National Labor Relations Board Member Nominee: Craig Becker
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009
Questions for the Record: Senator Enzi

1) Have you discussed with any members of the Obama Administration, any clients, or any other stakeholders the prospect of altering any National Labor Relations Board decisions, regulations or policies, or the prospect of taking steps to promulgate new policies or regulations?

Answer: At no time have I discussed with any person any action I would or would not take as a Member of the Board to alter any National Labor Relations Board decisions, regulations or policies; nor have I discussed with any person any steps I would or would not take as a Member of the Board to promulgate new policies or regulations.

2) What have you discussed possibly rescinding and/or promulgating? With who have you discussed the prospect of rescinding or promulgating any such regulations? What has been the substance of each of those discussions?

Answer: N/A for the reasons stated in my answer to question 1.

3) Please describe your view of the overall role of the National Labor Relations Board. Do you have a general philosophy regarding the appropriate balance to be struck by the Board in weighing the importance of individual liberty versus collective rights in its decisions?

Answer: Congress has vested in the NLRB the authority to administer and enforce the National Labor Relations Act, as amended. The Board's role is to do so fairly, efficiently, effectively, and consistent with Congress' intent. The Act vests certain rights in individual employees and it also vests certain rights in employees only when they act concertedly. The Act also vests rights in employees, under appropriate procedures, to act collectively through a representative of their own choosing. The Board's duty is to enforce all statutory rights consistent with Congress' intent.

4) What is your opinion of the National Labor Relations Board's obligation to follow precedent? Are the Board's prior decisions controlling for future cases? What standard would you apply in determining whether to overrule a prior Board decision?

Answer: I think the NLRB, like other adjudicatory agencies, should respect its own precedent and the rule of stare decisis. I think the Board should respect parties' legitimate reliance on past precedent to guide their actions. I think that the Board should not depart from its own precedent without citing that precedent and openly acknowledging that it is overruling past precedent. I think that when the Board decides to overrule prior precedent it should do so expressly and only after fully explaining the basis of its decision.

5) Do you believe the authority provided to the National Labor Relations Board under current law has been effective in enabling it to fulfill its purpose?

Answer: I believe that the question of whether the authority vested in the NLRB has been sufficient to enable it to fulfill its purposes is a question for Congress.

6) Do you believe National Labor Relations Board supervised elections are fairly run currently?

Answer: I believe the Board's career staff is highly professional and fair and that relatively few meritorious objections have been filed after Board supervised elections alleging the Board did not fairly run the election. I believe that the majority of the meritorious objections that have been filed were based on inadvertent errors or unforeseen circumstances.

7) In your opinion, what changes could be made under current law to improve the union certification process?

Answer: The Act vests broad discretion in the Board to conduct and regulate representation elections and certify the results. Subject to the constraints of the principle of stare decisis discussed in my answer to question 4 and the requirements of the Administrative Procedures Act, where applicable, the Board could make changes in election procedures and rules if it determined after appropriate deliberation that they were consistent with Congress' intent and would improve the process. Because questions concerning whether the Board could make particular changes may arise before the Board, I do not believe it would be appropriate to address them in this context.

8) In your opinion, what changes could be made under current law to improve the union decertification process?

Answer: The Act vests broad discretion in the Board to conduct and regulate decertification elections and certify the results. Subject to the constraints of the principle of stare decisis discussed in my answer to question 4 and the requirements of the Administrative Procedures Act, where applicable, the Board could make changes in election procedures and rules if it determined after appropriate deliberation that they were consistent with Congress' intent and would improve the process. Because questions concerning whether the Board could make particular changes may arise before the Board, I do not believe it would be appropriate to address them in this context.

9) Please describe your view of the financial obligation an individual employed in a unionized workplace located in a non-right to work state owes to the union? What rights does that employee have to be informed of how union funds are

being spent, and to control, limit and/or challenge use of his/her own dues contribution?

Answer: The law in this area is extensive and complex so the following is, necessarily, only a summary of the law. Such an employee has the rights created by section 7 of the Act, as amended, "to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by section 158(a)(3)." An employee has a right not to be a full union member and, if he or she exercises that right, a right to limit his or her financial contribution to a union to supporting those union activities described in *Communications Workers v. Beck*, 487 U.S. 735 (1988), and its progeny. Under that line of cases, objecting, nonmember employees also have a right to receive information about union expenditures and an explanation of the union's calculation of the reduced fee *Beck* permits them to be charged and a right to challenge the union's calculation of the fee.

10) Please describe your view of the financial obligation an individual employed in a unionized workplace located in a right to work state owes to the union? What rights does that employee have to be informed of how union funds are being spent, and to control, limit and/or challenge use of his own dues contribution?

Answer: Section 14(b) of the Act, as amended, permits states to adopt laws prohibiting the execution or application of so-called union security agreements requiring membership in a labor organization (subject to the limitations described in my answer to question 9) that would otherwise be permissible under the Act. Generally, under such state laws, nonmember employees have a right not to be required to make any form of financial contribution to the union that represents them. The precise rights employees have in such states depends on the precise terms of the state law and whether those terms are consistent with the Act, including section 14(b).

11) What is your opinion with regard to the appropriate level of employee control of union dues contributions? Do you have an opinion as to whether union members should be compelled to contribute to unions for purposes of political and lobbying expenses?

Answer: The Labor-Management Reporting and Disclosure Act (LMRDA) vests in union members specified rights to control the amount of their union dues. The LMRDA also vests in union members specified rights to elect union officers who supervise the use of union dues. The NLRB does not administer or enforce those provisions of the LMRDA. The NLRA, as amended, has not been construed to limit the use of dues paid by union members (in contrast to objecting, nonmembers). As set forth in my answer to question 9, an employee has a right not to be a full union member and, if he or she exercises that right, a right to limit his or her financial contribution to a union duly selected as his or her representative to supporting those union activities described in *Communication Workers v. Beck*, 487 U.S. 735 (1988), and its progeny. Federal election law imposes specified

limits on the use of union dues for political purposes. The NLRB does not administer or enforce federal election law.

12) What is your view of preemption under the National Labor Relations Act? Do you support the continued validity of both *Garmon* and *Machinists* preemption? Do you support the Supreme Court's decision in *Chamber v. Brown*? Do you believe state or local government attempts to restrict private employer speech as to unionization are generally preempted by the NLRA?

Answer: The Supreme Court has held that the NLRA, as amended, preempts certain state and local laws. The Court's decisions in *Garmon*, *Machinists*, and *Brown* have not been overruled by the Court and remain binding. In *Brown*, the Court held that a California statute barring use of state funds to support or oppose unionization was preempted. Application of preemption principles to particular state and local laws is dependent upon the specific language and intent of the law or regulation at issue. *Brown* is a recent decision of the Court, and the implications of its holding continue to be explored in cases before the lower courts. Questions concerning the preemptive sweep of the NLRA generally do not arise before the Board, but because questions concerning whether a state or local government action differing from that at issue in *Brown* is preempted could arise before the Board, I do not believe it would be appropriate to address them further in this context.

13) Does current law adequately protect an employee's ability to choose whether or not to join a union in an environment free from harassment on the part of union organizers? If so, how so? If not, how not?

Answer: Current law governing both union elections and voluntary recognition of a union based on a non-electoral showing of majority support regulates conduct by union organizers which interferes with employees' right to refrain from supporting a union. After an election, such conduct may be cited in an objection and, if the objection is found to be valid, can be grounds for setting aside an election in which the employees voted for representation by the union. Either before or after the election, such conduct may be cited in an unfair labor practice charge under section 8(b)(1). Because questions concerning whether current law is adequate to protect employees in this regard may arise before the Board, I do not believe it would be appropriate to address them in this context

14) What role do you believe a union that does not represent the majority of employees in a workplace should have under the National Labor Relations Act?

Answer: The law protects employees' right to join, support and participate in a union whether or not it represents a majority of employees in the workplace. If there is no exclusive representative, the law protects, under appropriate circumstances, employees' right to act in concert with a union whether or not it represents a majority of employees in the workplace for mutual aid and protected. If there is an exclusive representative, the Supreme Court's decision in *Emporium Capwell Co. v. Western*

Addition Community Org., 420 U.S. 50 (1975), imposes specified limits on that protection. Because questions concerning whether an employer has a legal duty to recognize a representative chosen by less than a majority of its employees (in the absence of a duly selected exclusive representative) and whether an employer may lawfully recognize such a representative and agree to a contract covering its members may arise before the Board and, in fact, are currently pending before the Board, I do not believe it would be appropriate to address them in this context.

15) Do you believe employers should be involved in representation elections and proceedings regarding such elections before the Board? Would you maintain their current rights to petition the Board, expand those rights or reduce those rights? Which if any changes could be implemented without legislation?

Answer: Section 8(c) of the Act provides that the expression of views cannot be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. That section applies to an employer's expression of views concerning a representation election. In addition, section 9(c)(1)(B) provides that an employer can petition the Board to conduct an election if one or more individuals or labor organizations have presented the employer a claim to be recognized as employees exclusive representative. The Board is bound by those provisions. The Act otherwise vests broad discretion in the Board to conduct and regulate representation elections and related proceedings. Subject to the constraints of the principle of stare decisis and the requirements of the Administrative Procedures Act, where applicable, the Board could make changes in election procedures and rules if it determined after appropriate deliberation that they were consistent with Congress' intent and would improve the process. Because questions concerning whether the Board should or could make particular changes may arise before the Board, I do not believe it would be appropriate to address them in this context.

16) What changes have you advocated or do you advocate regarding the filing of unfair labor practice charges in the wake of an election in which a union is certified? Can any of these changes be accomplished under current law?

Answer: While teaching at ULCA Law School, I published an article in the Minnesota Law Review in 1993 suggesting that when an employer refuses to bargain with a union that has been certified after a representation election and is charged with an unfair labor practice, the defenses the employer can raise relating to the election should be limited. In that article, I suggested that the change could not be fully made in the absence of amendment of section 9(d) of the Act. The suggestion in my 1993 Minnesota Law Review was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made as a scholar will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind

and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if suggestions for changing current NLRB procedures in technical refusal to bargain cases, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties legitimate reliance on existing law. Because questions concerning changes to these procedures could arise before the Board, I do not believe it would be appropriate to address them further in this context.

17) What changes have you advocated or do you advocate with regard to the legality of primary, secondary and intermittent strikes and treatment of participating employees? Do you believe any of these changes can be accomplished under the current National Labor Relations Act?

Answer: While teaching at ULCA Law School, I published an article in the University of Chicago Law Review in 1994 suggesting that repeated strikes concerning discrete grievances should be protected. I suggested that such protection was consistent with the Act and then-existing Board and court precedent. The suggestion in my 1994 University of Chicago Law Review was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. I may have made other good faith arguments for changes in existing Board law as an advocate within the context of specific cases or in other scholarly publications, but I cannot recall any other specific arguments at this time. The suggestions I made as a scholar and any suggestions I made as an advocate will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument in favor of changing current law governing strikes is made to the Board, I will evaluate it with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties legitimate reliance on existing law. Because questions concerning protection of strikers, the legality of strikes and what changes to the rules governing these issues could arise before the Board, I do not believe it would be appropriate to address them in this context.

18) In your opinion, are there aspects of foreign labor law that give employees superior ability to self-organize and bargain collectively? If so, please describe. Would you favor adopting any aspects of foreign labor law in the United States? If so, are there any aspects that could be adopted without legislative changes to the National Labor Relations Act?

Answer: I am not an expert in foreign labor law. I believe the question of whether any aspects of foreign labor law give employees superior ability to self-organize and bargain collectively is appropriately addressed by Congress.

19) According to National Labor Relations Board statistics, unions have won a majority of all certification elections since 1997 and won over 66 percent last year with the total number of elections up also. Additionally, the percentage of elections that are "re-run" because of employer misconduct has dropped to under 1 percent. The median time period from presentation of a petition to election is reported to be 39 days. How do you interpret these statistics?

Answer: In order to interpret these statistics, a number of policy question would have to be considered, including: whether employees are able to petition for an election in situations where a substantial number of employees wish to be represented; whether the results of elections that are conducted accurately reflect the uncoerced desires of employees; whether objections are filed and elections are rerun in all or most cases in which conduct has occurred that suggests the original outcome did not accurately reflect the uncoerced desires of employees; and whether the median time between petition and election is consistent with the number and complexity of issues the Board must resolve prior to conducting the election, the nature of the proceedings required to resolve the issues, and the difficulty of preparing to conduct the election. The Board's regional office staffs and central representation case unit at the Board's headquarters have been involved in thousands of elections. If I am confirmed as a Member of the NLRB, I would seek their counsel before interpreting such statistics.

20) Do you believe that the National Labor Relations Board's current definition of supervisory employee is broad enough? What do you believe is the meaning of the Supreme Court's decision in *Kentucky River*? Do you believe the NLRB's subsequent trio of decisions applying *Kentucky River* were appropriately decided?

Answer: In *Kentucky River*, the Supreme Court held (1) that the Board has appropriately placed the burden of proving supervisory status on the party alleging an employee is a supervisor and (2) that the Board's exclusion of independent judgment informed by professional or technical training or experience from the category of independent judgment which the exercise of the enumerated forms of supervisory authority must require under section 2(11) of the Act was inconsistent with the Act. Because questions concerning whether the Board's current definition of supervisor is broad enough and whether the Board's *Oakwood* trilogy was appropriately decided could arise before the Board, I do not believe it would be appropriate to address them in this context.

21) Currently the National Labor Relations Board provides a small business exemption, but it is so outdated that it covers very few employers. Would you support expanding or restricting this exemption? Do you support a continued

small business exemption? What do you think would be an appropriate level for a small business exemption?

Answer: Section 10(a) of the Act empowers the Board to prevent unfair labor practices affecting commerce. The Board construed this grant of authority to be permissive rather than mandatory and has, for prudential reasons, declined to assert jurisdiction over small employers. In 1959, Congress amended the Act to add what is now section 14(c), expressly authorizing the Board to decline to assert jurisdiction over labor disputes involving any category of employers when "in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." In the same section, however, Congress provided that the Board "shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." Congress, thus, in effect, froze the discretionary small business exemption as it existed in 1959. The decision concerning whether the small business exemption should be expanded therefore currently rests with Congress.

22) Do you believe that current National Labor Relations Act remedies are sufficient to deter unfair labor practices by unions?

Answer: The NLRA, as amended, creates three types of remedies for unfair labor practices by unions. First, under section 8(b) an employee, employer or rival union can file an unfair labor practice charge and under section 10 the Board is empowered to order a union to cease and desist and to take such other affirmative action as will effectuate the policies of the Act. Second, under section 10(l), the Board is required to give priority to charges that a union engaged in specified unfair labor practices and if, after investigating, the Board finds reasonable cause to believe the charge is true, the Board is required to petition a district court for appropriate injunctive relief pending final adjudication by the Board. Finally, under section 303 of the Labor Management Relations Act, any person injured as a result of a union's violation of section 8(b)(4) of the Act may bring suit in federal court and recover damages and costs. The question of whether these statutory remedies are sufficient to deter unfair labor practices by unions is a question for Congress. Because questions concerning whether the Board should expand its current remedies consistent with these statutory provisions could arise before the Board, I do not believe it would be appropriate to address them in this context.

23) Do you believe that current National Labor Relations Act remedies are sufficient to deter unfair labor practices by employers?

Answer: The NLRA, as amended, creates two types of remedies for unfair labor practices by employers. First, under section 8(a), an employee or labor organization can file an unfair labor practice charge and under section 10 the Board is empowered to order an employer to cease and desist and to take such other affirmative action as will effectuate the policies of the Act. Second, under section 10(j), the Board is empowered, after the issuance of a complaint against an employer, to petition a district court for

appropriate injunctive relief pending final adjudication by the Board. The question of whether these statutory remedies are sufficient to deter unfair labor practices by employers is a question for Congress. Because questions concerning whether the Board should expand its current remedies consistent with these statutory provisions could arise before the Board, I do not believe it would be appropriate to address them in this context.

24) Do you believe a legal representative's ideology is relevant to his/her ability to represent a client before the Board?

Answer: No.

25) What do you believe are allowable activities that a union can engage in that do not violate the secondary boycott restriction under the NLRA? What do you believe are activities that would violate the secondary boycott restriction? Would you advocate any changes? What is your view of what is known as bannering?

Answer: Congress adopted section 8(b)(4) of the Act in 1947 to protect so-called secondary employers (even though that term does not appear in the Act) from specified types of action by labor organizations. Since that time, an extensive jurisprudence has developed both before the Board and the federal courts defining what conduct violates the 8(b)(4) prohibition and what conduct falls outside the prohibition. It is not possible here to describe all the conduct that has been classified as prohibited and all the conduct that has been classified as permitted. Under existing Supreme Court precedent a union may, for example, generally distribute handbills to consumers outside the place of business of an employer that does business with a primary employer involved in a labor dispute with the union asking consumers not to do business with the secondary employer on that basis. In addition, under existing Supreme Court precedent, a union may, for example, generally engage in picketing directed at communicating with consumers outside the place of business of an employer that sells the products of a primary employer involved in a labor dispute with the union asking consumers not to buy those products for that reason so long as the product picketing cannot reasonably be expected to threaten the secondary employer with substantial loss. On the other hand, under existing Supreme Court precedent, picketing directed at employees of the secondary employer generally falls within the prohibition. Because questions concerning how the Board should construe the statutory prohibition within the bounds established by Supreme Court precedent could arise before the Board, I do not believe it would be appropriate to address them in this context. In particular, because the question of whether unions' display of banners outside the premises of secondary employers violates section 8(b)(4) may be and, to the best of my knowledge, is currently the subject of litigation before the Board, I do not believe it would be appropriate to address the question in this context.

26) The National Labor Relations Board's strategic planning process focuses, in part, on setting goals and performance measures. These efforts include establishing

performance goals and measures. What strategic planning experience do you have that might assist the Board in improving its planning processes?

Answer: While my experience in this area is not extensive, I hope that if confirmed it will enable me to contribute to these important activities of the agency.

27) The Board annually evaluates and reports on the effectiveness of its programs. What management experience do you have in evaluating programs and what actions would you suggest the Board take to improve the evaluation of programs?

Answer: I have minimal management experience at this time. In addition, I have little knowledge of the Board's existing evaluation and reporting procedures. For these reasons, I would not make any suggests to improve the evaluation of programs until I have fully informed myself about the existing programs should I be confirmed.

28) What specific metrics do you believe the Board should be judged on? For example, do you believe the Board should be evaluated on whether or how long it takes employers and unions to agree to first contracts after a Board-supervised election? Please explain why you feel the metrics you identify are appropriate under the National Labor Relations Act.

Answer: The Board should be judged based on its fidelity to Congress' intent as expressed in the National Labor Relations Act, as amended, and on how effectively it effectuates the policies Congress intended to effectuate through the Act. Identifying specific metrics to use in judging the Board is difficult given the numerous functions performed by the Board, the various policies Congress intended to effectuate through the Act, and the roles other parties, for example, the Board's General Counsel and the federal courts of appeal, play under the Act. Reliance on a single metric or set of metrics has the potential to create incentives to improve performance as judged by the metric even under circumstances where doing so is not consistent with Congress' intent and does not effectuate the policies Congress intended to effectuate through the Act. If I am confirmed, I intend to fully inform myself concerning what metrics the Board currently employs before drawing any conclusions about which metrics are most appropriate.

29) What is your opinion of binding interest arbitration? Do you believe the government would be as effective at deciding the appropriate terms for a collective bargaining agreement as employers and employees through their representative?

Answer: Under the current Act, as amended, an employer and a union representing employees of the employer are free to agree to resolve outstanding disputes concerning an initial or successor collective bargaining agreement by binding interest arbitration. However, under current law, neither party is under any obligation to agree to such a system of dispute resolution. Binding interest arbitration need not involve the

government. In the private sector, parties that agree to binding interest arbitration typically select a mutually agreeable, private party, often a party with expertise in the industry, to resolve their dispute. Under the current Act, as amended, the question of whether any form of binding interest arbitration should be required to resolve all disputes concerning an initial or successor collective bargaining agreement is a question for Congress.

30) What is your opinion of unions and employers negotiating terms and conditions of a contract before the union achieves majority recognition? Would you favor any sort of required disclosure to employees of proposed contract terms prior to a vote or other recognition of the union?

