act," scheduled for debate by the committee tomorrow.

Passage of the "Employee Free Choice Act" would rob American workers of their right to a private ballot election overseen by the National Labor Relations Board (NLRB) when deciding whether or not to join a union. It would replace the private ballot election with a scheme called "card check." Under "card check," workers are forced to vote in public—inviting intimidation and coercion into the workplace.

NLRB case law is full of examples where the use of card checks have been challenged because of incidents that involved misrepresentation, forgery, fraud, peer pressure, and promised benefits. Tactics have included threats of termination, deportation, and loss of 401(k) and health benefits for not signing a card. For signing a card, employees have been promised green cards, termination of supervisors, turkeys, and waiving of union dues. The expansion of this practice via this legislation would only lead to more egregious threats upon workers.

Federal courts have repeatedly ruled that secret ballot elections are the preferred method of ascertaining union support from employees. In a brief to the Ninth Circuit Court of Appeals, the NLRB stated,

> "Congress and the Supreme Court regard a secret ballot election conducted under the Board's auspices as the preferred method for resolving representational disputes in the manner that best ensures employees free and informed choice."

Simply put, the private ballot is absolutely essential to protecting the integrity of the union election process.

The bill also contains an infringement on a private employer's right to contract. It provides that if an employer and a union engaged in their first collective bargaining agreement are unable to reach agreement within 90 days, then either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS). If the FMCS is unable to bring the parties to agreement after 30 days of mediation, then the dispute would be referred to arbitration. The results of the arbitration would be binding on the employer, the union, and ultimately the employees for 2 years.

Besides departing from seven decades of precedent and law under the National Labor Relations Act, this provision would completely undermine the collective bargaining process by creating an incentive for bad faith bargaining. Unions could deliberately stall collective bargaining with impossible demands, expecting the Federal Government to grant some or all of their demands through binding arbitration.

This provision also represents a serious threat to small businesses, by allowing the Federal Government to set a private company's wages and benefits during binding arbitration.

The "Employee Free Choice Act" in fact does nothing to enhance freedom in the workplace. Instead, it tramples on both the privacy of individual workers and the freedom of employers to bargain collectively. We strongly urge you to oppose this dangerous bill.

Respectfully submitted,

WILLIAM B. SPENCER,
Vice President, Government Affairs.

AMERICANS FOR TAX REFORM (ATR),
WASHINGTON, DC.,
March 26, 2007.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, DC. 20510.

Hon. MICHAEL ENZI,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: On behalf of Americans for Tax Reform, I write to express my strong condemnation of H.R. 800, the so-called "Employee Free Choice Act." The Senate HELP Committee will be considering the merits of this bill tomorrow. **This anti-worker bill should be dismissed as the thinly veiled sop to Big Labor that it really is.**

For generations, American workers have had the right to a federally supervised, private ballot election when deciding on union membership. **This bill would strip workers of this democratic right.** The bill would also impose wage and benefit

terms on newly-unionized small businesses, giving a decisive advantage to unions over entrepreneurs.

Taxpayers are the big losers if this bill were to become law. Within the next 3 years, experts predict that a majority of labor union members will be government employees. At that point, the majority interest of Big Labor will undoubtedly be higher taxes, more spending, and a bigger workforce to run it all (and pay union dues). **By tipping the scales in favor of Big Labor, this bill lays the groundwork for a massive expansion of government and a crushing tax burden.**

Sincerely,

GROVER NORQUIST.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
WASHINGTON, DC.,
March 27, 2007.

Hon. TED KENNEDY,
Chairman,
Committee on Health, Education, Labor, & Pensions,
U.S. Senate,
Washington, DC 20510.

Hon. MICHAEL ENZI,
Ranking Member,
Committee on Health, Education, Labor, & Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: The Employee Free Choice Act (EFCA), which will be considered during today's hearing, is perhaps the most imbalanced and ill-advised labor legislation in over 30 years. This bill would destroy 60 years of precedent and balance that currently characterize the process by which employees decide whether to be represented by a union in their workplace. The U.S. Chamber of Commerce, the world's largest business federation representing more than 3 million members and organizations of every size, sector, and region, does not oppose unions or their representation of employees. However, the Chamber is committed to ensuring that the process for deciding whether they are recognized produces a legitimate expression of employee interest.

Enactment of this legislation would deny employees their ability to vote on two of the most important issues they face with regard to their work lives: whether to have a union be their exclusive representative to their employer, and the terms of their employment as embodied in the contract that would be bargained collectively on their behalf. Accordingly, the Chamber unequivocally opposes EFCA, as passed by the House, and the version of it that is likely to be introduced in the Senate.

Unions' desire for this bill is driven by the continued decline in their membership, currently at 7.4 percent of the private sector. The primary cause of this trend is not that unions are being denied the opportunity to make their case to employees, or that the current system is unfair, or rigged, but that the message unions have been trying to sell to employees is no longer relevant or compelling. But the answer to organized labor's recent failure to recruit more members lies in developing an agenda and message that is relevant and attractive to the modern workforce, not in subverting proven election procedures that protect an employee's right to vote for a union, in secret and free from coercion.

However, in response to union claims that the current procedure is somehow flawed or rigged, it is worth emphasizing that unions still win more elections than they lose. The National Labor Relations Board ("NLRB" or "Board") most recent election report summary shows that unions won 59.6 percent of all elections involving new organizing.[1]

The signature provision of this bill would supplant the use of a private ballot, overseen by the NLRB, that is the current preferred method for determining whether a union will be recognized in a workplace, with an unsupervised process where a union would be recognized if union organizers can get more than 50 percent of the employees in a bargaining unit to sign authorization cards. While this provision is offensive, it is by no means the only objectionable provision of this bill. Equally egregious is the provision that mandates interest arbitration for a first contract if the parties have not come to an agreement after only 120 days. Finally, the section

[1] *See* NLRB Election Report; 6-Months Summary—April 2006 through September 2006 and Cases Closed September 2006, at p. 18.

increasing penalties on employers, but not unions, is similarly without merit. The Chamber's objections to each of these provisions are laid out in more detail below.

SECTION 2—DENYING EMPLOYEE CHOICE THROUGH CARD CHECK PROCESS

Under current law, when 30 percent of the employees in a bargaining unit indicate their interest in having a union represent them, the Board administers the election by bringing portable voting booths, ballots and a ballot box to the workplace. The election process occurs outside the presence of any supervisors or managerial representatives of the employer. No campaigning of any kind may occur in the voting area. The only people who are allowed in the voting area are the NLRB agent, the employees who are voting, and certain designated employee observers.

The ultimate question of union representation is determined by the majority of the number of valid votes cast. If a majority of votes are cast in favor of the union, the Board will certify the union as the exclusive bargaining representative of all employees in the collective bargaining unit. Once a union is certified by the Board, it becomes the exclusive representative of *the entire* unit of employees, regardless of whether they voted for the union. This means that even if an employee previously had an open and cordial relationship with his employer, that employee must now go through the union for many questions or requests they would otherwise have posed directly to the employer. The employer is obligated to bargain with the union in good faith with respect to all matters relating to wages, hours and working conditions of the bargaining unit employees.

The secret ballot process allows *all* employees to express their position on whether to have a union. Under the card check process, only those who sign the card will be expressing their view. Employees who do not favor having a union will have no opportunity to indicate this, and may very well end up having a union imposed on them against their wishes. Indeed, it is well understood that some employees who sign authorization cards do so just to get the organizer to stop bothering them, or because they were asked to do so by a friend, and may actually intend to vote against having a union when they are in the privacy of the voting booth.[2]

The card check process moves the decision about whether to have a union from the protection of the NLRB supervised election area and voting booth, out into the unsupervised open arena. An employee would be exposed to all manner of contacts and potential intimidation, threats and coercion to secure their signature. Furthermore, unlike the election process, a card check campaign has no time limit—it can last indefinitely until the union gets the number of signatures it needs to get over 50 percent. This replaces a process with specific protections and rules for both sides with one that entirely favors the union—not the employees—with no protections for either the employer or employees.

EFCA would mandate that if the union is able to present signatures from more than 50 percent of the employees in the relevant bargaining unit, the Board will certify the union as the representative of that unit. While technically this does not repeal the provisions of the National Labor Relations Act providing for a secret ballot election, it completely obviates any reason why such an election would be held. The union will always seek to obtain enough signatures to claim more than 50 percent, at which point it will be recognized without an election.

The benefits and protections of a secret ballot election process have even been recognized by Rep. George Miller in a letter to Mexican labor authorities in August, 2001:

> [W]e are writing to encourage you to *use the secret ballot in all union recognition elections.*
>
> We understand that the secret ballot is allowed for, but not required, by Mexican labor law. *However, we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.*
>
> We respect Mexico as an important neighbor and trading partner, and *we feel that the increased use of the secret ballot in union recognition elections will help bring real democracy to the Mexican workplace.* (emphasis added)

The letter was co-signed by 15 other members of the House, including then Rep. Bernie Sanders, who is now a Senator and a member of the Health Education, Labor, and Pensions Committee. These members all believed that the only way to

[2] "Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." *NLRB* v. *Village IX, Inc.,* 723 F.2d 1360, 1371 (7th Cir. 1983).

accurately ascertain the true wishes of employees on the question of union representation was to conduct a secret ballot election.

The right to vote in private has been a cornerstone of the Nation's political democracy for exactly the same reason it underpins workplace democracy—too much rides on the outcome to allow voters/employees to be vulnerable to coercion or intimidation. Exposing employees to such tactics has a corrosive effect on the credibility of the process and creates the very real possibility of a fraudulent outcome if a majority of employees do not support a union.

SECTION 3—IMPOSING UNION-DRIVEN FIRST CONTRACTS

Not only will EFCA deny employees an opportunity to vote on whether they are represented by a union, it could then deny them the opportunity to have *any* say in the contract under which they will have to work.

This section would also destroy the foundational principle of labor law that the parties are to negotiate out their differences, and the government should not decide who wins or impose its version of a "reasonable" agreement. If the parties are unable to agree on a first contract after 120 days, including only 30 days working with the Federal Mediation and Conciliation Service, then the matter would be referred to an arbitrator who would decide the terms of the first contract and the employer and employees would be bound to it for 2 years. This creates a strong incentive for the union to stretch out the bargaining process to push the matter to binding arbitration where they can expect to "win" more than the employer is willing or able to provide.

The Chamber does not believe that a government arbitrator will have the ability or knowledge of the employer's operations so that he or she can realistically tell an employer how to run its workplace, from setting wages, benefits, and pension contributions to other terms and conditions of employment—from the most significant to the most trivial. This grant of authority to the government under private sector labor law is unprecedented.

Further, this process involves absolutely no employee involvement or opportunity to express approval or disapproval. Normally, a contract would be submitted to employees for a ratification vote, but employees under the system envisioned by this bill would be entirely shut out—completely at the discretion of the union which frequently promises wages and benefits during the organizing campaign which the employer can not provide to induce signatures on the authorization cards. When these promises are then made part of the bargaining process, the arbitrator may well, under this new provision, simply impose them as part of the contract, notwithstanding their unreasonableness, or the impact they can have on the company's ability to remain competitive. Putting aside the obvious adverse impact on the employer, employees will be severely disadvantaged if their jobs are jeopardized or lost due to an overloaded union contract now mandated by a government-imposed referee.

SECTION 4—PENALIZING EMPLOYERS BUT NOT UNIONS

This section would mandate that any charges brought against an employer for discharging or discriminating against an employee while the employee was seeking union representation, or during the period after a union is recognized, and a first contract is signed, be elevated to the highest priority for investigation. It would also award three times the amount of any back pay lost to the employee as liquidated damages. Employers may also be subject to civil penalties of up to $20,000 for any willful or repeated unfair labor practices committed while employees are seeking union representation or after a union has been recognized and a first contract has been signed.