Answer: Under section 8(a)(2) of the Act, as amended, and construed by the Supreme Court, it is unlawful for an employer to recognize a union as the exclusive representative of its employees prior to a demonstration of majority support for the union. On the other hand, under existing Board precedent, it is lawful for an employer and union to meet and discuss terms and conditions of employment prior to a showing of majority support. The question poses the problem of where the line should be drawn between these two forms of activity consistent with Congress' intent and Supreme Court precedent. Because questions concerning whether various forms of discussion, negotiation and agreement prior to a demonstration of majority support violate section 8(a)(2) may arise and are currently before the Board, I do not believe it would be appropriate to address the questions further in this context.

31) Do you believe employers can hire replacement workers during a strike under the National Labor Relations Act? Would you advocate changing this and if so how? Do you believe this can be altered by the Board without legislative action?

Answer: In *NLRB v. Mackay Radio*, 304 U.S. 333 (1938), the Supreme Court stated that the Act did not bar the employer from hiring replacements for employees engaged in an economic strike and refusing to discharge the replacements in order to open positions for the strikers upon their unilateral offer to return to work. The Court's holding in *Mackay* is binding on the Board absent congressional action or reversal by the Court. The Board and federal courts have subsequently distinguished between economic strikes and unfair labor practice strikes, holding that employers cannot permanently replace unfair labor practice strikers. Because questions concerning replacement of strikers may arise before the Board I do not believe it would be appropriate to address the questions further in this context.

32) What is your opinion of the Labor-Management Reporting and Disclosure Act's requirements for democratic secret ballot elections for union officers and transparency? Do you support the mandatory disclosures and transparency requirements, including the obligation to provide financial records to union members upon request?

Answer: The provisions of the LMRDA related to this question are not administered or enforced by the NLRB. The LMRDA requires that local union officers be chosen by secret ballot among the members in good standing. In addition, the LMRDA requires specified financial reporting by labor organizations and also that labor organizations make available the information that the law requires be contained in such reports to all their members. Congress has made these judgments, and they are binding.

National Labor Relations Board Member Nominee: Craig Becker
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009
Questions for the Record: Senator Alexander

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1) In your brief you cite to Dutch Boy, Inc. 262 NLRB 4, 6 (1982) for the proposition that "the Board has struck down" rules forbidding fraternization. In your brief, you state that regarding the "no-talking" and "no fraternization rule" in that case there was no "legitimate business purpose, but for the interfering with employees' union activities." Is it your contention that there is no legitimate business purpose for a fraternization rule, such as the one at issue here, with regard to employees performing sensitive or dangerous jobs?

Answer: For purposes of my answer, I have assumed that (1) "your brief" refers to the brief for the petitioner in *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C.Cir. 2007), and (2) "a fraternization rule, such as the one at issue here" refers to the rule at issue in that case, in which I was one of several attorneys representing the petitioner. Our contention in that case, as advocates representing the petitioner, was that the specific no-fraternization rule at issue either unambiguously prohibited protected activity or was ambiguous and could reasonable be read by employees to prohibit protected activity and that the rule was thus unlawful under existing Board precedent. We cited *Dutch Boy, Inc.*, 262 NLRB 4 (1982), for the proposition that a no-fraternization rule must contain a clear statement that it does not apply during breaks or after work. Our contention was that the employer's asserted business purpose for the rule could not serve to narrow its unambiguous meaning and was not supported by the record evidence in that case. The D.C. Circuit agreed with that contention and reversed the decision of the Board. 475 F.3d at 380. We did not contend that there could never be a legitimate business purpose for a properly drafted no-fraternization rule applying to employees performing sensitive or dangerous jobs. Indeed, our brief specifically stated that the employer "could have crafted a lawful rule . . . -- a nondiscriminatory rule that prohibits guards from overly friendly association on the worksite in the interest of efficient provision of security services."

2) On what basis did you conclude that there was no "legitimate business purpose" behind the rule in *Guardsmark*?

Answer: I did not draw any conclusion about the rule in Guardsmark. At that time, I was acting an advocate for the petitioner. In our brief, we made an argument based on the record evidence and existing precedent that no legitimate business purpose had been articulated by the employer in that case that was supported by the record and could serve to narrow the rule as written. In agreement with those arguments, the D.C. Circuit concluded that the employer did not have a legitimate business purpose for adopting the specific rule at issue.

3) If the no fraternization rule in *Guardsmark* does not serve a legitimate business purpose when would such a rule be lawful?

Answer: Because questions concerning the lawfulness of no fraternization rules could arise before the Board, I do not believe it would be appropriate to address them further in this context. Should I be confirmed, and should any such question come before me, I would approach it with an open mind, and would consider the matter in the context of the factual circumstances of the particular case and in light of the arguments presented by the parties.

4) In your brief in *NLRB v. Ancor Concepts, Inc.,* 1998 WL 34303125 (2d Cir.) you discussed Board precedent allowing employers to temporarily replace locked out employees, even outside of the whipsaw strike context, as long as the use of replacement employees was in pursuit of the employer's legitimate bargaining objectives. You noted that "the Board has excused the discrimination, and coercion, inherent in the replacement of locked out employees," based on the rationale that the locked-out employees knew of the replacements' temporary status and knew they could go back to work by accepting the Employer's proposal. Br. at *7. Given that statement, would you reverse the line of Board precedent that approves of the use of temporary replacements and instead hold that an employer may not temporarily replace locked-out employees because of the "discrimination, and coercion, inherent" in that practice even when the employer does so in pursuit of legitimate bargaining objectives?

Answer: The statements in the brief in *Ancor Concepts* were not expressions of my personal views but were made by me and my co-counsel as advocates on behalf of a client – the intervenor in that case. As the brief noted, the Board has approved the hiring of temporary replacements for locked out employees not just in the whipsaw strike context but in other contexts as well, and the brief did not advocate overturning that precedent. The statements I made as an advocate will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if suggestions for changing current NLRB rules in respect to replacement of locked-out employees are made to the Board, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties legitimate reliance on existing law. Because questions concerning the lawfulness of temporary replacement of locked-out employees under various circumstances may arise before the Board, I do not believe it would be appropriate to address them further in this context.

5) If so, would you still permit an employer to use of temporary replacements in the context of a whipsaw strike?

Answer: In *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), the Supreme Court reversed a Board decision holding the lockout and temporary replacement of

employees during a whipsaw strike to be unlawful. If confirmed as a Member of the Board, I would of course consider myself bound to follow Supreme Court precedent wherever it is applicable. Because questions concerning the lawfulness of temporary replacement of locked-out employees in the context of a whipsaw strike may arise before the Board (1) under factual circumstances different from those in *Brown Food Store* or (2) raising legal theories different from those addressed by the Court in *Brown Food Store*, I do not believe it would be appropriate to address them further in this context.

6) You have authored multiple briefs regarding supervisory status. In particular, your brief in *NLRB v. Hillard Development Corp.,* 1999 WL 34845074 (1st Cir.), argued that Nurses who affect the assignment of Mental Health Aides by determining the residents and patients assigned to MHAs were not supervisors under the Act because they lacked a sufficient responsibility to "assign" particular tasks. In support, you cited numerous prior Board and Circuit court cases applying the rationale that "the assignment of patients to aides by charge nurses . . .is a routine function that does not require the exercise of independent judgment."However, the Board's subsequent decisions in the *Oakwood Healthcare* trilogy held that "[i]n the healthcare setting, the term 'assign' encompasses the charge nurses' responsibility to assign nurses and aides to particular patients." 348 NLRB at 689 (2006). Given the Board's decision in Oakwood Healthcare and its companion cases, and your prior contrary position in *Hillard Development*, would you reverse *Oakwood Healthcare*?

Answer: The arguments that my co-counsel and I made in the brief in *Hilliard Development Corp.* were made as advocates representing the intervenor based on the evidence in the record and existing precedent and were sustained by the First Circuit. We did not advocate reversal of any Board precedent in that case. Rather, we argued based on existing Board precedent and the record evidence that the employer had not carried its burden of proving that the nurses' authority to assign required the use of independent judgment. The Supreme Court has held that the party alleging supervisory status has the burden of proof and that Section 2(11) of the Act requires that a supervisor not only have authority to assign, but also that such authority require the use of independent judgment. The Board's decision in *Oakwood Healthcare* did not alter those principles. The contentions I made as an advocate will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. Because questions concerning whether *Oakwood Healthcare* should be overruled may arise before the Board, I do not believe it would be appropriate to address them in this context.

7) If so, how would you provide employers with guidance to determine who is a supervisor, which your *Hillard Development* brief calls an inquiry where

"gradations of authority...from that of general manager or other top executive to 'straw boss' are...infinite and subtle?"

Answer: The question of who is a supervisor is a critical question under the Act and it is often difficult for interested parties and the Board to answer given the great variety of workplaces and distribution of authority within them. The Board should strive to articulate standards consistent with section 2(11) of the Act that give employers, employees, supervisors, and labor organizations the clearest guidance possible in applying the broad terms of the supervisory exclusion to the particular facts they confront in their workplaces.

8) If it's your position that an employee may perform some supervisory functions without having to be excluded from a bargaining unit, Do you endorse the idea of "minor supervisors" who possess some, but limited or rarely utilized, supervisory functions?

Answer: Section 2(11) of the Act provides that if an employee has authority to perform enumerated supervisory functions in the interest of the employer and the exercise of that authority requires the use of independent judgment, the employee is a supervisor. The Supreme Court has stated that, "[T]he statutory term 'independent judgment' is ambiguous with respect to the degree of discretion required for supervisory status. Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding" of supervisory status under the Act. It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001) (quoting *NLRB* v. *Health Care & Retirement Corp. of America,* 511 U.S. 571, 579 (1994). Because questions concerning the precise meaning of the statutory terms and the application of those terms and Supreme Court precedent construing those terms may arise before the Board, I do not believe it would be appropriate to address them further in this context.

9) Your *Hillard Development* brief cited with approval *Chicago Metallic Corp.,* 273 NLRB 1677, 1688 (1985), which stated that under Section 2(11) "only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, set-up men and other minor supervisory employees.'" Br. at 23 (emphasis added). Further, your *Jochims v. NLRB*, 2006 WL 3335296 (D.C. Cir.), brief also states that the "'sporadic exercise of authority does not denote true supervisory authority.'" If it is your position that the performance of a small or minor supervisory function does not require the employee to be excluded from the bargaining unit, how do you balance *Harborside Healthcare's* rule on supervisory speech?

Answer: As explained above, the arguments that my co-counsel and I made in the brief in *Hilliard Development* were made as advocates acting on behalf of our client. We did not address *Harborside Healthcare* in that case because it had not yet been decided. We made arguments based on existing Board precedent in support of the Board's

decision which was sustained by the First Circuit. The quotation from *Chicago Metallic*, in turn, quotes the Senate Report on the Taft-Hartley amendments, which introduced the supervisory exclusion into the Act. The argument I made in my brief in *Jochims* was similarly made as an advocate acting on behalf of my client, the petitioner in that case. The D.C. Circuit held in that case that the Board improperly departed from its own prior precedent construing the terms of the statutory definition of supervisor.

The central issue before the Board in *Harborside Healthcare, Inc*., 343 NLRB 906, 909 (2004), was different than in *Hilliard* and *Jochims*. *Harborside* addressed the question of when prounion conduct by a supervisor upsets the laboratory conditions needed for a fair election. The Board stated, "When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors. (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; . . . ."

The contentions I made as an advocate in these cases will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. Because questions concerning the application of the statutory terms in the definition of supervisor and the relationships among the Board's supervisor precedents may arise before the Board, I do not believe it would be appropriate to address them further in this context.

10) If an employee has some supervisory power over an employee or employees--whether that power is actively exercised, has been rarely exercised, or never exercised but may be at some point in the future, as was the case in *Harborside Healthcare*--at what point are those individuals prohibited from speaking regarding organization?

Answer: Section 8(c) of the Act provides that the expression of views shall not constitute evidence of an unfair labor practice so long as the expression contains no threat of reprisal or force or promise of benefit. Under this provision, an employee cannot be prohibited from speaking regarding organization regardless of what supervisory authority they possess so long as the speech contains no threat of reprisal or force or promise of benefit.

11) *Harborside Healthcare's* prohibition on supervisor speech--either pro-union or anti-union--was based on the mere possibility of coercion, prohibiting speech by even an infrequent supervisor. Thus, how would a union eligible "minor supervisor" be treated under *Harborside Healthcare*?

Answer: As stated above, *Harborside Healthcare* did not prohibit supervisor speech. The decision in *Harborside Healthcare* concerned the question of under what

circumstances advocacy by supervisors constitutes objectionable conduct and is grounds for overturning the results of an election. Moreover, the term "union eligible" is not a term that is in the Act or has been used by the Board. All supervisors are eligible to join unions. However, the Act does not protect supervisors as defined in section 2(11) if they choose to do so. As stated above, under *Harborside Healthcare*, "the nature and degree of supervisory authority possessed by" the individual who engages in the speech is relevant to whether the speech constitutes objectionable conduct. Because questions concerning the application of the statutory terms in the definition of supervisor and the application of the Board's supervisor precedents, including *Harborside Healthcare*, may arise before the Board, I do not believe it would be appropriate to address them further in this context.

12) Would accepting your position on "minor supervisors" require reversal of *Harborside Healthcare*? If not, please explain how and why an employee can be a supervisor prohibited from speaking under *Harborside Healthcare* because he or she has a single, potential supervisory function, but at the same time be a non-supervisor under the pre-*Oakwood Healthcare* definitions of supervisors because his or her managerial functions do not require more than routine judgment or do not take up the majority of their time?

Answer: As stated above, the arguments cited in the previous questions were arguments made by my co-counsel and me as advocates representing clients in particular cases. They were not expressions of my personal views. Furthermore, as stated above, *Harborside Healthcare* did not prohibit any supervisor from speaking. Moreover, as stated above, *Harborside Healthcare* states that "the nature and degree of supervisory authority possessed by" the individual who engages in the speech is relevant to whether the speech constitutes objectionable conduct. Finally, section 2(11) states that an employee is not a supervisory if the exercise of the enumerated supervisory authority possessed by the employee does not require more than "merely routine" judgment. Because questions concerning the application of the statutory terms in the definition of supervisor and the application of the Board's supervisor precedents, including *Harborside Healthcare*, may arise before the Board, I do not believe it would be appropriate to address them further in this context.

13) In your brief filed with the U.S. Court of Appeals for the District of Columbia in STANFORD HOSPITAL AND CLINICS v. NATIONAL LABOR RELATIONS BOARD and Service Employees International Union Local 715, AFL-CIO, Intervenor, No. 01-1454. (November 8, 2002), in which you argue that a hospital employer's no-solicitation / no-distribution rule prohibiting employee solicitation and distribution in waiting areas and hallways outside of patient units is overly broad and invalid.

The Board has developed and the Supreme Court has approved a set of presumptions regarding no-solicitation and no-distribution rules. These presumptions are designed to accommodate the Section 7 rights of employees

and the managerial interests of employers “with as little destruction of one as is consistent with the maintenance of the other.” *NLRB v. Babcock & Wilcox Co.*,.

The applicable rule, which was unanimously reaffirmed by the DC Circuit, governing hospital no-solicitation and no-distribution rules provides that: "a hospital may ban solicitation and distribution in immediate patient-care areas, but may lawfully enact such a ban outside of those areas only as 'necessary to avoid disruption of health-care operations or disturbance of patients.' ” *Brockton Hospital*, 294 F.3d 100, 103 (D.C. Cir 2002). Do you maintain your position stated in your *Stanford Hospital* brief that a no solicitation / no distribution rule prohibiting employee solicitation and distribution in waiting areas and hallways outside of patient's rooms is overly broad and invalid?

Answer: The arguments that my co-counsel and I made in the brief in *Stanford Hospital* were made as advocates representing our client, the intervenor in that case. The arguments were based on existing precedent and the record evidence in that case and were accepted by the District of Columbia Circuit when it upheld the Board’s decision concerning the application of the hospital policy to “hallways and lounges outside patient units.” 325 F.3d 334, 339 (D.C. Cir. 2003). The question at issues in the case was not the application of the policy to “waiting areas and hallways outside of patient’s rooms,” but rather to “hallways and lounges outside patient units.” 325 F.3d 334, 339 (D.C. Cir. 2003). Our argument was that substantial evidence supported the Board’s conclusion that the employer had not carried its burden of proving, under existing Board precedent, that solicitation and distribution in those areas would create a likelihood of patient disturbance. In this context, the Board must apply that law to the facts of each case, considering the precise terms of the hospital’s policy and how they apply to the hospital’s physical layout as it relates to the hospital’s care of patients. The statements I made as an advocate will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. Because questions concerning the lawfulness of no-solicitation and no-distribution rules in a hospital setting may come before the Board, I do not believe it would be appropriate to address them further in this context.

14) If so, how is your position consistent with the hospital's contention in *Stanford Hospital* that the waiting rooms and hallways outside of patient's rooms are "immediate patient-care areas" and that solicitation for the union or other causes and distribution of union materials and other materials in such areas would "disrupt health care operations and disturb patients"?

Answer: Our position as advocates representing the intervenor in the *Stanford Hospital* litigation was not consistent with the position of the hospital. The D.C. Circuit upheld our position and the Board’s conclusions that (1) the “hallways and lounges outside patient units” were not “immediate patient-care areas” under existing Board precedent and (2) the employer had not carried its burden of proving, under existing Board

precedent, that solicitation and distribution in those areas would create a likelihood of patient disturbance. Because questions concerning the lawfulness of no-solicitation and no-distribution rules in a hospital setting may come before the Board, I do not believe it would be appropriate to address them further in this context

15) Would your position be the same as expressed in your brief in *Stanford Hospital* if the solicitation/distribution were by non-employee union organizers? If so, how would it be different?

Answer: The question of whether the hospital's policy could have lawfully been applied to a union organizer not employed by the hospital was not at issue in *Stanford Hospital* and thus we took no position on the question in our brief. The law governing access by union organizers not employed by an employer to the employer's property is distinct from the law governing employees' solicitation and distribution on employer property. The former is governed by the Supreme Court's decisions in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), and *Lechmere, Inc. v. NLRB*, 503 U.S. 527 (1992). As advocates, our arguments would necessarily have been different had the case raised the issue of access by a union organizer not employed by the hospital to the areas at issue. Because questions concerning the lawfulness of rules barring access by union organizers may come before the Board, I do not believe it would be appropriate to address them further in this context

16) What areas in a hospital would not, in your opinion, be "immediate patient-care areas" where there is a risk of disrupting health care operations and disturbing patients?

Answer: In *St. John's Hospital & School of Nursing, Inc*., 222 NLRB 1150 (1976), the Board held that a hospital could ban solicitation and distribution in "patient care areas, such as the patients' room, operating rooms, and places where patients receive treatment." The Board must apply the concept of "patient care areas" to the facts of each case, considering how they apply to the hospital's physical layout as it relates to the hospital's care of patients. Because questions concerning the application of *St. John's* to hospital no-solicitation and no-distribution rules may arise before the Board, I do not believe it would be appropriate to address them further in this context.

17) Would you argue that during a union organizing campaign, or a "corporate campaign," materials distributed by a union falsely describing patient care at the hospital as being substandard, unsanitary, or unhealthy would not disrupt health-care operations and disturb patients? Please explain.

Answer: The Board would consider allegations of this type in light of the record evidence relevant to what was stated, in what form, where, and to whom. The Board has not generally considered the content of solicitations or distributions in ruling on whether a hospital has lawfully applied a no-solicitation or no-distribution rule. An employer might make such allegations as a defense to the discipline of employees involved in the distribution in order to support a product disparagement defense.

Because questions concerning whether such statements disrupt health-care operation and disturb patient may arise before the Board, I do not believe it would be appropriate to address them further in this context.

18) What is your position with regard to union displays of giant rats or cockroaches at health care institutions?

Answer: I have not taken any position with regard to such displays. The most likely legal claims to arise out of such displays would be a variety of state-law claims such as defamation. Such claims would not fall within the Board's jurisdiction. Depending on the precise facts of how the rats or cockroaches were displayed a claim might arise that the display violated section 8(b)(4) of the Act. Because questions concerning the lawfulness of such displays may arise before the Board, I do not believe it would be appropriate to address them further in this context.

19) What role does a union play in making sure that the patients, their families, and the public are not given the false impression that the health care institution is infested by rats or cockroaches?

Answer: State laws, for example the law of defamation, ordinarily impose certain restrictions on union conduct in this area. Claims under such state laws would not fall within the Board's jurisdiction. Under certain circumstances, federal labor law may not protect employees engaged in what would otherwise be protected, protest activities if they disparage their employer's product.

20) Would you agree that such a message would tend to disrupt patient-operations and disturb patients?

Answer: If such a factual contention was relevant to resolution of an issue before the Board, I would consider the contention in light of the record evidence relevant to what was stated, in what form, where, and to whom. Because questions concerning whether such statements disrupt health-care operation and disturb patients may arise before the Board, I do not believe it would be appropriate to address them further in this context.