These increased penalties and scrutiny are structured as if the process for seeking union representation would be the same as currently practiced under Section 9 of the National Labor Relations Act (29 U.S.C. 159) i.e. that the process for seeking union recognition will be open and public, such as it is when an election has been scheduled. However, under a card check campaign, the process is much less structured and obvious—union organizers approach employees outside the workplace and the process can go on as long as the union wishes until it gets a majority. Under this process, an employer, such as a small business, might not even know that this process is under way until the union presents the required amount of signed authorization cards. The employer might take a disciplinary action against an employee, for a legitimate reason, without even knowing that the employee is supporting unionization, thus triggering the provisions of this section even though the employer had no knowledge of the union activities at all.

This section also increases penalties only for employers who are found to be involved in coercion with no increases for unions found to have coerced employees. Under the card check process, union coercion of employees to produce signatures is expected to be rampant, yet there are no increased penalties applying to unions. Employees deserve protection from all sources of coercion and intimidation, and assuming that employers are the only source of this overlooks the realities of this process.

CONCLUSION

The EFCA would undermine fundamental rights and privileges currently enjoyed by employees, and protections designed to ensure a fair process so that both sides can have faith that the outcome is a truthful representation of employee desires on whether to have a union in their workplace. The bill would impose unreasonable contracts on employers, forcing terms and work conditions which could eliminate their flexibility and ability to be competitive in an unrelenting global marketplace. Finally, the bill creates an entirely one-sided enhanced penalty structure without acknowledging the very real potential union coercion and intimidating behavior that impacts vulnerable workers.

Sincerely,

RANDEL K. JOHNSON,
Vice President, Labor, Immigration and Employee Benefits.

NATIONAL RESTAURANT ASSOCIATION,
MARCH 26, 2007.

Hon. EDWARD M. KENNEDY,
Chairman,
U.S. Senate,
Health, Education, Labor, and Pensions Committee,
Washington, DC. 20510.

Hon. MICHAEL B. ENZI,
Ranking Member,
U.S. Senate,
Health, Education, Labor, and Pensions Committee,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: As one of the Nation's largest private sector employers providing jobs to 12.8 million individuals, we are writing in opposition to the so-called "Employee Free Choice Act." We strongly believe that it is completely inappropriate to deny a worker's fundamental right to a private ballot election for purposes of determining union representation.

The restaurant industry is proud to be a dynamic industry where our workers frequently move up to management and ownership. In fact, 8 out of 10 salaried employees started as hourly employees. We believe it is highly important to defend our workers and their rights to privacy if they ever have to choose whether to join a union.

A worker's decision whether or not to participate in a union is an important one. We believe this is a decision that is best made in private, so that workers are protected from coercion and influence from both union representatives, employers or both. The sanctity of private ballot voting is a cornerstone of our democracy. If EFCA were approved, this fundamental right of workers would be taken away for purposes of determining union representation.

Our opposition to this legislation is based upon our concerns for the process EFCA proposes. If it only takes a simple majority of signed authorization cards to determine if a workplace is unionized, it is quite possible that many workers with concerns for unionizing will be shut out of the process. The card-check process also provides no opportunity for the employer to provide their perspective. We believe the existing federally supervised NLRB election process is a more fair and balanced approach.

In addition to our concerns with the undemocratic card-check process, we also have serious concerns with the binding arbitration requirements and increased employer penalties that are included in the bill. These provisions would also have a significant negative impact on restaurants and other small businesses.

We urge the committee to oppose the so-called "Employee Free Choice Act."

Thank you,

PETER KILGORE,
Acting President and Chief Executive Officer.

JOHN GAY,
Senior Vice President, Government Affairs and Public Policy.

INDEPENDENT ELECTRICAL CONTRACTORS (IEC),
ALEXANDRIA, VA. 22302,
March 26, 2007.

Hon. EDWARD KENNEDY,
Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY: I am writing on behalf of the Independent Electrical Contractors, Inc. (IEC) in opposition to the *Employee Free Choice Act* (EFCA). IEC is a trade association representing 2,700 merit shop electrical and systems contractors across the United States, two-thirds of which are small businesses that employ 10 or fewer individuals.

The *Employee Free Choice Act (EFCA)* would eliminate union organizing elections and replace them with a card check system that would force an employer to recognize a union when half of his or her employees sign union authorization cards.

IEC contractors choose to make their living based on the merit shop business philosophy, and their employees have made the same choice. With a card check system, however, a union could approach individual employees and pressure them to sign an authorization card. This kind of coercive organizing method does a disservice to both the employer and the employee. If the union is confident that the employees want to be organized, then they should not have a problem with a private ballot election conducted by the National Labor Relations Board.

Furthermore, the *EFCA* contains a provision that mandates compulsory, binding arbitration as part of the collective bargaining process. This misguided language would have a government official making labor contract decisions that are binding upon both parties. This would mean that the small business owner would have no real voice in his own business nor would the union employees be provided with the opportunity to vote on their new contract.

This legislation runs counter to the ideals of free enterprise and democracy. These values have made America the great Nation that it is today, and that is why IEC opposes the *Employee Free Choice Act.*

Sincerely,

BRIAN WORTH,
Vice President, Government Affairs.

INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION (IFDA),
MARCH 26, 2007.

Hon. EDWARD M. KENNEDY,
Chairman,
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
Washington, DC. 20510.

Hon. MICHAEL B. ENZI,
Ranking Member,
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: On behalf of the members of the International Foodservice Distributors Association (IFDA), I am writing to express our opposition to the so-called Employee Free Choice Act or "card-check" legislation. IFDA believes this bill would be a dramatic, negative change to the American workplace and would deprive workers of the fundamental American right of a secret ballot election to determine union representation.

The Employee Free Choice Act would replace the privacy of election booths with the very public "card check recognition" process where employees make their choice

for or against the union by signing authorization cards in front of union organizers and co-workers that support union representation. Employees have no protection in such a process and often sign cards for a variety of reasons such as not to anger coworkers. If card check recognition were to be required, employees would lose the freedom to decide their own future—free of intimidation or coercion—one of the most important protections they are granted under the National Labor Relations Act (NLRA).

The Employee Free Choice Act also contains a provision that mandates compulsory, binding arbitration on the employer and the employees as part of the collective bargaining process. This misguided language would have a third-party government official making labor contract decisions within 120 days of recognition that are binding upon both parties. The owner of a foodservice distribution company would have no real voice in their own business nor would the union employees be provided with the opportunity to vote on their new contract.

Denying workers the protection they are provided by secure and private voting is simply undemocratic. I urge you not to support the Employee Free Choice Act.

Sincerely,

JONATHAN EISEN,
Senior Vice President, Government Relations.

NATIONAL ASSOCIATION OF MANUFACTURERS (NAM),
MARCH 26, 2007.

Hon. EDWARD KENNEDY,
Chairman,
Committee on Health, Education, Labor, and Pensions,
Washington, DC. 20510.

Hon. MICHAEL ENZI,
Ranking Member,
Committee on Health, Education, Labor, and Pensions,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: On behalf of the National Association of Manufacturers (NAM), the Nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States, I write in strong opposition to H.R. 800, the so-called "Employee Free Choice Act" (or EFCA). This legislation, which recently passed the House, effectively changes more than 70 years of precedent. Manufacturers of all sizes and in every sector have serious concerns with this legislation, particularly how it will restrict employees' freedom to choose whether union representation is right for themselves and their families.

The EFCA would allow union organizers to bypass the federally supervised election process entirely, and require a majority of signed authorization cards to achieve certification. Employees who do not sign a card, or are not even approached to sign such a card, will be without a "free choice." NLRB case law is full of examples where the use of card checks have been challenged on coercion, misrepresentation, forgery, fraud, peer pressure and promised benefits. Expansion of this practice would only further intimidate and threaten the freedoms of American workers.

Additionally, this bill departs from more than seven decades of precedent established by the National Labor Relations Act (NLRA) of 1935. It imposes contract terms on private employers and their employees through a process of compulsory, binding arbitration. Essentially, government arbiters will establish wages and terms between the two parties. In these instances, the employees will be unable to vote or ratify the contract. This provision completely rewrites the NLRA and overturns what Congress intended in 1935, when it stated that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." Imposing contract terms through compulsory arbitration is an unconstitutional infringement on the right of private employers to freedom of contract.

The NAM strongly opposes legislation that not only interferes with the democratic process, but also forces private enterprise to agree to contract terms or face government intervention and, ultimately, wages and benefit terms that are established by the government.

Should you have any questions regarding this matter, please feel free to contact me or the NAM's Jason Straczewski at (202) 637-3129 or *jstraczewski@nam.org.*

Sincerely,

JOHN ENGLER.

NATIONAL RETAIL FEDERATION,
MARCH 26, 2007.

Hon. EDWARD KENNEDY,
Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY: On behalf of the National Retail Federation, I am writing in opposition to the misnamed "Employee Free Choice Act (EFCA)," legislation that would take away workers' right to secret ballots in union elections.

This measure would require the National Labor Relations Board to certify a union if presented with signed authorization cards from a majority of employees the union is seeking to organize, eliminating the long-standing National Labor Relations Act requirement for secret ballots in union elections. The EFCA also includes other equally onerous provisions such as compulsory arbitration of first contracts and enhanced penalties.

The Senate Health, Education, Labor, and Pensions Committee is holding a hearing on EFCA this week. As American workers find out more about the surprising details included in the bill, they understand how EFCA will take away their rights in workplaces around the country. A recent national poll found that 89 percent of voters, when asked to make a choice whether a worker's vote to organize a union should remain private or be public information, said the vote should remain private. The changes to Federal labor law proposed in H.R. 800 are too important for the committee to rush to judgment. Therefore, we urge the committee to hold additional hearings on this measure so that the American people can learn more about this misguided legislation.

For over 60 years, the choice about whether a union will serve as the bargaining representative of a group of employees has been made by employees voting in a private, federally supervised secret-ballot election. The secret-ballot election is the fairest way to guarantee the rights of employees to freely choose whether or not to be represented by a union. It allows for a private, confidential vote by employees, based on the principles of the American system of democracy.

The National Retail Federation strongly urges you to oppose EFCA.

Sincerely,

ROBERT J. GREEN,
Vice President,
Government and Political Affairs.

RETAIL INDUSTRY LEADERS ASSOCIATION (RILA),
MARCH 26, 2007.

Hon. EDWARD M. KENNEDY,
Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

Hon. MICHAEL B. ENZI,
Ranking Member,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC. 20510.

DEAR CHAIRMAN KENNEDY AND RANKING MEMBER ENZI: I am writing on behalf of the Retail Industry Leaders Association (RILA) to express our opposition to the so-called "Employee Free Choice Act," as fundamentally incompatible with protecting the interests of workers to choose whether to have a union in private, free of coercion.

The Retail Industry Leaders Association promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry—retailers, product manufacturers, and service suppliers—which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

We believe the only way to guarantee worker protection from coercion and intimidation is through the continued use of a federally supervised private ballot election so that personal decisions about whether to join a union remain private. Citizens

from both union and non-union households overwhelmingly oppose the bill's assault on individual rights. Polling by the Coalition for a Democratic Workplace reveals that:

• 87 percent of voters agree that "every worker should continue to have the right to a federally supervised secret ballot election when deciding whether to organize a union";
• Four out of five voters specifically oppose this legislation;
• 89 percent of voters believe organizing votes should remain confidential and not be made public; and
• 80 percent of union households oppose the so-called "Employee Free Choice Act."

Additionally, this legislation departs from over seven decades of precedent established by the National Labor Relations Act. It imposes contract terms on private employers through a process of compulsory, binding arbitration. Government arbiters will establish wages and terms between the two parties, leaving employees out of the process since they will not be provided with the opportunity to vote on the new contract. Imposing contract terms through compulsory arbitration is an unconstitutional infringement on the right of private employers and employees to freedom of contract.

RILA joins a majority of Americans who oppose the "Employee Free Choice Act," which not only interferes with the democratic process, but it also forces private enterprise to agree to contract terms or face government intervention and, ultimately, wages and benefit terms that are established by the government.

Sincerely,

SANDRA L. KENNEDY,
President.

CONGRESSIONAL RESEARCH SERVICE,
WASHINGTON, DC. 20540–7000,
March 5, 2007.