21) Generally speaking, what do you think should be the average time between when employees submit a petition for representation to the Board and when a secret ballot election is held?

Answer: The optimal average time would depend on the number and complexity of issues the Board must resolve prior to conducting the election, the nature of the proceedings required to resolve the issues, and the difficulty of preparing to conduct of the election. The Board's regional office staffs and central representation case unit at the Board's headquarters have been involved in thousands of elections. If I am confirmed as a Member of the NLRB, I would seek their counsel before forming a conclusion concerning the optimal time.

22) If during a corporate campaign a union's actions rise to the appropriate level, is RICO an effective legal weapon against union abuse?

Answer: The NLRB does not have jurisdiction to hear claims arising under the RICO statute. Whether the RICO statute is an effective legal weapon against particular union conduct is an empirical question concerning which I do not have sufficient data to express an informed opinion.

23) Do you support minority bargaining rights? If so, should there be a minimum threshold of the workforce that must want representation in a workplace?

Answer: The law protects employees' right to join, support and participate in a union whether or not it represents a majority of employees in the workplace. If there is no exclusive representative, the law protects, under appropriate circumstances, employees' right to act in concert with a union whether or not it represents a majority of employees in the workplace. If there is an exclusive representative, the Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Org*., 420 U.S. 50 (1975), imposes specified limits on that protection. Because questions concerning whether an employer has a legal duty to recognize a representative chosen by less than a majority of its employees in the absence of a duly selected exclusive representative and whether an employer may lawfully recognize such a representative and enter into a contract covering its members may arise before the Board and, in fact, are currently pending before the Board, I do not believe it would be appropriate to address them further in this context.

24) If the majority card check sign up procedure, as described in the Employee Free Choice Act (S. 560/H.R. 1409) does not become part of the federal statute, will you attempt to promulgate the procedure under Board rulemaking?

Answer: No. The Employee Free Choice Act would amend Section 9(c)(1) of the National Labor Relations Act to provide for certification of a bargaining representative "[i]f 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 . . . ." Section 9(c)(1) currently provides that when a petition is filed alleging that a substantial number of employees wish to be represented and their employer declines to recognize their representative, the Board shall investigate and if it finds that a question concerning representation exists it shall conduct an election and certify the results thereof. Based on the arguments I am currently aware of relevant to Congress' intent, I believe that provision as currently written precludes the Board from certifying a representative based on signed valid authorizations as provided for in the Employee Free Choice Act.

25) Do you agree that secret ballot elections are superior mechanism to the card check process in determining the employees' ultimate wishes to be represented by a union? If not, why?

Answer: I believe the answer to that question depends on the procedures used to conduct the secret ballot election or card check process, the rules governing each, and the legal consequences that attach to their outcomes. Because questions concerning whether a secret ballot election is a superior mechanism to the card check process may arise before the Board, for example, in the context of a decision whether to order a rerun election or issue a bargaining order based on a card showing of majority support, I do not believe it would be appropriate to address them further in this context.

26) What are your views about the weight of NLRB precedent and what do you believe to be the contours of limitations on the Board in reversing precedent?

Answer: I think the NLRB, like other adjudicatory agencies, should respect its own precedent and the rule of stare decisis. I think the Board should respect parties' legitimate reliance on past precedent to guide their actions. I think that the Board should not depart from its own precedent without citing that precedent and openly acknowledging that it is overruling past precedent. I think that when the Board decides to overrule prior precedent it should do so expressly and only after fully explaining the basis of its decision.

National Labor Relations Board Member Nominee: Craig Becker
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009
Questions for the Record: Senator Isakson

Impartiality

1) You are currently employed by both the SEIU and the AFL-CIO. Would you continue receiving paychecks from these groups if confirmed?

Answer: No. I have entered into an ethics agreement with the NLRB providing that I will resign from my employment with both SEIU and the AFL-CIO if I am confirmed as a Member of the NLRB and I will fully comply with that agreement.

2) Have you ever received compensation (including paid vacation) from either the SEIU or the AFL-CIO while working or volunteering for the Obama Administration?

Answer: I have never worked or volunteered for the Obama Administration.

3) Have you ever received compensation (including paid vacation) from either the SEIU or the AFL-CIO while working or volunteering for the Obama Administration's transition team?

Answer: Pursuant to Presidential Transition Team policy, all my Transition work was done on my own time, and not on that of the SEIU or AFL-CIO. I utilized my accrued, paid vacation leave for that purpose.

4) Have you ever received compensation (including paid vacation) from either the SEIU or the AFL-CIO while assisting with the drafting of executive orders, regulations, and/or interpretations for the Obama Administration either as a paid consultant or a volunteer?

Answer: I have provided no such assistance to the Obama Administration. As explained in my answer to question 3, pursuant to Presidential Transition Team policy, all my Transition work was done on my own time, and not on that of the SEIU or AFL-CIO. I utilized my accrued, paid vacation leave for that purpose.

Card Check

5) Former NLRB Chairman William Gould has noted that an Obama Board could attempt to impose some provisions of the Employee Free Choice Act without Congressional consent. Specifically, Member Gould suggested that an Obama

Board could certify a union even if no secret ballot election has occurred. Do you agree with Mr. Gould?

Answer: No. Section 9(c)(1) of the Act, as amended, provides that the Board can certify only the results of a Board-conducted election.

6) In Truck Drivers Union Loc. No. 413 v. National Labor Relations Board, the Court of Appeals for the District of Columbia found that “cards are not the functional equivalent of a certification election” and elections have a “preferred status” as a means of determining representation. Do agree with the Court’s assessment?

Answer: I agree that under the current Act cards are not the functional equivalent of a Board-supervised election because under the current Act only a Board-supervised election can result in Board certification of a union as employees’ representative and certification has functions under current law that differ from recognition based on other evidence of majority support. I also agree that elections have a “preferred status” in some respects under existing law, for example, resulting in a one year bar on withdrawal or recognition and the filing of a decertification petition.

7) In the same case, the Court also pointed out that the NLRB has concluded that card checks give a "greater opportunity for coercion of employees by union organizers, as compared with a secret ballot." Do agree with the Court’s assessment?

Answer: Current law bars coercion by unions and employers in relation to employees’ choice of whether to be represented whether that choice is being made in a Board-supervised election or by signing authorization cards. Different procedures for gauging majority support present different opportunities for such unlawful coercion by both unions and employers. An assessment of the relative opportunities for coercion depends on the precise procedures used and the rules governing those procedures. Because questions relating to the relative opportunity for coercion when these two methods of gauging majority support are used, may be presented to the Board I do not believe it would be appropriate to address them further in this context.

8) The Second Circuit Court of Appeals has said (National Labor Relations Board v. Flomatic Corporation) that "it is beyond dispute that [a] 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." Do agree with the Court’s assessment?

Answer: I do not believe that question can be answered in the abstract. The Board has developed an elaborate set of practices for conducting representation elections, and

rules governing these elections. Similarly, the Board has developed a set of rules governing collection of authorization cards and voluntary recognition based on such cards under existing law. Assessment of which mechanism more accurately reflects employees' true desires depends on how they are conducted and regulated.

9) The Seventh Circuit has found (National Labor Relations Board v. Village IX, Inc.) that "[w]orkers 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." Is that your experience?

Answer: I have had no direct experience with workers signing authorization cards, and I have had no experience in litigation where such a claim was made.

State Law

10) Do you favor the Board filing amicus curiae briefs in court proceedings involving whether state laws are preempted by National Labor Relations Act, as was done in the Ninth Circuit in Chamber of Commerce v. Lockyer?

Answer: I believe that the Board should consider filing briefs as an amicus curiae in important cases to which it is not a party when its expertise in the construction and administration of the National Labor Relations Act, as amended, might assist the Court in properly resolving the questions before it.

11) Do you believe that state laws establishing neutrality requirements for state contractors or any other employers covered by the National Labor Relations Act are preempted by the NLRA?

Answer: The Supreme Court has held that the NLRA, as amended, preempts certain state and local laws. Questions concerning the preemptive sweep of the NLRA generally do not arise before the Board. I believe a state law that required employers covered by the Act to remain neutral solely in relation to their employees' decision of whether or not to be represented would be preempted by the Act under the Supreme Court's current preemption jurisprudence.

Employer Rights

12) How should the NLRB limit employer involvement in a unionization campaign?

Answer: This is a sweeping and complex question implicating various provisions of the Act. Generally, under section 8(a)(1), the Board should not permit any employer involvement that interferes with, restrains or coerces employees in the exercise of their right to freely choose whether or not to be represented. Under section 8(a)(2), the

Board should not permit any employer involvement that involves domination of or interference with the formation or administration of a labor organization. Under section 8(a)(3), the Board should not permit any employer involvement involving discrimination or a threat of discrimination. Under section 9(c)(1)(B), the Board should not permit employers to file a petition for an election except under the circumstances specified by Congress in that section. Finally, in conducting elections under section 9(c)(1), the Board should not permit any form of employer involvement that interferes with employees' right to freely choose whether or not to be represented through such elections.

13) Do you still believe that employers should have no observers to challenge ballots during secret ballot voting to decide employee representation?

Answer: The suggestion in my 1993 Minnesota Law Review that employers should not place observers at the polls during Board-supervised election was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. Any such statements will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter its existing practice in this regard is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

14) If employers are prohibited from contesting a union representation election, should unions also be prohibited under the same standard?

Answer: The answer to that question depends on what form of contest is being asked about, *i.e*., what issues can be raised in such a contest and in what forum or forums. The Act, as currently construed, permits both employers and unions to challenge voters' eligibility at the polls and to file objections after a Board-supervised election and to have both those forms of contest resolved by a Regional Director and/or the Board. The Act, as currently construed, permits only employers to effectively appeal a Board ruling on such contests to a court of appeals through a technical refusal to bargain. Employers and unions thus have different rights to contest election results under existing law.

15) If the Board allows union access to employer property during organization drives/campaigns, what limits do you think should be imposed on the union? Or do you think that unions should have unfettered access?

Answer: If the Board were to grant union representatives a right of access to employer property for the purpose of communicating with employees during an organizing campaign, for example, under the circumstances described in *NLRB v. Babcock &*

Wilcox Co., 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), I do not believe access should be unlimited unless the employer grants other third parties unlimited access to its property. Otherwise, the Board should determine what limits on access are appropriate consistent with the statutory rights underlying the grant of access and the parties' other relevant rights and interests. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

16)If an employer holds an on-site meeting, and an employee asks a question on the subject of unionization, is that "unequal access"?

Answer: The term "unequal access" is not used in the Act and has no established meaning in the Board's jurisprudence. The term has generally been used to describe the difference between an employers' ability to communicate its views concerning whether employees should choose to be represented and the ability of a union whose representatives are barred from entering the workplace to do the same. The term is generally used in reference to the employer's ability to initiate communications with employees during the workday and in the workplace. Employee-initiated conversations do not raise precisely the same policy questions.

Miscellaneous

17)Should employees have the right to vote on the terms of a first contract?

Answer: Under current law, employees have no statutory right to vote on the terms of a first contract. The Board has considered ratification procedures to be an internal union matter not regulated by the Act. The Labor Management Reporting and Disclosure Act regulates some aspects on internal union affairs, for example, requiring a membership vote to increase dues and to elect officers of local unions. The NLRB does not enforce or administer those provisions of the LMRDA. Whether employees should have a statutory right to vote on the terms of a first contract is a question for Congress to decide.

18)Do you believe there should be a difference between strikes for the purposes of hiring permanent striker replacements, as was decided in the Supreme Court's MacKay Radio decision?

Answer: In sum, under the current construction of the Act, an employer can hire permanent replacements to replace employees engaged in an economic strike, but an employer cannot hire permanent replacements to replace employees engaged in an unfair labor practice strike. If I am confirmed as a Member of the NLRB and if an argument that the Board could and should alter its rules governing permanent replacement of either economic or unfair labor practice strikers is made to the Board, I

will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents, such as *NLRB v. MacKay Radio & Tel. Co*., 304 U.S. 333 (1938), with due regard for the principle of stare decisis and the legitimate reliance of parties on existing law. Because questions concerning issues related to permanent replacement of strikers could arise before the Board, I do not believe it would be appropriate to address them further in this context.

19)Do you support regulatory or legislative prohibitions on “salting” activities?

Answer: Salting is a term generally used to refer to two types of practices. The term is sometimes used to refer to the practice of testing an employer’s hiring practices by arranging for qualified applicants to apply for employment by the employer and to disclose during the application process their union support or affiliation. The term is sometimes used to refer to the practice of arranging for qualified applicants who are union organizers or supporters to apply for employment by an employer so that after they are hired they can communicate with other employees concerning union representation. In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court upheld the NLRB’s holding that paid union organizers hired by an employer under these types of circumstances are employees protected by the Act. The question of whether the Act should be amended to prohibit certain forms of salting is a question appropriately addressed by Congress. Within the constraints of the Act’s terms and the Court’s decision in *Town & Country*, the Board has addressed a range of questions relating to salting. If I am confirmed as a Member of the NLRB, and if an argument that the Board could and should prohibit any specific salting practice is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents with due regard for the principle of stare decisis and the legitimate reliance of parties on existing law. Because questions concerning issues related to various salting practices could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Senator Isakson
Senate Health, Education, Labor and Pension Committee
Answers to Second Round of Questions for the Record for
Craig Becker, Nominee for National Labor Relations Board
October 6, 2009

1. Please describe the nature of your involvement in organizing home health care and/or home day care workers. What mechanisms (e.g., card check or elections) were used to organize these workers in each state?

Answer: I have provided legal counsel to SEIU and, in some cases, to local labor organizations affiliated with SEIU and working in concert with SEIU, concerning their efforts to assist home health care workers to organize and engage in collective bargaining. I have had no similar involvement in relation to home day care workers. In the states in relation to which I have provided some such legal counsel and in which home care workers were able to make a choice concerning whether they wished to be represented and engage in collective bargaining, including California, Illinois, Michigan, Ohio, and Washington, the mechanism through which the choice was made was an election to the best of my knowledge.

2. News sources reported that SEIU gave disgraced Illinois Governor Rod Blagojevich $800,000 in return for collective bargaining rights for 37,000 home health-care workers and gave him $1.8 million for his two runs for governor. Did you have any role in developing legislation, Executive Orders or other advice to assist SEIU or Governor Blagojevich with organizing home health care workers or other workers in Illinois?

Answer: I have no personal knowledge concerning and played no role in the making of any contributions to former Governor Blagojevich's campaigns. I have no knowledge concerning anything being promised or given by Governor Blagojevich in return for any such contributions.

I did provide advice and counsel to SEIU relating to proposed executive orders and proposed legislation giving homecare workers a right to organize and engage in collective bargaining under state law. My involvement in such matters began significantly before the campaigns and subsequent election of Governor Blagojevich. I did not have any such involvement in relation to other workers in Illinois.

3. According to the Wall Street Journal, a second Executive Order contemplated by former Governor Blagojevich was designed to enable the SEIU to organize workers in the state who care for developmentally disabled people in their homes. Did you have any involvement in preparing or developing a reported second Executive Order for Governor Blagojevich to expand organizing to this group? Did you have any involvement with the development of Executive Order 15-2009, signed by Illinois Governor Pat Quinn on June 26, 2009 to allow organizing of these workers? Have you been involved with the SEIU organizing campaign that began after Governor Quinn's executive order was signed? Please describe the nature of any involvement.

Answer: No to each question.

4. Mr. Tom Balanoff, the head of Chicago local of the SEIU as well as of the SEIU's Illinois chapter, has been reported to have been involved in the former Governor Blagojevich's plans to auction off President Obama's Senate seat. Have you advised/counseled Mr. Balanoff on any issues relating to interactions with former Governor Blagojevich? Please describe that work to the best of your ability.

Answer: No.

5. Have you ever had any interactions or relationships with the Long Term Care Housing Corp., the Homecare Workers Training Center or their officers, directors, employees or affiliates?

Answer: No.

6. Have you been involved in any manner with the state bills/laws that allow card check organizing in New York, New Mexico, Illinois New Jersey, New Hampshire, Oregon, and Massachusetts? Please describe the nature of your involvement.

Answer: No.

National Labor Relations Board Member Nominee: Craig Becker
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009
Questions for the Record: Senator Hatch

SEIU

Mr. Becker, according to your resume you represent or have represented the Service Employee International Union as its Associate General Counsel.

1. What was your role as Associate General Counsel with the SEIU?

Answer: I provided legal advice and counsel to the SEIU and represented the SEIU in legal proceedings. On occasion, at the request of SEIU, I provided legal advice and counsel to local unions affiliated with SEIU and to individual employees and, on occasion, represented such entities and individuals in legal proceedings. When I was based in Los Angeles, a significant portion of my work related to matters arising in California. Since I have been based in Chicago, a significant portion of my work has related to matters arising in the mid-west. My work has focused, although not exclusively, on special litigation.

Question: The SEIU has engaged in numerous "corporate campaign" tactics designed to force employers into neutrality agreements and recognition of the SEIU without an election among employees.

2. Have you counseled SEIU regarding corporate campaigns?

Answer: The term “corporate campaign” is not used in the National Labor Relations Act, as amended, or in any other federal or state law that I am aware of. It has no precise definition. My duties as Associate General Counsel to SEIU have included providing advice concerning organizing and contract campaigns.

3. In your view, what does a typical "corporate campaign" entail?

Answer: The term “corporate campaign” is not used in the National Labor Relations Act, as amended, or in any other federal or state law that I am aware of. It has no precise definition. The term is generally used to describe protest activities that take a form other than striking and picketing and address employer practices in addition to wages, hours and working conditions.

4. What are some of the more innovative "corporate campaign" tactics utilized by the SEIU?

Answer: Because I have an attorney-client relationship with the SEIU, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to disclose information obtained from my client in confidence such as whether it is conducting or has conducted any form of campaign or the nature of those campaigns.

5. Have those techniques been effective?

Answer: Because I have an attorney-client relationship with the SEI"U, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to disclose information obtained from my client in confidence such as whether it is conducting or has conducted any form of campaign, the nature of those campaigns, and whether those campaigns have been effective.

6. What is your view of corporate campaign tactics such as violations of employees' privacy rights when a union finds their home addresses by tracing the license plates on cars in the company parking lot?

Answer: As currently construed by the Board, the NLRA, as amended, does not prevent union representatives from visiting employees in their homes so long as the union representative does not engage in other conduct that somehow violates section 8(b)(1). Claims that a union's or other party's use of license plate number to discover employees' home addresses is illegal have not arisen under the NLRA or before the NLRB as far as I know. I am not fully versed in the law under which such claims arise and thus cannot comment on them.

Question: The information gathered enables the union to progress its corporate campaign by visiting the employees in their homes, not for the basis of organizing after the filing of a petition for an election, where employers are obligated to provide lists of employees and home addresses ("Excelsior" list), but instead to solicit information to serve as the basis for initiating a variety of legal actions against the company, including EEOC charges, OSHA violations, NLRB charges, etc.

In a lawsuit by the employees of Cintas, the employees complained of the violation of the Drivers Privacy Protection Act of 1994 ("DPPA"), which prohibits the

disclosure of personal information gleaned from motor vehicle records, and the courts agreed and fined the union for such conduct.

7. What is your view of such conduct?

Answer: As noted above, the NLRA, as amended, as currently construed by the Board, does not prevent union representatives from visiting employees in their homes so long as the union representative does not engage in other conduct that somehow violates section 8(b) or some other section of the Act. Current law does not distinguish between such visits for the purpose of campaigning prior to an election and for other purposes so long as the union representative does not engage in other conduct that somehow violates section 8(b). The Board has also held that employee discussions with union about possible equal opportunity, occupational safety, and NLRA violations are protected activity under the Act. Concerning a union's or other party's use of license plate number to discover employees' home addresses, please see my answer to question 6.

8. Do you condone the invasion of employees' privacy by using their license plates to gain their home addresses?

Answer: Please see my answer to question 6.

Question: The SEIU also has developed quite a negative reputation recently for financial scandals.

First, according to an article in the *Washington Examiner* in July, 2009, the SEIU contributed $7.4 million to the Association of Community Organizers for Reform Now (ACORN) and its affiliates. For example, the relationship was so close that SEIU Locals 100 and 880 were listed as allied organizations on ACORN's web site. LM-2's show over $600,000 in contributions between these SEIU locals and other ACORN operations. A 2007 LM-2 form shows SEIU Local 880, which is active in Illinois and Minnesota, donated $60,118 to ACORN for "membership services."

In return, ACORN activists have participated in highly aggressive, well-coordinated anti-corporate campaigns across the country unofficially called "Muscle for Money" funded by SEIU. In other words, SEIU contributes funding to ACORN activists to conduct corporate campaigns, with tactics that include crashing business meetings and harassing company officials and their families at

their own homes, to intimidate employers into remaining neutral in union organizing campaigns and recognizing the union without an election.

9. What legal standards should be applied in cases such as this, where it appears that there has been a "kick back" or "quid-pro-quo" relationship between SEIU and ACORN?

Answer: Because I currently have an attorney-client relationship with the SEIU, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to provide a legal evaluation of my current client's actions or matters specifically involving my current client for use by anyone other than my current client.

10. Are or should such transactions be covered by ERISA and/or the LMRDA?

Answer: Because I currently have an attorney-client relationship with the SEIU, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to provide a legal evaluation of my current client's actions or matters specifically involving my current client for use by anyone other than my current client.

11. Do you believe that these facts suggest that SEIU has violated any laws?

Answer: Because I currently have an attorney-client relationship with the SEIU, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to provide a legal evaluation of my current client's actions or matters specifically involving my current client for use by anyone other than my current client.

Question: Second, financial corruption also was alleged in charges filed with National Labor Relations Board against SEIU and Bank of America over a "corrupt relationship"

Lawyers representing the National Union of Healthcare Workers (NUHW) filed charges with the National Labor Relations Board (NLRB) over financial ties between Bank of America and the Washington, D.C.-based Service Employees International Union (SEIU) that appear to be gross violations of federal labor laws.

The charges allege that Bank of America, whose 234,000 employees SEIU has taken steps to organize, offered SEIU at least $88 million in prohibited financial support in the form of loans. Federal law bars loans, gifts and other financial ties between employers and unions attempting to organize their employees. Unions that take money from the companies whose workers they seek to represent are considered "employer-dominated unions."

"The laws against the type of financial arrangement SEIU appears to have engaged in are very clear," said Sal Rosselli, NUHW Interim President. "Unions are supposed to be focused on the needs of workers, and the law is intended to keep employers from using money to gain undue influence with union officials. At the same time, the law prevents unions from shaking down employers with organizing campaigns designed solely to elicit funds to fill the coffers of the local or international union."

Over several months, SEIU staged protests outside Bank of America offices, called for the resignation of bank CEO Ken Lewis, and demanded improvements in wages, bargaining rights, and health care benefits for Bank of America workers through public campaigns and in testimony before Congress. SEIU's efforts against Bank of America have been documented in more than 1,500 news stories.

12. What legal standards should be applied to cases such as this where unions appear to extort funds in the form of loans from employers, and then use those funds to try to organize their employees through neutrality and recognition agreements with their employers without an election.

Answer: Because I currently have an attorney-client relationship with the SEIU, it would be inconsistent with my professional responsibilities and ethical duties as an attorney for me to provide a legal evaluation of my current client's actions or matters specifically involving my current client for use by anyone other than my current client.

Question: SEIU's precarious financial situation also has been well documented by the *Wall Street Journal* ("Unions in Debt," June 9, 2009) and in the union's own financial statements filed with the U.S. Dept. of Labor. These statements show that SEIU has $34 million in net assets, but more than $150 million in obligations to Bank of America, Amalgamated Bank of New York and others. The union is financially strapped as a result of heavy spending in the 2008 election campaign, seven-figure legal bills linked to SEIU's involvement in the

Blagojevich scandal, and a corruption scandal in California, declining dues revenue, a loss of investment income, a costly civil war within the union, and ongoing battles with NUHW and hotel and textile workers' union UNITE HERE.

It has been estimated that SEIU has spent up to $10 million in the past three months in an attempt to stop an organizing drive by 10,000 Fresno County, California homecare providers who are trying to switch from SEIU to NUHW. Millions more are being spent to stop other workers in California from leaving the service workers union, and at least $1 million per month is being spent in SEIU's attempted raids against the members of UNITE HERE.

Labor councils across the Western U.S. have issued resolutions condemning SEIU for their continued attacks on other unions, including SEIU's "reliance on corporate-type anti-union tactics."

As a result of these and other rather contentious organizing activities by SEIU, it would appear that there will be many objections to elections filed by and against the SEIU as well as unfair labor practice charges, and possible complaints, filed by and against the SEIU and its locals.

13. Will you recuse yourself from all objections and SEIU complaints, filed by or against the SEIU, while you are a Board Member?

Answer: I have entered into an ethics agreement with the NLRB which has been approved by the Office of Government Ethics. I intend to fully comply with that agreement, which provides as follows. Upon confirmation, I will resign from the position of Associate General Counsel for the SEIU. Pursuant to 5 CFR 2635.502, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which the SEIU is a party or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I am vested in the Pension Plan for Employees of the Service Employees International Union. This is a defined benefit plan and, upon eligibility, I will receive monthly retirement benefits. Because I will continue to participate in this entity's defined benefit plan, I will not participate personally and substantially in any particular matter that will have a direct and predictable effect on the ability or willingness of SEIU to provide me with this contractual benefit, unless I first obtain a written waiver under 18 USC 208(b)(1), or qualify for a regulatory exemption under 18 USC 208(b)(2). Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Executive

Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the requirements cited above.

14. What standards of recusal will you apply?

Answer: I will use the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490, considering any other arguments for recusal raised in a particular matter based on the relevant facts and applicable law and, where prudent, in consultation with the agency ethics officer.

15. Certainly, at the least, you will agree to recuse yourself from any SEIU cases which arose while you were its Associate General Counsel?

Answer: Please see my answer to question 13. In addition, I will not participate personally and substantially in any particular matter involving specific parties that arose while I was counsel to SEIU and in which the SEIU is a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d).

16. Will you recuse yourself from all AFL-CIO complaints, filed by or against the AFL-CIO, while you are a Board Member?

Answer: I have entered into an ethics agreement with the NLRB which has been approved by the Office of Government Ethics. I intend to fully comply with that agreement, which provides as follows. Upon confirmation, I will resign from the position of Staff Counsel for the AFL-CIO. Pursuant to 5 CFR 2635.502, for a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which the AFL-CIO is a party or represents a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d). In addition, I understand that as an appointee I am required to sign the Ethics Pledge (Executive Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the requirements cited above.

17. What standards of recusal will you apply?

Answer: I will use the standards of recusal applicable to executive branch officials set forth in 5 CFR 2635 and in Executive Order No. 13490, considering any other arguments for recusal raised in a particular matter based on the

relevant facts and applicable law and, where prudent, in consultation with the agency ethics officer.

18. Certainly, at the least, you will agree to recuse yourself from any AFL-CIO cases which arose while you were its Associate General Counsel?

Answer: Please see my answer to question 16. In addition, I will not participate personally and substantially in any particular matter involving specific parties that arose while I was counsel to the AFL-CIO and in which the AFL-CIO is a party, unless I am first authorized to participate, pursuant to 5 CFR 2635.502(d).

HARVARD UNION OF CLERICAL AND TECHNICAL WORKERS, AFSCME LOCAL 3650

Please describe your duties as counsel to the Harvard Union of Clerical and Technical Workers, AFSCME Local 3650 during a contested election and subsequent litigation. *See* Harvard College, No. 1-RC-19054 (NLRB Oct. 21, 1988).

Answer: I was counsel to the Union as Petitioner in that representation case. I represented the Union in both a pre- and post-election hearing and filed a brief with the Administrative Law Judge concerning the employer's objections.

AFL-CIO

Please describe your duties and accomplishments as Associate General Counsel of the AFL-CIO.

Answer: I provide legal advice and counsel to the AFL-CIO and represented the AFL-CIO in legal proceedings. On occasion, at the request of the AFL-CIO, I have represented unions affiliated with the AFL-CIO or local unions affiliated with such unions in legal proceedings. My work has focused, although not exclusively, on appellate litigation, primarily in the federal courts of appeals and in the Supreme Court. I have successfully represented my clients in numerous cases before the courts of appeals.

TEACHING

Please describe your professional experiences as a professor at UCLA, the University of Chicago, and other universities. Did you primarily teach labor

and employment law? What did you do, if anything, to avoid bias and to try to make sure that you were fair to students who took your courses and had a pro-management point of view? In other words, were you open to other ideas, even if you disagreed with them, so long as the work was well done? Can you cite an example of a pro-management paper or thesis with which you disagreed, but where you awarded a good grade because the arguments were well expressed?

Answer: I taught public sector labor law at Georgetown University Law Center as an adjunct while I was in practice in Washington, D.C. in the mid 1980s. I was employed as an Acting Professor of Law at UCLA School of Law between 1989 and 1994. I taught labor law, employment law, civil procedure, and civil rights litigation. I taught employment law and a labor law seminar at the University of Chicago Law School as a lecturer while I was in practice in Chicago between 1994 and 1996. In all of my teaching, I attempted to make an accurate and fair presentation of existing law. I informed my students about my background as counsel to labor unions so that they could consider any evaluation of existing law I offered based on my prior experience. I was open to all ideas about labor law and the other subjects I taught and welcomed discussion and debate in my classes. Because it has been over ten years since I taught labor law or any other subject, I cannot recall any specific arguments made by students or what grades I assigned any specific students.

BOARD PROCEDURES

19. What current NLRB procedures would you advocate changing if you were a Member?

Answer: If I am confirmed as a Member of the NLRB, I will not assume the position with any preconceived agenda as to what procedures I will support changing. I will attempt to benefit from the immense experience and expertise of the Board's career staff in administering and enforcing the Act. I will consult with my fellow Board Members. If suggestions for changing current NLRB procedures are made, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

20. Would you favor mandating an "expedited" period for union representation elections within less than 21 days?

Answer: If I am confirmed as a Member of the NLRB, I will not assume the position with any preconceived agenda as to such questions of administration. I will seek the benefit of the immense experience and expertise of the Board's career staff in administering and enforcing the Act, in particular, in conducting election. I will consult with my fellow Board Members. The Board's regional office staffs and central representation case unit have been involved in thousands of elections. If I am confirmed as a Member of the NLRB, I would seek their counsel before reaching any conclusion on whether such a time frame should be imposed. If suggestions for mandating such a time frame are made, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law. In considering any such suggestion, I would consider, among other factors, the number and complexity of issues the Board must resolve prior to conducting elections, the nature of the proceedings required to resolve the issues, and the difficulty of preparing to conduct elections.

21. If not, how quickly should union representation elections be held?

Answer: Please see my answer to question 20.

22. What are your views on a greater use of "*Gissel* bargaining orders" against employers where you do not believe a fair election can be conducted?

Answer: The Supreme Court held in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), that under appropriate circumstances an order that an employer bargain with a union is a lawful and appropriate remedy for employer unfair labor practices that prevent the conduct of a fair election. If I am confirmed as a Member of the Board and if an argument for changing the current standards for issuance of bargaining orders is made to the Board, I will evaluate the argument with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law. Because questions concerning changes to these standards could arise before the Board, I do not believe it would be appropriate to address them further in this context.

23. How would you revise the current standards for issuance of *Gissel* orders?

Answer: Please see my answer to question 22.

24. What are your views on non-majority bargaining orders where a union has never demonstrated majority status?

Answer: The Supreme Court stated in *Gissel* that the Board could issue a bargaining order directed to an employer which committed "outrageous" and "pervasive" unfair labor practices even if the union had never demonstrated majority support. The Board has previously held that it had authority to issue such a remedy. Currently, however, the Board will not issue such a remedy. If I am confirmed as a Member of the NLRB and if an argument is presented for the modification or reversal of existing Board practice concerning non-majority bargaining orders is presented to me as a Member of the NLRB, I will consider the argument with an open mind based on the terms of the Act, relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law. Because questions concerning the preconditions for issuance of a *Gissel* bargaining order could arise before the Board, I do not believe it would be appropriate to address them further in this context

25. What are your views on additional "extraordinary" remedies for an employer's unfair labor practices, or objectionable conduct, during a union organizing campaign or bargaining for a first contract?

Answer: The Board uses the concept of extraordinary remedies only in relation to unfair labor practices. At present, the only "remedy" for objectionable conduct is for the Board to refuse to certify the results of an election and order that a rerun election be conducted. Section 10 of the Act vests in the Board authority, after finding an unfair labor practice, to order such affirmative relief as will effectuate the policies of the Act. The Board should seek, as far as practicable, to eliminate the effects of an unfair labor practice. If I am confirmed as a Member of the NLRB and if an argument for an additional or new remedy is presented to me as a Member of the NLRB, I will consider the argument with an open mind based on the terms of the Act, relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties legitimate reliance on existing law. Because questions concerning changes in Board remedies could arise before the Board, I do not believe it would be appropriate to address them further in this context

26. Do you believe that new remedies must come from Congress, or does the NLRB have the authority to fashion new remedies?

Answer: Congress has vested the Board with specific remedial authority in section 10 of the Act. The NLRB has authority to fashion new remedies consistent with the remedial authority vested in the Board by Congress and consistent with relevant Supreme Court precedent. Outside those bounds, use of new remedies must by authorized by Congress.

27. Would the Board have the authority to impose double or triple back pay in the form of liquidated damages for employer Section 8(a)(3) violations during a union organizing campaign or bargaining on a first contract?

Answer: Section 10(c) of the Act vests in the Board authority to order a party to take affirmative relief, including reinstatement with or without backpay. I do not believe the Board has authority to award double or triple back pay as a remedy for a violation of section 8(a)(3) without congressional action. However, if I am confirmed as a Member of the NLRB and if an argument that the Board has and should exercise such authority is presented to the NLRB, I will consider the argument with an open mind based on the terms of the Act and relevant Supreme Court precedent, and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties' legitimate reliance on existing law.

28. What are your views regarding self-enforcing Board Orders?

Answer: The Act currently provides that the Board may petition an appropriate court of appeals for enforcement of its orders. The term "self-enforcing order" is used to mean several different things. It has been used to refer to orders of administrative agencies that become final and enforceable in federal court without substantive review if the party to whom the order is directed does not seek review of the order within a set period of time. The term also has also been used to refer to orders of administrative agencies that are enforceable in federal court without substantive review after a designated period of time unless the party to whom the order is directed both seeks review of the order and obtains a stay of the order. Whether Board orders should be made self-enforcing in either of these respects is a question appropriately addressed by Congress.

29. When, if ever, should the Board's Orders become final?

Answer: Under current law, Board orders become final and enforceable only after the Board obtains an order enforcing its order from a court of appeals. The current law creates no time period within which a party to whom a Board order is directed must petition an appropriate court of appeals for review of the order (although some of the courts of appeals have applied concepts such as laches to untimely petitions). The question of whether Board orders should become final, unreviewable and enforceable after some set period of time is a question appropriately addressed by Congress.

30. What are your views regarding union organizer access to a worksite to meet with employees during a union organizing campaign?

Answer: Under current Board law, employers are free to permit union organizers onto their property to communicate with employees concerning representation. Employers are prohibited from discriminating against union organizers in relation to other third parties in granting access to the workplace to communicate with employees. Absent such discrimination, the Supreme Court held in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that the Act requires employers to grant union organizers access to their property to communicate with workers only when there are extraordinary barriers to communication with the employees off the employer's premises. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

31. What are your views regarding mail ballots in union representation elections?

Answer: The Act is silent as to the location of elections and the manner of conducting elections. The Board has historically conducted the vast majority of election using on-site voting. In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the Board held that "When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of

all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern." If I am confirmed as a Member of the NLRB and if suggestions for changing the current standards for conducting elections by mail ballot are made to the Board, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of stare decisis and the importance of stability in the law and respect for parties legitimate reliance on existing law. Because questions concerning the standards that should be used to evaluate whether an election should be conducted by mail ballot could arise before the Board, I do not believe it would be appropriate to address them further in this context.

32. When should mail ballots be used?

Answer: Please see my answer to question 31.

33. Should the size of the NLRB be increased beyond five Members?

Answer: The size of the NLRB is set in the Act. Whether the size should be increased is a question appropriately addressed by Congress.

34. Should Board Members terms be expanded beyond five years?

Answer: As with the size of the Board, the term of members' service is set in the Act. Whether the terms should be expanded is a question appropriately addressed by Congress.

35. Should Board Members be permitted to continue in office beyond their terms until a successor is confirmed?

Answer: The Act, as amended, does not permit Board members to continue in office after the expiration of their terms. Whether Board members should be permitted to continue in office beyond the expiration of their terms until a successor is confirmed is a question appropriately addressed by Congress.

36. Should the Board engage in more rulemaking in addition to decision-making?

Answer: The Act vests in the Board authority to adopt rules and regulations "as may be necessary to carry out the provisions of" the Act. The Board has rarely exercised its rule-making authority. Several labor and administrative law scholars have criticized the Board for proceeding almost exclusively by adjudication rather than rulemaking. The Board exercised its rulemaking authority in 1989 to establish appropriate bargaining units in acute care hospitals. See 29 C.F.R. 101.30. The Supreme Court upheld the Board's rules in *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991). If I am confirmed as a Member of the NLRB and if suggestions for rulemaking are made, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of fair and efficient administration and enforcement of the Act. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

37. What types of issues should be the subject of rulemaking?

Answer: The Board engaged in rulemaking to establish appropriate bargaining units in acute care hospital after repeated adjudication had failed to establish a stable resolution of the issue. If I am confirmed as a Member of the NLRB and if suggestions for rulemaking are made to the Board, I will evaluate them with an open mind based on the terms of the statute and relevant Supreme Court precedent and with due regard for the principle of fair and efficient administration and enforcement of the Act. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In the Winter/Spring 2003 Labor Lawyer article entitled: "TOWARD A RATIONAL INTERPRETATION OF THE TERM "SUPERVISOR" AFTER *KENTUCKY RIVER*" you wrote:

"Is a skilled electrician who works with an apprentice or other assistant an exempt supervisor based on directions he or she gives the assistant? And, even more to the point, does the NLRB retain discretion to construe the Act in a manner that will prevent a significant portion of the professional workforce as well as large numbers of nonprofessional, but skilled and experienced workers once thought to be at the very core of the category of employee protected by the Act, from being swept outside the Act's protection as supervisors?"

38. Was that question answered by the NLRB in the *Oakwood Healthcare* Trilogy?

Answer: None of the three cases that comprise the *Oakwood* Trilogy involved a skilled craftsperson and an apprentice or other assistant. Moreover, in the *Oakwood* Trilogy, the Board construed the statutory terms assign, responsible to direct and independent judgment, but the question of the degree of discretion retained by the Board to construe those and other terms in the statutory definition of supervisor can only be definitively answered by the Supreme Court, and none of the three decisions was reviewed by the Supreme Court. Finally, the impact of the decision in the *Oakwood* Trilogy on skilled craftspersons as well as professionals and other skilled and experienced workers can only be determined after the Board applies those decisions to the precise facts of a significant number of cases involving those categories of workers.

Question: In the same article you wrote that *Kentucky River* "should not be read to deprive these employees of statutory protection. Such a result is neither suggested by the Supreme Court's decision nor permissible given the congressional intent manifest both on the face of the statute and its legislative history."

39. Do you continue to maintain that view?

Answer: The suggestions I made in a scholarly article while serving as an advocate for various labor organizations will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. Because questions concerning the application of the statutory definition, the Supreme Court's decision in *Kentucky River*, and the Board's *Oakwood* Trilogy rulings to individual employees and categories of employees will certainly arise before the Board, I do not believe it would be appropriate to address them in this context.

40. Do you believe that the NLRB has the authority to interpret the section 2 (11) supervisory exclusion to require that putative supervisors must spend a majority of work time engaged in others of the enumerated supervisory duties beyond the "duty to assign" and "duty responsibly direct"?

In other words, does the NLRB have the authority to prioritize the duties listed in section 2 (11) giving some less weight than others?

Answer: At this time I do not believe that the NLRB has authority to interpret the section 2 (11) definition of supervisor to require that an alleged supervisor spend a majority of his or her work time engaged in enumerated supervisory duties other than assigning and responsible directing. However, if I am confirmed as a Member of the NLRB and an argument that the Board possesses such authority is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

41. Is this a situation where the Board should engage in rulemaking?

Answer: I do not believe so at this time for the reason stated in my answer to question 40.

42. Do you agree that working supervisors are agents of their employers in all matters, including labor relations, and that they should be unfettered, except within the constraints of section 8 (c), to express the employer's views during union organizing campaigns?

Answer: The term "working supervisor" is not a term that appears in the Act or that has an established meaning under Board jurisprudence. Employees who are supervisors within the meaning of section 2(11) are not protected by the Act and therefore have no right under current Board law under most circumstances to refuse to express their employer's views during a union organizing campaign.