MEMORANDUM

To: Senate Committee on Health, Education, Labor, and Pensions
Attention: Kyle Hicks

From: Jon O. Shimabukuro, Legislative Attorney, American Law Division

Subject: Employee Free Choice Act of 2007

This memorandum responds to your question concerning H.R. 800, the Employee Free Choice Act of 2007 ("EFCA").[1] The EFCA would amend the National Labor Relations Act ("NLRA") to require the National Labor Relations Board ("the Board") to certify an individual or labor organization as the exclusive representative of a bargaining unit if the Board finds that a majority of employees in an appropriate unit has signed valid authorizations designating the individual or labor organization as its bargaining representative. You asked whether the EFCA would still permit a secret ballot election to select an exclusive representative if the majority of employees who signed valid authorizations specifically requested such an election.

Section 2 of the EFCA would add the following paragraph to section 9(c) of the NLRA:

> (6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

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[1] H.R. 800, 110th Cong., 1st Sess. (2007). For additional information on the Employee Free Choice Act, *see* CRS Rept. RS21887, *The Employee Free Choice Act*, by Jon O. Shimabukuro.

The use of the word "shall" in the last sentence of the proposed paragraph seems to indicate that an election would be unavailable once the Board concludes that a majority of the employees in an appropriate unit has signed valid authorizations designating an individual or labor organization as its bargaining representative. In general, the word "shall" is considered to be imperative or mandatory.[2] Unlike the word "may" which is given a permissive meaning that suggests the use of discretion, the word "shall," in the absence of evidence of contrary legislative intent, is inconsistent with the idea of discretion.[3]

The legislative history of the EFCA supports the notion that the word "shall" should be viewed as imperative. House Report 110–23, which accompanies the EFCA, states firmly: "Indeed, if a majority sign and submit valid authorization cards to the NLRB, notwithstanding any other provision in the NLRA, the NLRB must certify their union."[4] The use of the word "must" by the House Committee on Education and Labor appears to confirm that certification by the NLRB would seem to always follow the submission of valid authorizations by a majority of employees in an appropriate unit.

RESPONSE TO QUESTIONS OF SENATOR HATCH AND SENATOR COBURN BY PETER J. HURTGEN

QUESTIONS OF SENATOR HATCH

Question 1. Because the first contract imposed by the Federal Government through compulsory arbitration is "binding" on the parties, the employees who are subject to the government's imposed wages, benefits, and other terms and conditions of employment will have *no right to a ratification vote to approve or reject the contract* as they would under current law if the contract were freely negotiated without government interference. In other words, it doesn't matter what the employees think or want, once the Federal Government has spoken and the contract is binding for 2 years like it or not.

Is that correct?

Answer 1. Yes.

Question 2. Because the government-imposed contract is binding on the parties, the *employees will not be allowed to strike to enforce their contract demands if the parties reached impasse* as they are under current law if the contract were freely negotiated. Also, of course, the employees would not be permitted to strike for the duration of the contract.

Is that correct?

Answer 2. It is unclear whether they could strike to enforce demands. It is clear that they could not strike for the duration of the contract to achieve changes in benefits, wages, or working conditions; or for any other reason if the contract contains a no-strike clause.

Question 3. Since the government-imposed contract would be binding for 2 years, under the *"contract bar" doctrine* neither the employer nor the employees would be permitted to challenge the union's continuing majority status through an NRLB-supervised secret ballot decertification or deauthorization election for the term of the contract. *That's an additional 2-year denial of the right of workers to a secret ballot election to express their views on the union.*

Is that correct?

Answer 3. Yes.

Question 4. Now I want to ask you a few questions about the effect of compulsory binding interest arbitration on the national labor policy of free collective bargaining.

First, I want to establish the difference between "interest arbitration" and "grievance arbitration."

Answer 4. Yes, they are fundamentally different.

Question 5. Is it correct that: In "grievance arbitration" the answers to the dispute are to be found within the "four corners" of the pre-existing contract . . . the arbitrator's job is interpreting and applying what the parties have agreed to.

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[2] *See* 82 C.J.S. *Statutes* § 368 (1999). *See also* 1A Sutherland Statutes and Statutory Construction § 25:4 (Norman J. Singer ed., 2002) ("Unless the context otherwise indicates the use of the word "shall" . . . indicates a mandatory intent.").

[3] 82 C.J.S. *Statutes*, *supra* note 2.

[4] H.R. Rep. No. 110–23, at 26 (2007).

"Interest arbitration," on the other hand, is an arbitrator's judgment, imposed on the parties in the absence of a contract, as to what in his opinion the parties should have agreed to, or would have agreed to, absent arbitration. So, such determinations imposed on the parties will be affected by the arbitrator's own economic or social theories, often without the benefit or understanding of practical, competitive economic forces. It is for that reason that most employers shudder at the thought of an outside government arbitrator with the power of the company's economic life and death in the balance.

Answer 5. Yes.

Question 6. Do you agree that Elkouri & Elkouri, "How Arbitration Works" (6th Ed, 2006) published by the ABA section of labor and employment law is regarded as one of the premier basic texts on arbitration?

Answer 6. Yes.

Question 7. Quoting from that text, I ask whether you agree or disagree with the following statements about compulsory binding interest arbitration:

> "Broadly stated, that: (1) it is incompatible with free collective bargaining, (2) it will not produce satisfactory solutions to disputes, (3) it may involve great enforcement problems, and (4) it will have damaging effects on the economic structure." (p. 21).

Answer 7. Yes.

Question 8. "Compulsory arbitration is a dictatorial and imitative process rather than a democratic and creative one." Id.

Answer 8. Yes.

Question 9. "Compulsory arbitration means governmental—politically influenced—determination of wages and will inevitably lead to governmental regulation of prices, production, and profits; it threatens not only free collective bargaining, but also the free market and enterprise system." Id at 22.

Answer 9. Yes.