43. If, as you write in the 1993 Minnesota Law Review, employers should have no role in union organizing campaigns, should supervisors be permitted a role?

Should that role be as an employee or as a supervisor?

Answer: In my 1993 Minnesota Law Review article, I did not suggest that employer should have no role in union organizing campaigns, but rather that employers should not be afforded the status of parties in representation cases. Supervisors are not currently classified as parties in representation cases and neither are employees (except if they are the petitioner). Supervisors cannot have a role as employees because the definition of employee in section 2(3) excludes individuals employed as supervisors. Because questions concerning the appropriate parties in representation cases may arise before the Board, I do not believe it would be appropriate to address them in this context.

44. Is it inherently objectionable conduct for supervisors to distribute union authorization cards or to speak in favor of a union for election against the employer's wishes during a union organizing campaign? If not, why not?

Answer: Under current Board law, it is not inherently objectionable conduct for a supervisor to speak in favor of a union prior to a representation election against the employer's wishes. Whether such speech is objectionable depends on "(1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question. (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct." *Harborside Healthcare, Inc*., 343 NLRB 906, 909 (2004). Under current Board law, "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and is therefore objectionable if the "conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election." *Id*. at 911, 913. Because questions concerning under what circumstances supervisors' participation in an organizing drive is objectionable conduct may arise before the Board, I do not believe it would be appropriate to address them in this context.

45. If an employer is not a party to a union representation election, and is not permitted to participate in a union organizing campaign, where will employees get information about the "other side" concerning unionization or of a particular union's ability to represent the employees?

Answer: Even if the Board were not afforded status as parties to representation proceeding, they would still have the ability to communicate with employees concerning union representation. Section 8(c) of the Act, as amended, provides that employer communication of this sort cannot be considered evidence of an unfair labor practice absent a threat or promise of benefit.

46. Do you think unions can fairly be expected to present both sides, or do you disagree that there even is another side?

Answer: Under the Act, as amended, employees have the right to support or oppose union representation. There are thus at least two "sides" in relation to a representation election. A union seeking to represent employees will generally present arguments in favor of such representation.

47. Have you participated as an advocate for the union in a union organizing campaign?

Answer: I have never acted as an advocate seeking to persuade employees during a union organizing campaign.

If so, please identify the campaign(s), the name of the employer(s), the date(s) of the campaign(s), the date(s) of the filing of the petition(s) for election, the date(s) and outcome(s) of the election(s) (if any), whether a collective bargaining agreement was executed and, if so, the date(s) of the agreement.

Answer: Please see my answer to question 47.

48. As a professor, did you employ graduate school teaching assistants?

Answer: No.

49. Do you agree that their function had more of an educational purpose than an employment purpose?

Were such graduate school teaching assistants unionized?

Answer: Please see my answer to question 48.

Question: In your 1993 Minnesota Law Review article you trace the history of lawful employer involvement in union organizing campaigns and union representation elections from the 1935 Wagner Act (where employers had little or no role), through the 1947 Taft-Hartley Act amendments, to the present day. It seems to be your position that the law should revert to the 1935 Wagner Act as if the 1947 amendments never occurred.

50. Do you still maintain that position?

Answer: My 1993 Minnesota Law Review article does not advocate a return to the pre-Taft-Hartley amendment law holding all employer speech concerning union representation to be inherently coercive and therefore an unfair labor practice. My article does not suggest that employers should not be permitted to speak to their employees about union representation. In fact, many of the practices I criticize in the article existed both before and after adoption of the Taft-Hartley amendments. Moreover, the suggestions in my 1993 Minnesota Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The question of whether the law should revert to the Wagner Act as it existed prior to the Taft-Hartley amendments isa question that may only be addressed in Congress.

Question: In that same article, you concluded that "employers should be stripped of any legally cognizable interest in their employees' election of representatives."

51. Is that still your belief?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter employers' status in representation proceedings is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning employers' cognizable interests in representation proceedings could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In the same article you stated that the Board has the authority to make such a change without legislation. In particular, you said that "The law leaves the Board discretion to determine the appropriate parties to hearings in representation cases. It should exercise this discretion by specifying that the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them."

52. Do you still believe the Board could make such a change without legislation?

Answer: The Act does not specify all the parties to representation proceedings or otherwise describe in detail the procedures the Board must follow in conducting elections or related hearings. The Board thus has broad discretion to establish procedures consistent with the terms of the Act, Supreme Court precedent, and the Constitution. The suggestion concerning this issue in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestion I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board could alter employers' status in representation proceedings is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning the Board's authority to alter employers' status in representation cases could arise before the Board, I do not believe it would be appropriate to address them further in this context.

53. If so, since this is not the current state of the law, would you seek to use rulemaking to change the law towards stripping employers of all interest in their employees' election of representatives or would you seek to make such a change through the adjudicatory process?

Answer: Please see my answer to question 52.

Question: You wrote that "If employers are denied party status, it also follows that the Board should revert to its earlier rule, already approved by the Supreme Court, of barring employers from placing observers at the polls to challenge ballots, as such challenges are resolved at post-election hearings."

54. Is it still your belief that employers should have no observes at polls to challenge ballots?

Answer: The suggestion in my 1993 Minnesota Law Review article concerning employer observers was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board should alter this practice is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning whether employers should be permitted to place observers at the polls could arise before the Board, I do not believe it would be appropriate to address them further in this context.

55. If so, would you take steps to effectuate this change in policy?

Answer: Please see my answer to question 54.

56. If so, would you seek to carry out these changes through rulemaking, on a case-by-case basis, or in some other manner?

Answer: Please see my answer to question 54.

57. Given what you have written in the 1993 Minnesota Law Review article cited above, do you continue to believe that the NLRB can prevent an employer from speaking to its employees at work without offering a union the same opportunity?

Answer: In my 1993 Minnesota Law Review article, I did not suggest that employers could be prevented from speaking to their employees at work without offering a union the same opportunity. Rather, I suggested that employers should be bound by their own restriction on solicitation, distribution and access so that if an employer bars union organizers from its premises it should not be permitted to bring a third-party onto the premises to persuade employees to vote against unionization. The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestion I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would

prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board should bar discriminatory application of a no access policy in this manner is made to the Board, I will consider it with an open mind based on the terms of the Act, the First Amendment, and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In that same article, you talk of removing the employer from the representation process.

58. Is that still your view? If so, what do you mean by this?

- **If the employer is not party to the election process what role, if any, can the employer play?**
- **Can supervisors give their views without employer prompting?**
- **You do not think that this raises First Amendment issues?**

Answer: In my 1993 Minnesota Law Review article, I suggested that only employees and labor organizations seeking to represent them should be afforded party status in representation proceedings and that employers could protect their legally protected interests in any subsequent unfair labor practice proceeding. I did not suggest that employers should be barred from speaking about union representation or that supervisors should be so barred with or without employer prompting. The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter employers' role in representation proceedings is made to the Board, I will consider it with an open mind based on the terms of the Act, relevant Supreme Court precedents, and the Constitution. Because questions concerning these issues

could arise before the Board, I do not believe it would be appropriate to address them further in this context.

59. Do you think this is counter to the intent of Section 8(c) of the NLRA?

Answer: In my 1993 Minnesota Law Review article, I described the adoption of section 8(c) and stated that it prevents the Board from considering employer speech as evidence of an unfair labor practice absent a threat or promise of benefit. I did not argue that it would be consistent with section 8(c) to prevent an employer from expressing its views. I argued only that defining employer requirements that employees listen to speech opposing or supporting unionization on pain of discipline as objectionable conduct would be consistent with section 8(c). The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should define employer requirements that employees listen to speech opposing or supporting unionization on pain of discipline as objectionable conduct is made to the Board, I will consider it with an open mind based on the terms of the Act, the First Amendment, and relevant Supreme Court precedents. Because questions concerning the scope of protection afforded by section 8(c) could arise before the Board, I do not believe it would be appropriate to address them further in this context.

60. You have talked about a union election being different from a political election but isn't the consequence of the result as much if not more important?

Answer: The outcome of a union representation election is extremely important. The differences I identified in my scholarly writing between union representation elections and political elections did not rest on conclusions about the relative importance of the results of the two types of elections and I do not believe that I advanced any conclusions about the relative importance of the results of the two types of elections.

61. Under the NLRA a union has significant power for the entire bargaining unit so isn't the choice critical to those employees?

Answer: Under the Act, as amended, a duly selected representative becomes the exclusive representative of all employees in the bargaining unit. For this and other reasons, the choice of representatives is an extremely important one for all employees in the unit.

62. Why then doesn't an employer have a significant place in the process given the consequences of a representation proceeding?

Answer: An employer does have a significant place in the representation process under current procedures.

63. Given your writings in the 1993 Minnesota Law Review article, do you still believe that an employer should be prevented from challenging the scope or composition of the bargaining unit?

Answer: In my 1993 Minnesota Law Review article I suggested that an employer should be able to (1) contest the inclusion of managers, supervisors, confidential employees, and guards in a unit and (2) argue that the contours of the unit limits its ability to reach agreement with the union, in an unfair labor practice proceeding subsequent to a representation proceeding. The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter employers' status in representation cases is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning how and when employers should be permitted to challenge the scope or composition of a bargaining unit could arise before the Board, I do not believe it would be appropriate to address them further in this context.

64. Given those writings would you prevent an employer from challenging a voter as being outside the bargaining unit?

Answer: Please see my answer to question 63**.**

65. If an employer is unable to participate in the proceeding over what is an appropriate unit how does the employer get to voice concerns over this important question?

Answer: Please see my answer to question 63.

Would this lead to unit fragmentations?

Answer: I do not believe so, but that is an empirical question concerning a change in the law that has not occurred. In either case, the Act, as amended, requires only that the bargaining unit be an appropriate unit and does not categorically disfavor small units.

66. Similarly, if an employer cannot challenge a voter for being outside the unit, won't there be the real risk of individuals being allowed to vote even though they may be outside the unit?

Answer: In my 1993 Minnesota Law Review article I suggested that employees and labor organizations seeking to represent them should be afforded the status of parties to representation proceedings. If the described change in Board procedures were adopted, employees, labor organizations, and the Board agent could challenge voters' eligibility to vote.

Question: You wrote that "employers should have no right to raise questions concerning voter eligibility."

67. Is that still your belief?

Answer: Please see my answer to question 63.

68. If so, since this is not the current state of the law, would you seek to effectuate such a change?

Answer: Please see my answer to question 63.

69. If so, would you seek to make this change through rulemaking or adjudication of cases or in some other way?

Answer: Please see my answer to question 63.

70. You wrote that employer should also not be able to raise questions concerning campaign conduct. Is this still your belief?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestion I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter existing practice concerning the employers' standing to raise objections concerning campaign conduct is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

71. If so, since this is not the current state of the law, would you seek to effectuate such a change?

Answer: Please see my answer to question 70.

72. If so, would you do so through rulemaking, adjudication, or in some other way?

Answer: Please see my answer to question 70.

Question: You have written that employers should not be able to refuse to bargain to test the certification of a union except "where Congress intended to protect employer interests."

73. Is that still your belief?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not

control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. In that article, I suggested that a statutory change was necessary to fully implement this change in practice. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter existing practice concerning the issues an employer can raise after a technical refusal to bargain is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning what issues may be raised in an unfair labor practice proceeding after an employer has refused to bargain with a newly certified union could arise before the Board, I do not believe it would be appropriate to address them further in this context.

74. If so, what are the employer interests that you believe Congress intended to protect that would justify an employer's technical refusal to bargain?

Answer: Please see my answer to question 63.

Question: You wrote that changing this would take a "minor revision" of the statute. To what extent do you believe narrowing an employer's ability to challenge certification through a technical refusal to bargain could be accomplished short of an amendment to the statute?

Answer: The statutory provision I cited in my 1993 Minnesota Law Review article was 29 U.S.C. 159(d). That provision governs petitions for enforcement and review in the courts of appeals. The question of whether the issues an employer can raise after a technical refusal to bargain can be narrowed absent statutory change is therefore a question appropriately addressed in the courts of appeals and the Supreme Court.

75. Would you seek to move the Board in this direction through rulemaking, adjudication or in some other manner?

Answer: Please see my answer to question 74.

Question: You have written that employers "should not be barred from campaigning against unions" but "should cease to gain through legal

procedures and economic authority any opportunity to influence employees that is not open to other interested third parties."

76. Is this still your belief?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter existing rules governing employer campaign conduct is made to the Board, I will consider it with an open mind based on the terms of the Act, the First Amendment, and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

77. Please describe in detail the legal procedures that employers use that are not open to other interested third parties.

Answer: In my 1993 Minnesota Law Review article, I cited employers' ability to influence the timing of elections through their status as parties to preelection hearings under existing practice.

78. Please describe in detail the economic authority that employers use that is not open to other interested third parties.

Answer: In my 1993 Minnesota Law Review article, I cited employers' ability, under existing law, to require employees to listen to campaign speech on pain of discipline up to termination.

Question: You have written that union elections "should be removed from the workplace, where employers have the last word" and that "all elections should take place on neutral ground."

79. Is this still your belief?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter existing practice concerning the location of elections is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning the appropriate location of the polls in representation election could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: You wrote that you believed it was within the Board's discretion to determine the place of the election.

80. Is this still your belief?

Answer: The Board has substantial discretion to determine the place of the election consistent with the terms of the Act and relevant Supreme Court precedent.

81. If you still believe elections should not occur at the workplace, but at a neutral site, would you seek to effectuate such a change?

Answer: Please see my answer to question 79.

82. If so, would you do so by rulemaking, through adjudication, or in some other way?

Answer: Please see my answer to question 79.

83. One of the principal justifications for holding elections at the workplace is that making voting more convenient will make it more likely more eligible voters will cast their vote. How do you think moving elections off site would affect participation in union recognition elections?

Answer: Without record evidence or other reliable data I have no basis for answering this empirical question.

Question: You have written that the "principal objective of Board regulation of campaign conduct" should be preventing "employers from exploiting their singular economic power to persuade employees to remain unrepresented" rather than assuring employee free choice.

84. Is this still your view?

Answer: To the best of my knowledge I have not written that "the 'principal objective of Board regulation of campaign conduct' should be preventing 'employers from exploiting their singular economic power to persuade employees to remain unrepresented' rather than assuring employee free choice." In my writing, I have never suggested that employer conduct during organizational campaigns be regulated as an end in itself. The reason for regulating campaign conduct by employers, unions, and employees is to assure that employees can exercise free choice on the question of unionization. The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board concerning the principal objective of its regulation of campaign conduct is made to the Board, I will consider it with an open mind based on the terms of the Act, the first amendment, and relevant Supreme Court precedents. Because questions concerning this issue could arise before the Board, I do not believe it would be appropriate to address them further in this context.

85. If so, would you seek to effectuate this view?

Answer: Please see my answer to question 84.

86. If so, would you do so through rulemaking, adjudication, or in some other manner?

Answer: Please see my answer to question 84.

Question: In your 1993 Minnesota Law Review article you are critical of the *General Shoe* "laboratory conditions" doctrine of Board regulation of election conduct as if in a laboratory.

87. Do you maintain that position?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter its use of the laboratory conditions metaphor is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

88. Do you believe that the NLRB should be stricter in its regulation of election conduct? In what way should it be stricter?

Answer: I do not believe the overall strictness of the Board's regulation of campaign conduct is a relevant standard under the Act. The relevant standard is whether the specific regulations further the purpose of insuring that the outcome of the election accurately reflects employees' sentiments. Because questions concerning the regulation of campaign conduct could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In your 1993 Minnesota Law Review article you wrote:

> "The law leaves the Board discretion to determine the appropriate parties to hearings in representation cases. It should exercise this discretion by specifying that the only parties to both pre- and post-election hearings are employees and the unions seeking to represent them."

89. Do you still maintain this view?

Answer: Please see my answer to question 58.

90. To the extent that this is not the current state of the law, would you seek to change the law in the direction of your stated view? If yes, how would you go about it? By Board decision, by rule making?

Answer: Please see my answer to question 58.

Question: You also stated in the 1993 Minnesota Law Review article that:

"Furthermore, employers should not be allowed to refuse to bargain after a union election victory as a tactic to provoke an unfair labor practice charge and thus the re-litigation of issues resolved in the earlier representation proceedings. Such a "technical refusal to bargain" should be permitted in only one instance: where the law excludes certain employees from a bargaining unit in order to protect employer interests."

91. Do you still maintain this view?

Answer: Please see my answer to question 63.

92. To the extent that this is not the current state of the law, would you seek to change the law in the direction of your stated view? If yes, how would you go about it? By Board decision, by rule making?

Answer: Please see my answer to question 63.

93. If you prohibit "technical refusals to bargain" by what method could an employer contest the fairness of a particular election, such as the appropriateness of a bargaining unit, the eligibility of voters, and most importantly, objectionable union campaign conduct?

Or, in your view, should an employer simply not be permitted to contest the results of a union representation election?

Answer: In my 1993 Minnesota Law Review article, I proposed that only employees and labor organizations seeking to represent them be parties to representation cases and thus be able to contest the results of elections. I proposed that in a subsequent refusal to bargain proceeding, the employer

could argue that it had no obligation to bargain concerning individuals in the unit who are supervisors, managers, confidential employees or guards and that the general scope of the unit limited its ability to reach agreement with the union. The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions I made in a scholarly article published in 1993 will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter the rules governing a technical refusal to bargain is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

94. If employers are prohibited from contesting a union representation election, should unions be permitted to do so?

Answer: Under current law, unions' cannot engage in a technical refusal to bargain or other similar action in order to obtain court of appeals review of Board decisions in representation cases. Please see my answer to question 93.

95. Do you believe that there is a problem with unions attaining a first contract?

If so, what would you do about it at the Board, short of legislation?

Answer: I am aware of empirical studies indicating that in a substantial percentage of cases, negotiations between newly certified unions and employers do not result in a first collective bargaining agreement. Under the current law, an employer has a duty to bargain in good faith with a union that is duly recognized or certified as the representative of its employees. The current law also provides that such obligation does not compel either party to agree to a proposal or require the making of a concession. If I am confirmed as a Member of the NLRB and credible evidence is presented to the Board that in a substantial percentage of cases negotiations between newly certified unions and employers do not result in a first collective bargaining agreement and an argument is made to the Board that that

fact is relevant to a question before the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In the 1993 Minnesota Law Review article you wrote:

> "Alternatively, it could be argued that industrial democracy should be made more like political democracy by altering the nature of the choice presented to workers in union elections. Such a reform would mandate employee representation, and the question posed on the ballot would simply be which representative."

96. Surely you do not believe mandating union representation now, if you did then. But if that is still your view, how would you implement such a radical change…by legislation, Board decisions or by rulemaking?

Answer: In my 1993 Minnesota Law Review article, I described this as an argument that could be made. I did not suggest that argument should be accepted. In fact, I suggested the opposite. Only Congress could mandate employee representation.

97. Should the NLRB have a greater role in setting first contracts?

Answer: Under current law, the NLRB's role in relation to parties' negotiation of a first contract is no different than its role in relation to parties' negotiation of successor contracts. Assuming that "setting first contracts" means imposing the terms of a first contract on the parties, under current law the NLRB has no role in setting first contracts. The question of whether the NLRB should have a greater role in setting first contracts is appropriately addressed by Congress.

98. Could the Board mandate mediation of all first contracts?

Answer: Under current law, I do not believe that Board has authority to mandate mediation in relation to the negotiation of all first contracts. Nevertheless, if I am confirmed as a Member of the NLRB and if an argument that the Board can and should mandate mediation in the negotiation of first contracts is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

99. Should the Board be permitted to hire economists to assist it in evaluating first contracts?

Answer: I am not at present sufficiently informed about the technical and social scientific resources and expertise available to the Board in evaluating, under appropriate circumstances, whether parties have negotiated in good faith concerning a first contract to answer this question. Moreover, 29 U.S.C. 154(a) provides, "Nothing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of . . . economic analysis." Therefore, the question may be one appropriately addressed by Congress.

100. What "extraordinary remedies" does the Board currently have available to address employer section 8(a)(5) violations and what others could it develop short of legislation?

Should such reforms be done by decisions or by rulemaking?

Answer: The term "extraordinary remedies" has not been used by the Board or commentators to describe remedies for violations of section 8(a)(5). Ordinarily, the Board remedies a violation of section 8(a)(5) that occurs during the process of collective bargaining with a cease and desist order and a notice-posting requirement. If I am confirmed as a Member of the NLRB and if an argument that the Board should employ additional remedies, adopted in the course of adjudicating a specific case or through rulemaking, is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: You have advocated going back to the Wagner Act in the 1993 Minnesota Law Review article on union representation elections.