Question 10. In fact, common sense and experience teach some of the practical flaws in compulsory arbitration:

> "Each party will be reluctant to offer compromises in bargaining for fear that they may prejudice its position in arbitration. Elimination of the strike from collective bargaining will eliminate the strongest incentive the parties may have to reach agreement. One or both of the parties may make only a pretense at bargaining in the belief that more desirable terms may be obtained through the arbitration that is assured if bargaining fails. Because compulsory arbitration will be used to resolve unknown future disputes, both sides may list many demands and drop few in bargaining, believing that little will be lost if some of the 'chaff' is denied by an arbitrator (who the party may believe would then be more inclined to favor that party on major issues in order to appear fair)." Id at 21.

Answer 10. Yes.

Question 11. I have heard that this provision has not met with universal support among local unions. After all, it takes negotiations out of their hands. They will be assured a "first contract," but on what terms?

Proponents of the bill will point to the fact that first contracts sometimes take a long time to negotiate, and in some instances the parties bargain to "impasse" giving employers the right to implement their final terms and the union the right to strike to enforce their contract demands.

But why is that? In your testimony, Mr. Hurtgen, you give several reasons why it is difficult for the parties to reach agreement on initial contracts. The employer is already offering competitive wages and benefits to employees, there is a lack of any historic track record between the parties, there may be inexperienced negotiators, or the union may have elevated employee's expectations beyond its ability to produce when it comes up against reality at the bargaining table.

Answer 11. Yes.

Question 12a. What happen to the labor law concept of "impasse" where the parties are simply unable to agree? Under H.R. 800, would you agree that the new definition of "impasse" will be "90 days?" That whenever negotiations reach 90 days, whether or not the parties are at impasse, the government steps in with mediation and then dictates the terms of a contract.

Answer 12a. Yes.

Question 12b. In your experience, is there any uniform timeframe at which point the parties reach "impasse?"
Answer 12b. No.

Question 12c. Have you ever negotiated collective bargaining agreements, or been involved with such agreements at FMCS, where the parties were bargaining in completely good faith beyond 90 days, but had not reached "impasse?"
Answer 12c. Yes, many times.

Question 13a. There is another extremely troubling aspect of the bill's compulsory "interest" arbitration provision.
What is the scope of the government's authority to set wages, benefits, and other terms and conditions of employment through compulsory interest arbitration?
Answer 13a. It is unclear and may raise constitutional issues.

Question 13b. For example, I ask you, since nowhere does the bill clarify the issue, would the arbitrator have the authority to place an employer in a multiemployer pension plan? The union may be seeking that, and the employer may disagree (especially if the plan is under funded and "at risk"). Could the arbitrator force the employer to agree?
Answer 13b. Yes.

Question 13c. Could the arbitrator place the employer in a multiemployer bargaining unit?
Answer 13c. Probably not, because under current law the consent of all the parties is necessary to the formation of a multiemployer bargaining unit.

Question 13d. Could the arbitrator impose the wages and benefits from other union contracts unrelated to the local economy?
Answer 13d. Yes.

Question 13e. Could an arbitrator mandate employer-provided health insurance coverage, even where the employer's competitors do not provide such benefits or provide lesser benefits or less costly plans?
Answer 13e. Yes.

Question 13f. What about contract provisions not to contract out, or subcontract work?
Answer 13f. Yes.

Question 13g. . . . or not to open a new facility without applying the terms of the union contract?
Answer 13g. Probably not, if it is a non-mandatory subject of bargaining.

Question 13h. Could an arbitrator mandate union neutrality and card check at all of the employers operations? What about union access to the employer's facilities?
Answer 13h. Only if it is a mandatory subject of bargaining and under current law that is unclear.

Question 13i. Is there anything, short of an illegal subject of bargaining, that a government arbitrator could not impose through compulsory interest arbitration? That would include not only all "mandatory subjects" of bargaining, but all "permissive subjects" as well?
Answer 13i. Probably could not impose on a non-mandatory subject of bargaining, but it is unclear from the proposed bill.

Question 14. Finally, in your testimony you suggest that compulsory interest arbitration can take weeks of hearings, and then lengthy periods for the arbitrator to draft a decision, and even then the process led to an imposed legislative body solution—not agreements. So I guess I have to ask, where is the time saving?
Answer 14. There would not be any time saved.

QUESTIONS OF SENATOR COBURN

Question 1. In both written and verbal testimony, Professor Estlund described various tactics and activities employers use to pressure workers into not supporting union organization. Are those activities already illegal and subject to enforcement by the NLRB?
Answer 1. Many of the tactics described by Professor Estlund are illegal, they are subject to NLRB enforcement, and if charges are promptly filed with the NLRB, ei-

ther by the union or by the impacted employees, the charges will be investigated immediately.

Unfair labor practice charges filed by unions or employees during an initial organizing campaign are considered "high impact" cases by the NLRB. These cases are decided by the NLRB regional offices within 7 weeks of filing of the charge. By the end of that time period, the case is either dismissed, or a complaint is issued setting the case for trial.

The NLRB's General Counsel recently issued memoranda to all field staff encouraging the use of injunctive relief under Section 10(j) of the Act in initial organizing campaigns.[1] Congress created Section 10(j) relief as a means to preserve or restore the lawful status quo ante, so that the purposes of the act are not frustrated and the final order of the Board is not rendered meaningless by the passage of time. Congress recognized that an employer's illegal acts could, in some cases, permanently alter the situation and prevent the Board from effectively remedying the violations by its final order. NLRB field staff review all charges filed in initial organizing campaigns and considers whether they are appropriate for 10(j) relief.[2] Even while the NLRB regional office considers 10(j) proceedings, every effort is made to seek an expedited administrative trial, between 28 days to 8 weeks from the issuance of a complaint.[3]

Although Professor Estlund claims that there is no injunctive relief for employer unfair labor practices, the statute already provides for such injunctive relief, and the NLRB's General Counsel has emphasized the importance of identifying and pursuing such relief as early as possible in initial contract cases. And even while such relief is under administrative review, an expedited trial will be sought in order to remedy these cases as quickly as possible. While I agree with Professor Estlund's premise that unfair labor practices that occur during an organizing campaign must be remedied quickly, no statutory changes are needed where it is clear that NLRB field staff investigate and pursue unlawful activity in a most expeditious manner, seeking injunctive relief when appropriate.