101. Would you also advocate going back to the pre-1947 Taft-Hartley Act laws governing secondary boycotts?

Answer: My 1993 Minnesota Law Review article did not advocate going back to the Wagner Act prior to its amendment by the Taft-Hartley Act. Whether the restriction of secondary boycotts introduced into the law by the Taft-

Hartley Act should be eliminated is a question appropriately addressed by Congress.

102. Do you support common situs picketing, recognitional strikes, and hot cargo agreements?

Answer: Common situs picketing is a term used to describe picketing at a location where employees of two or more employers are employed to perform their ordinary duties, such as on a typical construction site. The Board and federal courts, including the Supreme Court, have developed an extensive jurisprudence addressing the question of under what circumstances picketing at a common situs violates section 8(b)(4) of the Act. Recognitional strikes are strikes the object of which is to obtain voluntary recognition by an employer of employees' designated representative. Current law governs recognitional strikes in a number of respects, most importantly, through section 8(b)(7) of the Act which makes it an unfair labor practice for a union to engage in picketing with a recognitional objective under specified circumstances. A hot cargo agreement is a term used to refer to an agreement between a union and an employer under which the employer ceases doing business with another employer. Section 8(e) of the Act makes entry into a hot cargo agreement an unfair labor practice under specified circumstances. If I am confirmed as a Member of the NLRB, I will apply the terms of the Act to such activity based on the record evidence and the arguments of counsel concerning how the terms of the Act should be applied to the particular facts.

103. Would the law be better if there were not the current restrictions on such activities? Such changes would require legislation, but can you achieve partial relief through Board decisions or rulemaking?

Answer: The question of whether the law would be better without the existing statutory restrictions on such activity is a question appropriately addressed by Congress. If I am confirmed as a Member of the NLRB and if an argument is made to the Board that the Board could and should alter its construction of the prohibitions of these categories of activity, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents with due regard for the principle of stare decisis and the legitimate reliance of parties on existing law. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

104. Do you believe there should be a difference between an unfair

labor practice strike and an economic strike, as dictated by the Supreme Court's *MacKay Radio* decision, for purposes of hiring permanent striker replacements?

Answer: In sum, under the current construction of the Act, an employer can hire permanent replacements to replace employees engaged in an economic strike, but an employer cannot hire permanent replacements to replace employees engaged in an unfair labor practice strike. If I am confirmed as a Member of the NLRB and if an argument is made to the Board that the Board could and should alter its rules governing permanent replacement of either economic or unfair labor practice strikers, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents with due regard for the principle of stare decisis and the legitimate reliance of parties on existing law. Because questions concerning permanent replacement of strikers could arise before the Board, I do not believe it would be appropriate to address them further in this context.

105. Do you think there should be any restrictions on anti-employer corporate campaigns?

Answer: The term "corporate campaign" is not used in the Act or elsewhere in federal or state law as far as I am aware. The term has no precise meaning. Various restrictions contained in the Act, as amended, might apply to activity engaged in during what is sometimes referred to as a corporate campaign, including the restrictions created by section 8(b)(4). Whether additional restrictions of some sort should be imposed is a question appropriately addressed by Congress.

106. Do you think RICO is an effective legal weapon against union abuse in corporate campaign activities?

Answer: The NLRB does not have jurisdiction to hear claims arising under the RICO statute. Whether the RICO statute creates effective remedies for specified wrongs when they are committed by unions is an empirical question concerning which I have no data and cannot express an informed opinion. Whether the RICO statute should be so used is a legislative judgment that is appropriately made by Congress.

107. Do you believe that employer lawsuits against unions for corporate campaign damages should be permitted?

If such lawsuits are unsuccessful, should an employer be subject to an unfair labor practice?

Answer: The term "corporate campaign" is not used in the Act or elsewhere in federal or state law as far as I am aware. The term has no precise meaning. The question does not specify the precise actions that caused the damage or the type of damage. The Act permits employers to bring suit in federal court and to seek damages resulting from a labor organization's violation of section 8(b)(4) of the Act. The Act does not generally regulate employer litigation against unions under other state or federal laws. Under certain circumstances, the Act may wholly or partially preempt such litigation, for example, in the area of defamation. Under certain circumstances, the Board has held that such litigation can constitute an unfair labor practice. The Supreme Court has addressed the Board's law in this area on two occasions in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983). The question of whether initiation or maintenance of such lawsuits, if they are ultimately unsuccessful, should be found to be an unfair labor practice cannot be answered without reference to specific facts. If I am confirmed as a Member of the NLRB, and if such a contention is properly raised before the Board, I will apply the terms of the Act to such activity based on the record evidence and the arguments of counsel concerning how the terms of the Act should be applied to the particular facts. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

108. Do you support "salting" non-union or "open shop" worksites through batched applications by paid union organizers who do not intend to work for the employer?

Answer: Salting is a term generally used to refer to two types of practices. The term is sometimes used to refer to the practice of testing an employer's hiring practices by arranging for qualified applicants to apply for employment by the employer and to disclose during the application process their union support or affiliation. The term is sometimes used to refer to the practice of arranging for qualified applicants who are union organizers or supporters to apply for employment by an employer so that after they are hired they can communicate with other employees concerning union representation. In *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), the Supreme Court upheld the NLRB's holding that paid union organizers hired by an employer under these types of circumstances are employees protected by the Act. If I am confirmed as a Member of the NLRB, I will apply the terms of the Act to such activity based on the record

evidence and the arguments of counsel concerning how the terms of the Act should be applied to the particular facts.

109. Why do you think union density in the private sector has steadily declined over the past 50 years?

Is it all, or mainly, attributable to employer campaign conduct?

What should be done to reverse the decline?

Answer: This is a complex historical and empirical question. Scholars have offered various, sometime conflicting answers. I believe the decline in union density cannot all be attributed to employer campaign activity. The question of whether something should be done with the specific goal of reversing the decline and, if so, what, are questions appropriately addressed by Congress.

110. Do you believe that card check certification is preferable to secret ballot elections for union representation?

Or, do you believe that card check certification is the least reliable method for determining true employee sentiment regarding unionization?

Answer: The Act currently provides for certification only of the results of an election. The question of whether the Board should certify a union as the exclusive representative of employees based on authorization cards signed by a majority of employees is a question appropriately addressed by Congress.

111. If card check certification is acceptable for union representation, why shouldn't card check be equally acceptable for union decertification?

Answer: The Act currently provides for certification only of the results of an election. The question of whether the Board should certify a union as the exclusive representative of employees or certify that a union is no longer a representative designated or selected by a majority of employees based on authorization or some form of deauthorization cards signed by a majority of employees are questions appropriately addressed by Congress.

112. Do you believe that NLRB election procedures and issues are particularly susceptible to resolution through formal rulemaking?

Answer: The Board has adopted rules now codified at 29 C.F.R. parts 101 and 102 specifying basic procedures that are used in representation proceedings. In addition, the Board's General Counsel has promulgated a Casehandling Manual, Part Two of which concerns representation proceedings, to provide guidance to Regional Directors and their staffs in relation to representation matters. The Manual is not binding on the Board. I believe interested parties have found these documents useful. If I am confirmed as a Member of the NLRB and if an argument that the Board should promulgate additional rules in this area is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

Question: In your 1993 Minnesota Law Review article you wrote that "in a democratic society it is all but inevitable that representatives should be chosen in elections."

113. Should collective bargaining representatives be chosen in elections?

Answer: Under current law, employees can choose a representative either through a Board-supervised election or by otherwise demonstrating that a majority of employees wish to be represented by the representative. However, an employer can generally decline to recognize a representative chosen by means other than a Board-supervised election. The questions of whether collective bargaining representatives should only be chosen in Board-supervised elections is a question appropriately addressed by Congress.

114. Are NLRB-conducted secret ballot elections an effective means to determine whether an employee desires to be represented by a union in a certification election?

Answer: In NLRB-supervised elections, the ballots are cast in secret. Therefore, neither the Board nor the parties can ordinarily determine whether an individual employee desires to be represented by a union through a Board-supervised election. NLRB-supervised elections can be an effective means to determine whether employees in a voting unit desire to be represented by a union depending on the rules governing those elections, compliance with those rules, and the means of enforcement in the event of noncompliance.

Question: In your 1993 Minnesota Law Review article you quoted the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S.575, 602 (1969), and you wrote: "'[S]ecret ballot elections are generally the most satisfactory—indeed the preferred—method of a ascertaining whether a union has majority support.' The election now provides the only certain route to the labor representation protected by the Wagner Act."

115. Do you agree with the Court that the election now provides the only certain route to labor representation in certification cases?

Answer: The Act currently provides for certification only of the results of an election.

Question: As noted in the portion of the *Gissel* decision you quoted in your law review article, the Supreme Court has consistently recognized that secret ballot elections are superior to the card check process in determining an employee's choice of whether to be represented by a labor union. In doing so, the Court noted with approval a lower court's "comparison of the card procedure and the election process":

> The unreliability of the cards is not dependent upon the possible use of threats.... It is inherent, as we have noted, in the *absence of secrecy* and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.

Supreme Court Justice William O. Douglas in the 1974 *Linden Lumber* case stated: "[I]n terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." And in an NLRB case the secret ballot election was compared to a modern automobile and the card check process to an ox-cart.

116. Do you agree with these statements that secret ballot elections are superior mechanism to the card check process in determining an employee's choice of whether to be represented by a labor union?

If not, why?

Answer: Under current law, employees can choose a representative either through a Board-supervised election or by otherwise demonstrating that a majority of employees wish to be represented by the representative. However, an employer can generally decline to recognize a representative chosen by means other than a

Board-supervised election. The questions of whether collective bargaining representatives should only be chosen in Board-supervised elections is a question for Congress. Because questions concerning the relative superiority of Board-supervised elections versus non-electoral evidence of majority support may arise before the Board, I do not believe it would be appropriate to address them further in this context.

117. Do NLRB-conducted secret ballot elections provide more privacy than the card check process in choosing whether to be represented by a union?

Answer: In a properly conducted NLRB-supervised election, the privacy of employees' actual marking of the ballot can be more easily guaranteed than the privacy of card signing in a card check process as currently utilized to obtain voluntary recognition. This may not be true for other aspects of the process, however, for example, employees' decision to vote or not vote in an election. Generally, the answer to this question depends on the procedures used in the two processes and the rules governing the two processes.

118. Are employees potentially subject to a heightened level of intimidation, threats or coercion with certification through the card check process than through a secret ballot election?

Answer: Current law bars intimidation, threats and coercion by employers and unions whether connected to a Board-supervised election or the collection of authorization cards. Whether employees would be subject to heightened levels of intimidation, threats or coercion if Congress authorized the Board to certify a representative based on authorization cards is an empirical question the answer to which would depend on the procedures used in the processes and the rules governing the processes and is a question appropriately addressed by Congress.

Question: In your 1993 Minnesota Law Review article you wrote, "in guaranteeing employers a broad right to free speech, the Taft-Hartley Act assured their right to campaign against unions in elections."

119. Do you believe that the law currently permits employers to express concern or voice opposition to employees during a unionization campaign?

Answer: Current law generally permits employers to express concern and voice opposition to representation to employees during a union organizing campaign so long as the expression contains no threat or promise of benefit.

120. Do you believe that the NLRB should limit employer involvement in a unionization campaign?

Answer: If I am confirmed as a Member of the NLRB and if an argument that the Board should alter the rules governing such employer involvement is made to the Board, I will consider it with an open mind based on the terms of the Act, the First Amendment, relevant Supreme Court precedents, the principle of stare decisis, and parties' legitimate reliance on existing law. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

121. Have you ever taken a position on the card check provision of the Employee Free Choice Act (EFCA) (H.R. 1409/S. 560)? What was your position?

Has your position changed since your nomination?

Answer: I have supported the card check provisions of the Employee Free Choice Act prior to the President's announcement of his intention to nominate me to be a member of the NLRB. Since that time, I have taken no position.

122. Do you believe that the card check provision in the EFCA would *effectively* eliminate the use of secret ballot election in certification cases? Why not?

Answer: As currently drafted, if the provisions of the Employee Free Choice Act were adopted, employees would be able to choose between two means of demonstrating majority support in order to obtain Board certification of their chosen representative. Employees and labor organizations seeking to represent them might for a variety of reasons choose to demonstrate majority support through a Board-supervised election even if the Employee Free Choice Act were adopted.

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

> "a representation election 'is a solemn...occasion, conducted under safeguards to voluntary choice,'...other means of decision-making 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.'"

123. Do you agree with the statements made by organized labor to the NLRB that a secret ballot election is the best measure of employee sentiment in determining whether employees no longer wish to be represented by a union?

Answer: Because questions concerning the circumstances under which an employer can lawfully withdraw recognition from a union could arise before the Board, I do not believe it would be appropriate to address them further in this context.

124. Do you agree that the "less formal means of registering majority support" is not as reliable as a secret ballot election in decertification elections?

Answer: Because questions concerning the circumstances under which an employer can lawfully withdraw recognition from a union could arise before the Board, I do not believe it would be appropriate to address them further in this context.

125. Wouldn't the secret ballot election also be the most appropriate measure of employee support for a union in a certification case?

Answer: The answer to this question depends on the procedures used to conduct the secret ballot election and the rules governing the secret ballot election as well as the precise character of any alternative procedures.

126. In what way do decertification elections differ from certification elections that would justify a different approach?

Answer: In the context of decertification, a majority of employees will have already registered their support for representation either through an election or some other form of evidence. Because questions concerning the circumstances under which an employer can lawfully withdraw recognition from a union could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In 2007, the NLRB in the *Dana/Metaldyne* case (351 NLRB No. 28), modified the "recognition bar" by requiring notification to the employees of recognition of a union by an employer based on a card check and allowing those employees, upon being notified, to file a decertification petition within 45 days of the employer recognition if the petition is
supported by at least 30 percent of the workers in the unit.

127. Do you believe that *Dana/Metaldyne* was correctly decided?

Answer: If I am confirmed as a Member of the NLRB and if an argument that the Board should overrule *Dana* is made to the Board, I will consider it with an open mind based on the terms of the Act, relevant Supreme Court precedents, the principle of stare decisis, and parties' legitimate reliance on existing law. Because questions concerning whether *Dana* was correctly decided may arise before the Board, I do not believe it would be appropriate to address them in this context.

128. If not, how would the "recognition bar," without allowing such a petition, sufficiently protect employee choice if in fact a majority of the employees would otherwise vote in a secret ballot election to reject the union?

Answer: The Board has historically employed a number of bar rules that are intended to grant respect to the expressed choice of a majority of employees for some period of time. The recognition bar rule was one such rule. Because questions concerning whether some form of recognition bar sufficiently protects employee choice may arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In the 1993 Minnesota Law Review you complain about employers who use the current system to gain delay of union representation elections.

129. Are you equally concerned about unions who delay decertification elections by the filing of unfair labor practice "blocking charges"?

Answer: I am concerned about any party's use of Board procedures if the procedures are used for the sole purpose of delaying the progress of a representation proceeding.

Question: In an article in the September 2000 *Labor Lawyer* ("Drift and Division on the Clinton NLRB") you commented on the Board's decision in *San Diego Gas & Electric* (325 N.L.R.B. 1143 (1998), in which the Board expanded the Regional Director's discretion to order mail ballots as an alternative to manual elections.

130. Given your general view that elections should not be held at the worksite, would you favor expansion of the use of mail balloting in conducting elections?

Answer: The suggestions I made in a scholarly article published in 1993 that election should not be held at the worksite will not control my judgment on that question if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter existing practice concerning use of mail balloting is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Before reaching any conclusions on the issue, I would also consult with the Board's career staff in the regions and in the central representation case unit concerning the Board's experience in conducting mail ballot elections. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

131. In doing so, would you follow the guidelines suggested in *San Diego Gas & Electric* or would you establish different criteria?

Answer: Please see my answer to question 130.

132. If so, what would those criteria be and how would it differ from *San Diego Gas & Electric*?

Answer: Please see my answer to question 130.

133. If NLRB data indicates that mail ballot elections have a lower participation rate than manual elections, should that deter the Board from expanding the use of mail ballots?

Answer: If the data so indicates, the Board should consider whether turnout is a relevant criteria in evaluating the appropriateness of mail ballot and on-site elections based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question: In *Shepard Convention Services*, 635 F.3d 671 (D.C. Cir. 1996), the D.C. Circuit reversed a Board decision ordering the employer to bargain with a union elected in a mail ballot election in which only 77 out of 438 eligible voters cast ballots.

134. Should the NLRB certify a union after a mail ballot election in which (as in the case of *Shepard Convention Services*) only nine percent of the unit voted for the union?

Answer: I do not believe existing Board law provides a basis for not certifying the results of an election based on low turnout alone. In *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671, 673 (D.C.Cir. 1996), the Court reversed the Board on other grounds and expressly declined to base its decision on low turnout. Employees' rights under section 7 of the Act include the right not to participate in a union representation election. Nevertheless, if I become a Member of the NLRB and an argument that the Board should not certify the results of an election based on low turnout is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

135. Are you concerned about the fact that in mail ballot elections there is no supervision of the voting itself (as is the case in manual elections) to protect against employer or union coercion?

Answer: I believe the Board should consider the relevance of the lack of direct supervision of the marking of ballot in a mail ballot election if the Board is asked to revise the criteria governing the use of mail ballot elections or the rules governing the conduct of such elections.

136. If you were to support expansion of the use of mail ballots by the Board, would you also support additional protections to be used in such elections to protect against coercion by the employer or the union?

Answer: The Act currently bars coercion of employees in the exercise of their rights under section 7 by both employers and unions and the Board has adopted rules intended to implement the statutory protection of employees in the context of both on-site and mail ballot elections. If I am confirmed as a Member of the NLRB and the Board decides through appropriate procedures to expand the use of mail ballots and an argument that the Board should alter the rules governing employer or union conduct in relation to such elections is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

137. Would you consider the use of e-mail or Internet sites to conduct representation elections?

Answer: Yes. If I am confirmed as a Member of the NLRB and an argument that the Board should use email or internet voting in representation elections is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Full consideration of such a question would also require collection of reliable technical information through appropriate procedures related to the reliability, security and practicality of such voting techniques. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

138. If so, would you be concerned about the absence of supervision of the voting itself (as is the case in manual elections) to protect against employer or union coercion?

Answer: I believe the Board should consider the relevance of the lack of direct supervision of the marking of ballot in email or internet voting if the Board

is asked to consider the use of such voting procedures or the rules that would governing the conduct of elections using such procedures.

Question: In your 1993 University of Minnesota law review article, you wrote that the "principle of majority rule … is central to the union's effective representation" and, because of this, **"**the majority will should be expressed through the conventional institution of the election." Yet, in August 2007, several professors and unions petitioned the National Labor Relations Board seeking rulemaking that would provide employees "an enforceable right to bargain collectively through minority unions" where there is no Section 9(a) majority-exclusive representative in place.

139. Such proposed rulemaking would seem to contradict your statement about the principle of majority rule. Can you provide assurances that, as a Board Member, you would oppose any change in the interpretation of the NLRA to allow collective bargaining rights to minority unions where no 9(a) representative is in place?

Answer: The suggestion in my 1993 Minnesota Law Review article was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The statements I made in a scholarly article published in 1993 did not address any questions related to bargaining with a representative of a minority of employees and will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. The law protects employees' right to join, support and participate in a union whether or not it represents a majority of employees in the workplace. If there is no exclusive representative, the law protects, under appropriate circumstances, employees' right to act in concert with a union whether or not it represents a majority of employees in the workplace for mutual aid and protected. If there is an exclusive representative, the Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Org*., 420 U.S. 50 (1975), imposes specified limits on that protection. Because questions concerning whether an employer has a legal duty to recognize a representative chosen by less than a majority of its employees (in the absence of a duly selected exclusive representative) and whether an employer may lawfully recognize such a representative and agree to a contract covering its members may arise before the Board and, in fact, are currently pending before the Board in the referenced

petition, I do not believe it would be appropriate to address them further in this context.

140. Do you disagree with the statement by those who filed the petition that the Board has the authority under the existing statute to make this change?

Answer: Please see my answer to question 139.

141. Do you disagree with the statement by those who filed the petition that the "plain and unambiguous language of the Act" guarantees minority bargaining rights?

Answer: Please see my answer to question 139.

142. Do you disagree with the statement by those who filed the petition that there is "clear and consistent legislative history" providing for minority bargaining rights?

Answer: Please see my answer to question 139.

143. Do you believe that a rule allowing minority bargaining rights would be conducive to harmonious labor relations in the workplace?

Answer: Please see my answer to question 139.

144. Do you disagree with the petition filed in the matter by the United Steelworkers *et al.* that majority bargaining is merely the <u>ultimate</u> objective of the statute but that establishing minority bargaining rights supports the overall goal of encouraging collective bargaining?

Answer: Please see my answer to question 139.

145. Do you disagree with the petition filed in the matter by the United Steelworkers *et al.* that the principle of majority bargaining was not to curtail minority bargaining rights in the absence of a majority but to protect a majority's ability to bargain collectively where there is a majority-backed union?

Answer: Please see my answer to question 139.

146. Do you disagree with the petition filed in the matter by the United Steelworkers *et al.* that "not a single Board case has ever *excluded* minority union recognition where the union was not claiming, either overtly or covertly, exclusive Section 9(a) recognition?"

Answer: Please see my answer to question 139.

147. If you have not sufficiently researched the issue to answer the question, would confirmation of this statement make you more inclined to proceed with rulemaking establishing minority bargaining rights where there is no Section 9(a) union in place?

Answer: Please see my answer to question 139.

148. Even if you disagree with the proposed change allowing minority bargaining rights, do you agree with the petition filed in the matter by the United Steelworkers *et al.* that "the agency is required to give full consideration to a proper petition for rulemaking that had been submitted by an interested and affected party when the sole issue involves genuine statutory interpretation?"

Answer: The Act does not provide a procedure through which parties can file a petition for rulemaking and does not expressly create any obligation on the part of the Board to consider such a petition. Section 553(e) of the Administrative Procedures Act does provide for such a petition to an agency. The Board's regulations, specifically 29 CFR 102.124, provide that any interested party may petition the Board for the issuance of regulations. Section 102.125 describes the actions the Board shall take upon the filing of such a petition. Please see my answer to question 139.

Question: The petition for rulemaking regarding minority bargaining rights was prompted by the General Counsel's dismissal of a complaint in *Dick's Sporting Goods* (NLRB Case No. 6-CA-34821) in which the employer refused to bargain with an Employee Council, consisting of dues-paying members of the United Steelworkers of America wherein it was undisputed that the Council did not represent a majority of the employees at the location.

149. Do you agree with those who filed the petition that the General Counsel should not have dismissed the charge filed in the case but

instead should have issued a complaint in order to bring the issue before the Board?

Question: Please see my answer to question 139.

You have criticized the case law on the right of a union to have access to an employer's property in the 1993 Minnesota Law Review.

150. Do you continue to hold that view?

Answer: Any criticisms of existing case law contained in my 1993 Minnesota Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. Any such criticisms will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I become a Member of the NLRB and an argument that the Board should alter the rules governing union access to employer property is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

151. Do you think that the Board can order access in cases where the union has the ability to reasonably communicate to the employees in question outside the workplace?

Answer: Absent a claim of discrimination in the application of a no access policy, I believe that Supreme Court's decisions in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), preclude the Board from construing the Act to require employers to grant nonemployee union organizers access to their property when the union has a reasonable ability to communicate with employees off the property. Nevertheless, if I become a Member of the NLRB and an argument that the Board can and should require employers to grant such access under some set of circumstances is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

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152. Given your views on access, do you believe that if an employer prohibits <u>all</u> organizations from soliciting or distributing materials, it can ban a union from such activity?

Answer: Under existing Board law, an employer can lawfully enforce a nondiscriminatory prohibition on third-party access to its property except under those circumstances identified by the Supreme Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956).

153. More specifically, do you have to allow a union access to employer e-mail systems if other organizations are denied access. If so, why?

Answer: Under existing Board law, an employer has no legal obligation to grant a union access to the employer's email system to communicate with employees if other third-parties are denied access.

154. Can an employer distinguish between allowing some personal use of an e-mail system, and excluding outside organizations, including labor unions?

Answer: Under existing Board law, an employer can permit some personal use of an email system by employees while still lawfully enforcing a nondiscriminatory prohibition of third-party use of the system.

155. If you allow a union access what limits may be imposed?

Answer: Under existing Board law, if an employer grants a union access to its email system for the purpose of communicating with employees, the employer can nevertheless impose limits on that access so long as they are uniformly imposed on and enforced against other third-parties granted access to the system.

156. In the 1993 Minnesota Law Review cited above you state that many of the labor law reform proposals you advocate in the article can be achieved without legislation. Please be more specific about which of those proposals you think can be achieved by the NLRB alone.

Answer: In my 1993 Minnesota Law Review article, I suggested that all of the reform suggestions outlined therein could be implemented without legislation except for the suggested change to the technical refusal to bargain process through which employers may challenge the certification of a union in a refusal to bargain case before the Board and, thereafter, in a court of appeals. The statements in my 1993 Minnesota Law Review article were made as a scholar seeking to further

meaningful and wide-ranging analysis of the law. Any such statements will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching these issues as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board could and should alter its existing rules and procedures without amendment of the Act is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Answers to Additional Questions for Mr. Craig Becker
Nominee for the National Labor Relations Board
from Senator Orrin G. Hatch
October 6, 2009

1. Your previous responses to questions submitted by me regarding your 1993 Minnesota Law Review article and other published articles cited in my questions of July 30, 2009, you stated repeatedly, uniformly that your writings were "made as a scholar seeking to further meaningful and wide-ranging analysis of the law," that " I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially," and that if the particular issue raised in the question comes before the Board "I will consider it with an open mind." Your answers do not so much disavow your previous written statements as to obfuscate them and your views by repeating that you will maintain an "open mind."

Your responses never directly answered my questions as to whether those statements cited from your published articles, in fact, represented your views as to labor law at the time they were written (yes or no) and whether they represent your current views (yes or no) of labor law and labor policy today. Since you wrote those articles without any caveat that you were simply trying to stimulate academic debate, and since you never stated that they were really not your views, therefore we must assume that your suggestions for controversial labor law reforms in the 1993 Minnesota Law Review article and other articles did accurately represent your views. Is that accurate?

Do your earlier responses to my questions of July 30, 2009 mean that you did not really believe or advocate what you previously stated in those articles? Or, did you intend your answer to mean that you did really believe/advocate the changes then? Or, do you answers mean that was your position then, but not now, or that it still is your position?

And, putting aside your answers to my previous questions of July 30, 2009 that you have "no personal views" and that you have an "open mind" are we to assume that your views on the labor law and labor policy issues from your 1993 Minnesota Law Review article and other articles cited in my questions have changed since you wrote those articles? Such positions when written certainly did not represent "no personal views" or an "open mind." Is it accurate, therefore, for us to assume that your views have changed on those issues I inquired about in my previous questions to you, and that now you have "no personal views" and that you have a completely "open mind"? If so, how have your views changed? If not, we must assume that you continue to hold those views.

You understand that the Senate has an obligation to fully consider a nominee's views before voting on whether to confirm that individual or to allow that individual's nomination to come to a vote. It is important that the Senate have as complete a record as possible on the nominee's views, personal or professional, on broad national policies which are relevant to the position for which he/she has been nominated. It would be possible for any nominee to seek to hide or

obscure all of his/her views from the Senate simply by claiming that issues may come before the Agency which would make it inappropriate to respond, as you assert repeatedly in response to my questions of July 30, 2009. But my questions do not relate to pending or future cases before the NLRB. My questions are intended to relate to your broader philosophy of labor and employment law, and your support for changes, which you have previously expressed in published law review articles. If we cannot even rely on your written views published in law review and other articles, upon what can we base our judgment on your fitness for confirmation?

Therefore, I ask you again, please respond more fully and candidly to each of my previous questions of July 30, 2009 referencing your 1993 Minnesota Law Review article and other articles cited, which I incorporate here by reference, as to whether your views expressed in those articles are still your views, and if not, how have your views changed.

Answer: Your prior questions concerned portions of three articles I wrote: Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 Minn.L.Rev. 495 (1993); Drift and Division on the Clinton NLRB, 16 The Labor Lawyer 103 (2000) (with Jonathan Hiatt); and Toward a Rational Interpretation of the Term "Supervisor" after *Kentucky River*, 18 Lab. Law. 385 (2003) (with Diana Ceresi). You ask whether the suggestions I made in those articles accurately reflect my views at the time they were written. The suggestions I made in those articles, taken as a whole and within the context of the articles, do accurately represent my views at the time they were written as a scholar or an advocate.

You ask whether the suggestions I made in those articles remain my views. As a nominee to be a Member of the National Labor Relations Board I have and will maintain an open mind about whether those suggestions should be implemented in any manner. As a nominee to be a Member of the National Labor Relations Board, I understand that if confirmed I will occupy a position far different from the positions I occupied when I wrote the articles – as a scholar and as an advocate. I understand that, if confirmed, my decisions, unlike the views of a scholar, will have concrete and important consequences for labor, management and the general public. I also understand that, if confirmed, I will not act as an advocate or independent scholar, but will have a duty to implement Congress' intent as expressed in the law, to fairly consider all views appropriately expressed to the Board on questions arising before the Board, to deliberate with my fellow Board Members, to utilize the wealth of knowledge and experience possessed by the Board's career staff, and to fairly and impartially decide cases based on the relevant facts and applicable law. Faced with assuming those duties and obligations, if confirmed, my current view is that the suggestions I made in my prior articles are sound scholarly suggestions or pieces of advocacy, but should be accorded no more weight than similar scholarly work and pieces of advocacy. If raised in an appropriate manner before the Board, I believe such suggestions should be subject to elaboration and rebuttal through adversarial or other appropriate procedures. Only after such a process would it be appropriate for me to form and express a view about these matters that may arise before the Board.

2. Please submit a list of speeches you have made within the past five (5) years, or panels you have served on, regarding labor law or labor policy, and regarding the National Labor Relations

Board or National Labor Relations Act, including the dates and audiences, and also submitting copies of any written materials you presented in connection with those speeches or panels.

Answer: October 6, 2006, teleconference, members of the AFL-CIO Lawyers Coordinating Committee. I spoke on the NLRB's *Oakwood* trilogy of decisions concerning the definition of supervisor under the Act. A summary of the decisions, which I wrote and which was distributed to participants, is enclosed.

Fall 2007, University of Iowa, Iowa City, Iowa. Participated in symposium on labor in the global economy. University of Iowa faculty and other invited speakers. No written material presented.

Fall 2007, Iowa City Public Library, Iowa City, Iowa. Spoke on labor in the global economy. Open to the public. No written material presented.

December 3, 2007, teleconference, members of the AFL-CIO Lawyers Coordinating Committee. I spoke on the NLRB's *Dana* decision concerning the recognition bar rule. No written materials presented.

3. In your responses to my previous questions, you indicated that you provide legal advice and counsel to the Service Employees International Union (SEIU), it's local chapters and individual employees, in legal proceedings and that you have focused, although not exclusively, on special litigation. As part of the legal counsel and advice, do you provide advice on representation issues or unfair labor practice litigation to individual locals, nationals, internationals, or intermediate bodies of affiliated unions of SEIU? Did you provide strategic counsel/advice and/or coordinate litigation and/or supervise lawyers (in-house or outside counsel) involved in individual cases before the National Labor Relations Board (NLRB)? Please provide a list of all unions and their local chapters and individual union members affiliated with SEIU to whom you have personally provided such legal services. Please also list each individual case involving SEIU on which you advised or supervised other attorneys on cases before the NLRB or federal courts.

Answer: I have provided counsel and advice to SEIU and a few local labor organizations affiliated with SEIU and working in concert with SEIU concerning representation and unfair labor practice litigation before the NLRB.

I have not generally provided strategic counsel/advice and/or coordinated litigation and/or supervised lawyers (in-house or outside counsel) involved in individual cases before the National Labor Relations Board (NLRB). I have, on occasion, been consulted by another lawyer involved in an individual case before the NLRB, typically outside counsel, concerning a particular legal question concerning which I have experience or expertise.

I have personally provided legal services related to representation issues or unfair labor practice litigation before the Board to the following entities and individuals during the past five years:[1] SEIU, SEIU Local 1, SEIU Local 24/7, and SEIU Local 2000.

I do not believe that I have advised or supervised other attorneys on cases involving SEIU before the NLRB or federal courts except for the fielding of occasional questions described above.

4. Please describe your role at the American Federation of Labor-Congress of Industrial Organization (AFL-CIO) with regard to labor organizing and involvement with the National Labor Relations Board (NLRB). As part of the legal counsel and advice, do you provide advice on representation issues or unfair labor practice litigation to individual locals, nationals, internationals, or intermediate bodies of affiliated unions of the AFL-CIO? Did you provide strategic counsel/advice and/or coordinate litigation and/or supervise lawyers (in-house or outside counsel) involved in individual cases before the NLRB? Please provide a list of all unions and their local chapters and individual union members affiliated with AFL-CIO to whom you have personally provided such legal services. Please also list each individual case involving AFL-CIO on which you advised or supervised other attorneys on cases before the NLRB or federal courts.

Answer: In my work for the AFL-CIO, I have had limited direct involvement with labor organizing and litigation before the NLRB. In a few cases, I have represented the AFL-CIO as an amicus curiae in cases before the Board. In a few cases, I have appeared as cocounsel to a national or international labor organization affiliated with the AFL-CIO (or a local labor organization affiliated with such a labor organization) in cases before the NLRB.

In my work for the AFL-CIO, I do not generally provide advice on representation issues or unfair labor practice litigation to individual locals, nationals, internationals, or intermediate bodies of unions affiliated with the AFL-CIO. I have represented national or international labor organizations affiliated with the AFL-CIO (or a local labor organization affiliated with such a labor organization), typically as cocounsel with the organization's regular counsel, in cases in the courts of appeal on petitions for review or enforcement of NLRB orders. I have also on occasion provided advice on representation issues or unfair labor practice litigation to AFL-CIO staff working in concert with such labor organizations. I have also, on occasion, been consulted by lawyers for such labor organizations involved in an individual case before the NLRB, concerning a particular legal question concerning which I have experience or expertise.

In my work for the AFL-CIO, I do not believe that I have provided strategic counsel/advice to lawyers involved in individual cases before the NLRB beyond the fielding of occasional questions described above. On occasion, as counsel to the AFL-CIO, I have

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[1]Your question does not specify any time period. I have therefore answered this question and other similar questions as they relate to the last five years. That is the period covered in the supplemental questions submitted by the Committee's minority staff. It would be difficult for me to answer accurately for earlier periods in the absence of complete records which no longer exist.

facilitated a discussion among lawyers representing a number of labor organizations affiliated with the AFL-CIO handling similar cases before the NLRB and/or expressed the views of the AFL-CIO concerning such cases to such lawyers.

In my work for the AFL-CIO, I have personally provided such legal services to the following entities and individuals: AFL-CIO; Civil Service Employees Association, AFSCME Local 1000; Graphic Communications Conference, Teamsters Local 16-C; Minnesota Licensed Practical Nurses Association, AFSCME Local 105; and Local 791, United Food and Commercial Workers Union.

In my work for the AFL-CIO, I do not believe that I have advised or supervised any other attorneys on cases involving the AFL-CIO before the NLRB or federal courts beyond what I have described above.

5. Other than the entities/individuals you supplied in response to questions 3 and 4, please provide a list of all other unions and their local chapters and/or individual union members to whom you have personally provided legal services as part of your employment with or while you were employed by SEIU and AFL-CIO. Please also include any counsel/advice that you may have given on a volunteer basis.

Answer: SEIU Healthcare Illinois-Indiana; SEIU Healthcare Michigan.

6. In response to an earlier question about "corporate campaigns", you stated that the term is not used in the National Labor Relations Act, as amended, or in any other federal or state law that you are aware of. Further you stated that the term is generally used to describe protest activities that take a form other than striking or picketing. Please describe any advice that you have provided to SEIU, and its affiliated entities and local chapters, and/or individuals on protest activities that take a form other than striking or picketing.

Answer: On occasion, I have provided advice to SEIU, and I may have provided advice to local labor organizations affiliated with SEIU and acting in concert with SEIU, concerning protest activities that take a form other than striking or picketing, most commonly distribution of handbills and other expressive activity. I am bound by my obligation to maintain client confidences and by the attorney-client privilege not to reveal the contents of any such advice.

7. Were you involved or responsible in any way for Executive Order 13496 (Employee Rights Under Federal Laws) or its proposed implementing regulations for a Proposed Notice to be posted by federal contractors pursuant to that Executive Order? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, the Executive Order or its implementing regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? While serving on the Obama Transition Team were you speaking and acting solely for yourself or for the SEIU or AFL-CIO? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: I was not responsible for Executive Order 13496 except as described below. As a member of the Presidential Transition Team, I was asked to provide advice and information concerning a possible executive order of the sort described. I was involved in researching, analyzing, preliminary drafting, and consulting with other members of the Transition Team. My involvement with this matter began in December 2008 and ended when the President was inaugurated. At the time I was engaged in those activities I was on vacation from my employment with the SEIU and AFL-CIO. While serving on the Presidential Transition Team, I spoke and acted solely for myself. In order to provide the most accurate and useful information to the Transition Team concerning questions raised by the proposed executive order, I consulted Michael Gottesman, Georgetown University Law Center; Cynthia Estlund, New York University Law School; Katherine E. Bissell, U.S. Department of Labor; Michael Anderson, Murphy & Anderson; Andrew Strom, SEIU Local 32B-32J; Nancy Schiffer, AFL-CIO; and possibly one or two other academics or lawyers with relevant expertise whose identity I do not recall at this time. I have had no involvement with any proposed implementing regulations.

8. Were you in any way involved or responsible for Executive Order 13502 (Encouraging Project Labor Agreements) or its proposed implementing regulations? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, the Executive Order or its implementing regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? While serving on the Obama Transition Team were you speaking and acting solely for yourself or for the SEIU or AFL-CIO? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: I was not responsible for Executive Order 13502 except as described below. As a member of the Presidential Transition Team, I was asked to provide advice and information concerning a possible executive order of the sort described. I was involved in researching, analyzing, preliminary drafting, and consulting with other members of the Transition Team. My involvement with this matter began in December 2008 and ended when the President was inaugurated. At the time I was engaged in those activities I was on vacation from my employment with the SEIU and AFL-CIO. While serving on the Presidential Transition Team, I spoke and acted solely for myself. In order to provide the most accurate and useful information to the Transition Team concerning questions raised by the proposed Executive Order, I discussed such questions with Michael Gottesman, Georgetown University Law Center; Cynthia Estlund, New York University Law School; Richard Resnick and Victoria Bor, Sherman, Dunn, Cohen, Leiffer & Yellig; and possibly one or two other academics or lawyers with relevant expertise whose identity I do not recall at this time. I have had no involvement with any proposed implementing regulations.

9. Were you in any way involved or responsible for Executive Order 13497 (Non-Reimbursement of Labor Relations Costs) or in planning for rulemaking to implant its

requirements? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, the Executive Order or its implementing regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? While serving on the Obama Transition Team were you speaking and acting solely for yourself or for the SEIU or AFL-CIO? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: I was not responsible for Executive Order 13497 except as described below. As a member of the Presidential Transition Team, I was asked to provide advice and information concerning a possible executive order of the sort described. I was involved in researching, analyzing, preliminary drafting, and consulting with other members of the Transition Team. My involvement with this matter began in December 2008 and ended when the President was inaugurated. At the time I was engaged in those activities I was on vacation from my employment with the SEIU and AFL-CIO. While serving on the Presidential Transition Team, I spoke and acted solely for myself. In order to provide the most accurate and useful information to the Transition Team concerning questions raised by the proposed Executive Order, I discussed such questions with Michael Gottesman, Georgetown University Law Center; Cynthia Estlund, New York University Law School; Beth Brinkman, Morrison & Foerster, Scott Kronland, Altshuler, Berzon; James Coppess and Lynn Rhinehart, AFL-CIO; and possibly one or two other academics or lawyers with relevant expertise whose identity I do not recall at this time. I have had no involvement with any proposed implementing regulations.

10. Were you in any way involved or responsible for Executive Order 13497 (Non-Displacement of Qualified Workers Under the Service Contract Act) or in planning for rulemaking to implement its requirements? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, the Executive Order or its implementing regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? While serving on the Obama Transition Team were you speaking and acting solely for yourself or for the SEIU or AFL-CIO? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: I was not responsible for Executive Order 13497 except as described below. As a member of the Presidential Transition Team, I was asked to provide advice and information concerning a possible executive order of the sort described. I was involved in researching, analyzing, preliminary drafting, and consulting with other members of the Transition Team. My involvement with this matter began in December 2008 and ended when the President was inaugurated. At the time I was engaged in those activities I was on vacation from my employment with the SEIU and AFL-CIO. While serving on the Presidential Transition Team, I spoke and acted solely for myself. In order to provide the most accurate and useful information to the Transition Team concerning questions raised by the proposed Executive Order, I discussed

such questions with Michael Gottesman, Georgetown University Law Center; Cynthia Estlund, New York University Law School; Katherine E. Bissell, U.S. Department of Labor; Orrin Baird, SEIU; and possibly one or two other academics or lawyers with relevant expertise whose identity I do not recall at this time. I have had no involvement with any proposed implementing regulations.