Professor Estlund asserts that employers opposed to unionization threaten employees with job loss or plant closure and employees fear discharge. As noted in my answer to question 3 below, an employer that threatens plant closure because of the union's organizing campaign will be found to have violated the law. Although Professor Estlund claims that employees cannot be assured that the law will protect them if they support the union, the key to securing a quick remedy of unfair labor practices is to promptly contact the NLRB. The NLRB will expeditiously investigate the charges, decide the merits of the case, and seek relief either through an expedited trial or through 10(j) proceedings.

Professor Estlund also contends that even after an employer has violated the act, it takes years to secure a reinstatement remedy. This is not the case in a large majority of cases. The NLRB's records for fiscal year 2006 show that of the 37 percent of all cases that were found to have merit, 96.7 percent of them settled before a trial took place, a very high settlement rate. A small minority of cases require full litigation through the Federal appellate court level, and should that litigation be necessary, the remedial process is a long one. However, that is a tiny minority of the cases since most meritorious cases are settled before trial.[4]

Regarding backpay, Professor Estlund is correct that the statute is compensatory—a backpay award is intended to remedy the discharge by paying employee for lost earnings. While there are no punitive damages, and generally no fines are assessed against the employer, the Board does pursue tougher remedies for repeat offenders of the law. If an employer has violated the law previously, the NLRB will pursue formal settlements rather than informal settlements. A formal settlement is a written stipulation providing for, among other things, consent entry of a court judgment enforcing the Board's order. This gives the NLRB the ability to file contempt proceedings thereafter, which can be accompanied by fines for each violation. A formal settlement is appropriate where there is a history of unfair labor practices or there is a likelihood of recurrence or extension of current unfair labor practices.[5]

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[1] *See General Counsel's Memorandum 07–01 Submission of 10(j) Cases,* and *General Counsel Memorandum 06–05 First Contract Bargaining Cases http://www.nirb.gov/research/memos/general*__councel__memos.aspx.

[2] *See* NLRB Annual Reports for a discussion of cases involving injunctive relief litigation.

[3] *See* Operations Management Memorandum 06–60. *See* NLRB Annual Reports for discussion in injunctive relief litigation.

[4] The number of cases pending at the NLRB's headquarters in D.C. has declined substantially over the years, demonstrating that less and less cases are appealed to the NLRB and then to the Federal appellate courts.

[5] Section 10164, *Unfair Labor Practice Casehandling Manual. http://www.nlrb.gov/publications/manuals/ulp*__casehandling__manual__(l).aspx.

Formal settlements are not the only means of taking action against recidivist employers. Civil contempt actions are taken by the NLRB where an employer is in contempt of a court-enforced Board order. Professor Estlund argues that "many employers . . . have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers." With 96 percent of the cases settling at the regional level, within a few weeks after charges are filed, one cannot claim that the system is ridden with delays. And regarding allegedly "meager remedial powers," the NLRB has pursued many avenues to ensure compliance with its orders. It has obtained assessment of fines, writs of body attachment, and protective restraining orders where there has been evidence that a particular employer has repeatedly and flagrantly violated the law.[6] The NLRB's administrative process, in its current form, calls for formal settlements, consent court judgments, contempt proceedings and more serious penalties to deter recidivist offenders from engaging in egregious or repetitive acts of discrimination. No additional changes to the law are necessary.

Professor Estlund insinuates that employers should not be entitled to hold meetings with employees and express opposition to unionization. However, the law in its current form allows employers the right of free speech. Section 8(c) of the Act states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

An employer is permitted to express its opinion regarding unionization and even lawfully urge employees to vote against the union. It may not, however, cross the line into threatening employees with dire consequences if the union wins an election, as noted more fully in my response to question 3.

Question 2a. Chairman Hurtgen, with your extensive experience in collective bargaining negotiations, do you think 120 days is an adequate period of time to establish a first contract? Why or why not?

Answer 2a. Based on my experience, 120 days is not sufficient to negotiate an initial collective bargaining agreement. It is not even sufficient time in many cases for a mature collective bargaining relationship, considering the complexities of the workplace and the difficulty of the issues today. I do not believe that any time limit should be placed on initial contract negotiations, for the reasons set forth below.

Today, even experienced and amicable labor-management relationships can take longer than 120 days to reach a successor agreement because of the complexities of the issues facing the workplace. Employers and labor unions regard the high costs of health care and pensions as extremely difficult to negotiate and as a result, many commence negotiations sometimes as early as 6 months prior to contract expiration.

Certainly, in a new collective bargaining relationship, where the parties are negotiating their very first agreement, it can take even longer to address these complex issues. Negotiating contract language, for nascent collective bargaining relationships, is a time consuming process. Indeed, the NLRB has recognized that:

> "Parties engaged in initial contract bargaining are likely to need more time to conclude an agreement than parties who are bargaining for a renewal contract. It is not unusual for it to take place in an atmosphere of hard feelings left over from an acrimonious organizing campaign and the individuals sitting at the bargaining table may be inexperienced at collective bargaining. In initial bargaining, unlike in renewal negotiations, the parties have to establish basic bargaining procedures and core terms and conditions of employment, which may make negotiations more protracted than in renewal contract bargaining."[7]

Most labor and management representatives would agree that when parties are negotiating for an initial contract, there are difficulties often encountered in hammering out fundamental procedures, rights, wage scales, and benefit plans in the absence of previously established practices. For this reason, a statutory time limit for reaching a first contract is tantamount to setting up the process, and the parties' relationship, for failure.

The NLRB and the courts of appeal have long applied a 1-year insulated period where a union has been newly certified following a Board-conducted election. It is called the "certification year" rule, and a newly certified union's status cannot be

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[6] *See NLRB Annual Report for FY 2005,* page 73. *http://www.nlrb.gov/e-gov/e__*reading __room/nlrb__annual__reports.aspx.

[7] *Lee Lumber*, 334 NLRB 399 (2001).

questioned for 1 year after certification. "When a bargaining relationship has been initially established, it must be given a reasonable time to work and a fair chance to succeed" before an employer can question the union's majority status, or before employees can move to decertify the union. See *Lee Lumber*, supra. The NLRB has also held that "there are no rules concerning what constitutes a "reasonable time" to negotiate an agreement; each case must rest on its own particular facts. However, "a reasonable period of time" does not depend on either the passage of time, or on the number of meetings between the parties." *Id.*

In my view, newly established collective bargaining relationships must be given special attention, but not by statutorily mandating that they reach agreement in a specific time period. They must be given a reasonable period of time to meet, discuss the issues effecting that particular workplace, hammer out contract language, and build their relationship. To engage in such a complex process, yet restrict it to a 120-time period sets up the parties for failure.

Question 2b. To the best of your knowledge, historically, what is the average time period whereby a first contract is established?

Answer 2b. In *Lee Lumber*, 332 NLRB 399 (2001), the Board relied on data from the Federal Mediation and Conciliation Service to determine the average length of time to achieve a first contract. According to the FMCS, the average length of time after certification for newly certified unions to reach initial contracts was 296 days in fiscal year 1998, 313 days in fiscal year 1999, and 347 days in fiscal year 2000. This data has not been reproduced, to my knowledge, since 2000.

I would caution, however, that much has transpired in the 7 years since that data was reported. The rapid rise of the global economy, the meteoric rise in the costs of employer-sponsored health care, legacy costs, and pension benefits has placed a significant burden on employer and union relationships. These factors only make initial contract negotiations more complicated and time consuming than it was a few short years ago.

The FMCS keeps initial contract cases open for a 2-year period after the certification. If, within that 2-year period, a contract is reached, FMCS closes the case with an indication that an agreement was reached. If there was no contract reached after 2 years, the FMCS no longer tracks the progress of that case and administratively closes the case, noting that no agreement was reached as of the time of the closing.

I recently filed a FOIA request seeking information regarding initial contracts. To date, the FMCS has not released certain information that would be helpful to securing better data on the average time to achieve a first contract. In order to provide more current information, FMCS could provide the basis for closing initial contract cases (i.e., whether a contract was reached or not). To date, the FMCS has not released that data. Having that information would allow me to better answer this question.

Question 3. Please describe some of the restrictions employers face during a union organization drive of their employees.

Answer 3. Section 8(a)(1) through Section 8(a)(5) of the National Labor Relations Act details unfair labor practices against employers. The National Labor Relations Board, and the courts of appeal, interpret the statute in greater detail through case law. The list below represents only some of the restrictions an employer faces during an organizing campaign. It is in no way an exhaustive list of all restrictions an employer may encounter. Employers cannot:

- **Interrogate** their employees about their support of a union organizing campaign;
- **Question** their employees as to whether they signed an authorization card in support of the union;
- **Engage in surveillance** to determine which employees are involved in union organizing drive;
- **Change** working conditions of their employees in retaliation for employees' support of a union campaign. Such prohibitions can include reducing employee's pay, or changing other benefits such as leave and attendance policies;
- **Promise** employees better pay or working conditions as an inducement to abandon a union organizing campaign or to discourage support of the union campaign;
- **Make working conditions more onerous** because employees were involved in a union organizing campaign;
- **Suspend or discharge** employees, or engage in any other adverse employment action because they were involved in a union organizing campaign;
- **Threaten** their employees with loss of jobs or benefits if they vote for a union or engage in a union organizing campaign;

• **Threaten** to close the plant if employees select a union to represent them; or
• **Transfer, layoff, or otherwise punish** employees because they engaged in a union campaign.

QUESTIONS OF SENATOR HATCH TO PROFESSOR CYNTHIA L. ESTLUND

Question 1. Professor Estlund, I noticed that you had very little to say in your testimony about compulsory, binding interest arbitration of first contracts. Is that because you have little direct experience at the bargaining table negotiating contracts? How many first contracts have you negotiated?

Question 2. Are you aware that many union negotiators have resisted even voluntary interest arbitration to address protracted bargaining disputes, such as the recent west coast ports strike where the parties were at impasse at the bargaining table? We're informed that many local unions do not support the compulsory binding first contract interest arbitration provision in H.R. 800. Are you aware of that, as well?

Question 3. Are you familiar with the Elkouri & Elkouri text entitled "How Arbitration Works" published by the American Bar Association's section on labor and employment law (6th Ed. 2006), and do you recognize it as an authoritative basic text on the subject?

Then I want to get your reaction to the following statements from that text.

Quoting from that text, I ask whether you agree or disagree with the following statements about compulsory binding interest arbitration:

> "Broadly stated, that: (1) it is incompatible with free collective bargaining, (2) it will not produce satisfactory solutions to disputes, (3) it may involve great enforcement problems, and (4) it will have damaging effects on the economic structure." (p. 21).
>
> "Compulsory arbitration is a dictatorial and imitative process rather than a democratic and creative one." Id.
>
> "Each party will be reluctant to offer compromises in bargaining for fear that they may prejudice its position in arbitration. Elimination of the strike from collective bargaining will eliminate the strongest incentive the parties may have to reach agreement. One or both of the parties may make only a pretense at bargaining in the belief that more desirable terms may be obtained through the arbitration that is assured if bargaining fails. Because compulsory arbitration will be used to resolve unknown future disputes, both sides may list many demands and drop few in bargaining, believing that little will be lost if some of the 'chaff' is denied by an arbitrator (who the party may believe would then be more inclined to favor that party on major issues in order to appear fair)." Id. at 21.

Question 4. Professor, do you agree that under binding forced interest arbitration of first contracts, employees would lose their right to vote whether to ratify or approve the wages, benefits, and other terms and conditions of employment under which they will work as a result of the arbitrator's imposed 2-year contract.

In other words, it doesn't matter what the employees think or want, once the Federal Government has spoken through a government-appointed arbitrator, and the contract is binding on those employees for 2 years whether they like it or not.

Question 5. So I ask you, professor, where's the "employee free choice" in disenfranchising employees from voting to approve or reject the wages, terms, and other conditions they would be subject to for the first 2 years of a union contract?

[Editor's Note: Responses to the above questions were not available at time of print.]

[Whereupon, at 11:38 a.m., the hearing was adjourned.]

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