11. Were you in any way involved or responsible for advising the Obama Transition Team or the U.S. Department of Labor regarding a rollback of union officer and employee financial disclosure regulations? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, an Executive Order or other regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: No.

12. Were you, or are you, in any way involved or responsible for advising the Obama Transition Team or the U.S. Department of Labor regarding the Labor-Management Reporting and Disclosure Act's "Persuader Activity" regulations, including but not limited to the "Advice" Exception? If so, when, in what capacity, and in what way were you involved or responsible? Specifically, were you involved in advising, consulting, researching, analyzing, drafting, reviewing, or publishing, an Executive Order or other regulations while on the Obama Transition Team on labor issues? At the time you were engaged in those duties, by whom were you employed? Did you discuss or consult with the SEIU, the AFL-CIO, or any of their employees or members regarding this issue, or anyone else outside of the Transition Team? If so, please identify such individuals by name and affiliation.

Answer: No.

13. Who are your direct supervisors at SEIU and the AFL-CIO? Who managed your projects and cases for the SEIU and AFL-CIO while you were serving on the Transition Team? Did you review, oversee or participate in any decision-making on those projects or cases while on the Transition Team or while developing the Executive Order(s)? Were any of the matters you oversaw related to the application of the Executive Order you drafted or the one it replaced?

Answer: At the SEIU, my direct supervisor is Judith Scott. At the AFL-CIO, my direct supervisor is Jonathan Hiatt. At the SEIU, work that I could not perform due to my being on vacation to work on the Transition Team was performed by Walter Kamiat and outside counsel. At the AFL-CIO, work that I could not perform due to my being on vacation to work on the Transition Team was performed by Mr. Hiatt, Ana Avendano, Jim Coppess, Nancy Schiffer, and Bill Lurye. I did not oversee or participate in any decision-making on projects or cases while working on the Transition Team. However, my work on the Transition Team was not full time

or continuous from the time it started until the time it ended when the President was inaugurated. During that time period, when I was not on vacation in order to work on the Transition Team, I continued to perform my regular work for both SEIU and the AFL-CIO. No matter that I worked on during that period related to the application of any Executive Orders issued by the President or any prior Orders revoked by such Orders.

14. Were you personally compensated for any work performed during the Presidential transition or after, including developing the Executive Order(s)? If so, by what entity and what were the arrangements? Were you reimbursed by your employers for any business expenses for the work performed for the transition team? Please provide detailed information on amounts, sources, and characterization to the extent there were any payments or expense reimbursements related to this work.

Answer: I was not compensated for any work performed as a member of the Transition Team. I have done no work for the President or any part of the executive branch after the transition period. I was not reimbursed by my employers for any expenses related to my work on the Transition Team.

15. Does the SEIU employ registered lobbyists? Does the SEIU hire outside entities that hire lobbyists or outside individuals who are registered lobbyists? Have you provided counsel/advice to the SEIU registered lobbyists or hired third party lobbyists?

Answer: SEIU does employ registered lobbyists and it is my belief that SEIU has hired entities that hire registered lobbyists or outside individuals who are registered lobbyists. I have on occasion provided counsel on legal questions related to issues of public policy to employees of SEIU who are registered lobbyists. This activity has constituted a very minor portion of my work. It is also possible that I have provided counsel on legal and policy questions to third parties retained by SEIU who are registered lobbyists although I cannot recall any such activity at this time.

16. Does the AFL-CIO employ registered lobbyists? Does the AFL-CIO hire outside entities that hire lobbyists or outside individuals who are registered lobbyists? Have you provided counsel/advice to the AFL-CIO registered lobbyists or hired third party lobbyists?

Answer: The AFL-CIO does employ registered lobbyists and it is my belief that the AFL-CIO has hired entities that hire registered lobbyists or outside individuals who are registered lobbyists. I have on occasion provided counsel on legal questions related to issues of public policy to employees of the AFL-CIO who are registered lobbyists. This activity has constituted a very minor portion of my work. It is also possible that I have provided counsel on legal and policy questions to third parties retained by the AFL-CIO who are registered lobbyists although I cannot recall any such activity at this time.

17. One of the first orders of business for President Obama was to sign Executive Order 13490, "Ethics Commitments by Executive Branch Personnel." The President stated that he wanted to

ensure that lobbying entities and individuals associated with those entities should not be part of the revolving door access to the Executive Branch. As you are employed by and have had extensive ties to two entities and their affiliated entities that spend millions of dollars on lobbying each year in Washington, DC, please explain why you do not need a waiver from the Administration to be nominated to be a member of the Board of the NLRB?

Answer: I am not and have never been a registered lobbyist as that term is defined in the Executive Order nor have I engaged in activities that would require me to register as a lobbyist under the Lobbying Disclosure Act. As explained in my answers to questions 15 and 16, I have had very limited contact with registered lobbyists employed by or otherwise working for the AFL-CIO or SEIU. Pursuant to the Executive Order and my ethics agreement with the NLRB, if confirmed, I will not for a period of two years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including the AFL-CIO and SEIU, including regulations and contracts. In consultation with the NLRB's designated agency ethics officer and her staff and the Office of Government Ethics, I have determined that I can serve effectively on the NLRB without seeking a waiver of this requirement.

National Labor Relations Board Member Nominee: Craig Becker
Senate Committee on Health, Education, Labor and Pensions
July 30, 2009
Questions for the Record: Senator Roberts

1) Mr. Becker, please explain your position regarding the use of secret ballot elections for union organization and whether or not you believe private, secret ballot elections are a necessary component of a democratic process.

Answer: Under the NLRA as currently construed, employees can choose a representative either through a Board-supervised election or by otherwise demonstrating that a majority of employees wish to be represented by the representative. Both of those procedures have, under appropriate circumstances, been held to be consistent with the Act's protection of employees' free choice of a representative. However, an employer can generally decline to recognize a representative chosen by means other than a Board-supervised election. In addition, only an election can result in Board certification. The questions of whether the Board should be authorized to certify a representative based on evidence of majority support other than the results of an election and whether collective bargaining representatives should only be chosen in Board-supervised elections is a question appropriately addressed in Congress. In general, I believe private, secret ballot elections have been enormously important in advancing democratic values in a variety of arenas in this country and around the world. How effective secret ballot elections are in advancing democratic values depends on the procedures used to conduct the election, the rules governing the election, and the legal consequences that attach to its outcome. Because questions concerning the relative superiority of Board-supervised elections versus non-electoral evidence of majority support may arise before the Board, I do not believe it would be appropriate to address them further in this context.

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2) Please explain whether or not you believe workers should have a choice in whether or not to join a union.

Answer: I believe workers should have a choice of whether or not to join a union. Under current law, an employer cannot lawfully recognize a union as the exclusive representative of its employees unless a majority of eligible voters vote to be represented in a Board-supervised election or the union presents other reliable evidence of majority support. In addition, under current law, even if a union is lawfully recognized as the exclusive representative of employees in a unit, no employee in the unit can be required to join the union as a full member.

3) Please explain your position regarding the role and status of employers as a party to labor representation proceedings. On page 500 of the 1993 Minnesota Law Review article, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* you wrote, "employers should be stripped of any legally cognizable interest in their employees' election of representatives." Please explain whether or not you still hold this belief.

Answer: In my 1993 Minnesota Law Review article, I suggested that employers should not be afforded the status of parties in representation proceedings, but rather should be permitted to protect their legally cognizable interests, *i.e*., enforce those elements of the statue that Congress adopted to protect employers' interests, in a subsequent unfair labor practice case in which they would be afforded party status. I suggested that employers should remain free to express their views on the question of whether their employees should choose to be represented so long as employers did not require employees to listen to those views or face discipline up to termination and did not express their views in a manner that violated their own solicitation, distribution or access rules and thus discriminated against similar expressions of views. The suggestions in my 1993 Minnesota Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. Any such statements will not control my judgment on these questions if I become a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board should alter its existing practice in this regard is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

4) On page 586 of the Minnesota Law Review article listed in question three, you wrote, "the only parties to pre- and post-election hearings are employees and the unions seeking to represent them." Please explain whether or not you still hold this belief, and if so, why you believe employers should not be a party to pre- or post-election hearings.

Answer: Under current law, employees are not afforded party status in representation proceedings unless they are the petitioner even though they are the voters and the question at issue is whether they will be represented and, if so, by whom. In my 1993 Minnesota Law Review article, I suggested that employees were more appropriate parties in representation proceedings than employers and that employers should be permitted to protect their congressionally recognized interests in a subsequent unfair labor practice proceeding as explained in my answer to question 5. Please see may answers to questions 3 and 5.

5) On page 587 of the Minnesota Law Review article listed in question three, you wrote, "employers should have no right to be heard in either a representation case or an unfair labor practice case ... employers should have no right to raise questions concerning voter eligibility or campaign conduct." Please explain whether or not you still hold these beliefs, and if so, elaborate on why you believe employers should have no right to be heard in situations regarding union misconduct.

Answer: The language quoted from my 1993 Minnesota Law Review article is incomplete. In the paragraph proceeding the one including the quoted language, I

suggested that employers should be permitted to engage in a "technical refusal to bargain" in order to provoke an unfair labor practice charge and should be permitted, as parties to the unfair labor practice proceeding, to enforce those elements of the statute that Congress adopted to protect employers' interests. I suggested in the article that employers could refuse to bargain concerning supervisors, managers, confidential employees, and guards and defend against an unfair labor practice on the grounds that such individuals are excluded from bargaining units to protect employer interests. In addition, I suggested in the article that employers could argue in an unfair labor practice case that the composition of the unit limited their ability to reach agreement with the union. My suggestion was only that employers should not be able to enforce element of the statute that Congress did not adopt to protect employers' interests. Thus, the paragraph which includes the quoted language begins, "On these latter issues employers should have no right to be heard. . . ." The suggestions in my 1993 Minnesota Law Review article that employer were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The statements in the article will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that the Board should alter its existing practice in this regard is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

6) Please explain your position regarding intermittent, or grievance, strikes. On page 402 of the 1994 University of Chicago Law Review article, *Better Than a Strike: Protecting New Forms of Collective Work Stopages under the National Labor Relations Act,* you wrote, "Protecting repeated grievance strikes is fully in accord with the intent of the NLRA." Do you still hold the belief that the NLRB has the authority to protect repeated grievance strikes under the NLRA even though courts have held that these strikes are not protected under the Act?

Answer: The suggestion in my 1994 University of Chicago Law Review article that the Board should protect repeated strikes intended to remedy discrete grievances was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. I suggested that such protection was consistent with the Act, then existing Board and court precedent, and then existing Board General Counsel memoranda. I am not currently aware of any subsequent Board or court holdings rejecting the narrow suggestion advanced in my article. The statements in the article will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and if an argument that repeated strikes over discrete grievances are protected is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could

arise before the Board, I do not believe it would be appropriate to address them further in this context.

7) Please explain whether or not you believe repeated grievance strikes are a form of power for unions and provide leverage over employers in bargaining as compared to the traditional strike.

Answer: I suggested in my 1994 University of Chicago Law Review article that protecting repeated, short strikes over discrete grievances was consistent with the intent of the Act in several respects: it would insure that employer fulfill their legal duty to bargain in good faith concerning both the grievances and a collective bargaining agreement; it would shape the terms of agreements to correspond more closely with the genuine desires of employees; and it would minimize disruption of production (in comparison to a more typical, continuous strike). The suggestions in my 1994 University of Chicago Law Review article were made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The statements in the article will not control my judgment on these questions if I become a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I become a Member of the NLRB and an argument that repeated strikes over discrete grievances are protected is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

8) Please explain your position on whether or not employers should be required to provide unions with access to private property, such as the workplace, to distribute union organizing information and for union officials to meet with workers.

Answer: An employer is generally free under current Board law to permit union organizers onto its property to communicate with employees concerning representation. Under current Board law, an employer generally cannot discriminate against union organizers in relation to representatives of other third parties in granting access to the workplace to communicate with employees. Absent such discrimination, the Supreme Court held in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that the Act generally requires employers to grant union organizers access to their property to communicate with employees only when there are extraordinary barriers to communication with the employees off of the employer's premises. If I am confirmed as a Member of the NLRB and if an argument that the standards governing employers' exclusion of union organizers from the workplace could and should be altered, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

9) Please explain your view on whether or not employers should be barred from placing observers at union organizing polls to challenge ballots.

Answer: Please see my answers to questions 3, 4 and 5. The suggestion in my 1993 Minnesota Law Review that employers should not place observers at the polls during Board-supervised election was made as a scholar seeking to further meaningful and wide-ranging analysis of the law. The suggestions was part of my proposal, explained in my answers to questions 3, 4 and 5, that employees rather than employers should be afforded party status in representation proceedings and that employers should enforce those elements of the statute that Congress adopted to protect employers' interests in a subsequent unfair labor practice proceeding. Any such statements will not control my judgment on these questions if I am confirmed as a Member of the NLRB. I have no personal views that would prevent me from approaching this issue as a Board member with an open mind and without prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board should alter its existing practices relating to observers is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents.

10) Please explain what you consider to be a "captive audience" and what rights an employer has in explaining his or her opposition regarding union organization to his or her employees.

Answer: The term "captive audience" is used in the Board's jurisprudence as well as in the Supreme Court's First Amendment jurisprudence. It generally refers to an audience that is not free to choose whether or not to listen to speech. Under the Act, an employer is generally free to explain its opposition to union representation to its employees so long as the explanation does not contain a threat or promise of benefit. Section 8(c) of the Act provides that the expression of views shall not be evidence of an unfair labor practice so long as it does not contain a threat or promise of benefit. The Board has held that an employer may lawfully require all employees to attend meetings on work time to listen to the employer or the employer's representative explaining the employer's position on union representation. However, the Board has held that it is objectionable and grounds for overturning the results of an election for either party to address massed assemblies of employees during work time in the last 24 hours before an election.

11) Please explain what you consider unacceptable intimidation from both employers and union organizers.

Answer: Sections 8(a)(1) and 8(b)(1) of the Act, as amended, make it an unfair labor practice for employers and unions to restrain or coerce employees in the exercise of their section seven rights. Pursuant to its authority to oversee the representation election process, the Board has also held that employer and union conduct that does not rise to the level of an unfair labor practice may nevertheless be objectionable and grounds for overturning the results of an election. The Board and federal courts have developed an extensive jurisprudence applying these broad concepts to the vast variety

of facts that can arise in this context. Very generally, unacceptable intimidation under the Act includes discrimination in regard to terms and conditions of employment, physical violence, and threats of such discrimination or violence.

12) Please explain your view on workers' acceptable use of company email systems to promote union membership.

Answer: This is an area where the Board and federal courts are still actively engaged in applying traditional concepts governing employees' rights to communicate with one another about union representation to this relatively new form of workplace communication. Under well-established Board law, an employer cannot bar employees' union-related use of the employer's email system while permitting employees to use the system for other, non-work-related communications. In *Guard Publishing*, 351 NLRB No. 70 (2007), the Board held that the presumption upheld by the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) -- holding a nondiscriminatory ban on employee solicitation during non-work time extending to solicitation of support for a union presumptively unlawful -- did not apply to solicitation using an employer's email system. Because questions concerning the lawfulness of non-discriminatory prohibition of employee solicitation during non-work time extending to solicitation of support for a union could arise before the Board, I do not believe it would be appropriate to address them further in this context.

13) Please explain your position regarding the potential ability of the NLRB to rule that a company must recognize a union formed through a card check process, even if the card check provision of the Employee Free Choice Act fails to be enacted by Congress through the legislative process. Former NLRB Chairman William Gould has stated: "The board could develop new expertise based on new evidence and new facts and come to a different conclusion. In my judgment, yes, the board could issue such a ruling." Mr. Becker, please explain your views on whether or not, if such a case were to come before the NLRB, the board could in fact recognize a union formed through card check, even if Congress does not pass such majority sign-up legislation.

Answer: The so-called card check provision of the Employee Free Choice Act would, if adopted, permit the Board to certify a union as the exclusive representative of employees in an appropriate unit if a majority of employees in the unit signed cards authorizing the union to represent them. Section 9(c)(1) of the Act, as amended, provides that the Board can certify only the results of a Board-conducted election. If the Employee Free Choice Act is not adopted or the current Act otherwise amended, I do not believe the Board could certify a union as the exclusive representative of employees absent a Board-supervised election.

14) Please explain your position on the ability of the NLRB to shorten the time period for union elections, absent legislative action from Congress.

Answer: The Act is currently silent on the time period within which the Board must conduct an election pursuant to a petition satisfying the criteria set forth in section 9(c)(1). The Board has broad discretion in the conduct of elections. The Board could, for example, adopt procedures to expedite the processing of petitions and the conduct of any pre-election hearings in order to shorten the time period between petition and election. The Board could also, for example, impose internal deadlines on its Regional Directors for the processing of petitions, the holding of any pre-election hearing, the issuance of a decision and direction of election, or the actual conduct of the election.

15) Please explain your position on how to determine if an individual is considered a "supervisor" in relation to the National Labor Relations Act. Please elaborate on how individuals in a gray area between management and labor should be allowed to unionize.

Answer: Section 2(11) of the Act defines the term supervisor. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court upheld the Board's conclusion that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. In each case in which supervisory status is alleged, the Board must determine if the party asserting supervisory status has carried the burden of proving each element of the definition contained in section 2(11). The Act allows supervisors to join and form unions. However, because supervisors are excluded from the definition of the statutory term employee, they are not protected by the Act if they do so.

16) Please explain your position regarding the collective bargaining standards for local and state public safety personnel. Do you believe local jurisdictions are in the most advantageous position to make these determinations based on the relationships between local government and emergency personnel, or should a federal standard be applied across the country?

Answer: The definition of the term employer as used in the NLRA excludes states and political subdivisions thereof. Local and state public safety personnel are thus not covered by the NLRA. Whether the Act should be amended to cover such personnel or whether other federal legislation should be adopted which would in any way regulate state and local public safety labor relations is a question appropriately addressed by Congress.

Answers to Questions for Mr. Craig Becker
Nominee to be Board Member of the National Labor Relations Board
Senator Pat Roberts
October 6, 2009

1. Do you perform work for and/or provide advice to ACORN or ACORN-affiliated groups while employed by your current employers or on a volunteer basis? Did you perform such work in prior positions? Please describe the nature of that work.

Answer: No to both questions.

2. Have you ever met with or spoke to Mr. Wade Rathke or members of his immediate family or work? Have you worked with and/or provided advice to Mr. Rathke or Service Employees International Union (SEIU) Locals 880 or 100 or their officials/members?

Answer: I am not certain whether I have ever met or spoken with Mr. Rathke, but if I have I believe it would have been on a casual, unplanned, nonprofessional basis. I have not to the best of my knowledge met or spoken with members of his immediate family. I have never worked with or provided advice to SEIU Local 100 or its officials or members. I have worked with and provided advice to SEIU Local 880 (now merged with two other locals into SEIU Healthcare Illinois-Indiana) and its members when they were working in concert with SEIU. I have worked with officials of Local 880, but never provided them advice as individuals.

3. Mr. Rathke has noted your success in crafting and executing legal strategies for SEIU throughout your career. He has stated, "For my money Craig's signal contribution has been his work in crafting and executing the legal strategies and protections which have allowed the effective organization of informal workers, and by this I mean home health care workers, under the protection of the National Labor Relations Act. His role was often behind the scenes devising the strategy with the organizer and lawyers, writing the briefs for others to file, and putting all of the pieces together, but he was the go-to-guy on all of this." http://chieforganizer.org/2009/04/30/becker-to-the-nlrb/ . What specific legal strategies was he referencing? Please provide a copy of all briefs you authored in this area as referenced by Mr. Rathke.

Answer: I am not certain what Mr. Rathke was referring to in the quoted statement. The protection of home health care workers under the National Labor Relations is well established if they are employed by a private agency. Mr. Rathke might have been referring to several briefs I have written concerning the coverage of home health care workers under the Fair Labor Standards Act. The most recent brief I wrote in that area was in the case of Long Island Care at Home, Inc. v. Coke, 551 U.S. 158 (2007). A copy is enclosed. Mr. Rathke might also have been referring to counsel I have provided to SEIU concerning the Union's efforts to assist home care workers employed in a variety of publicly funded programs to organize and engage in collective bargaining under state law. In many states, the employment status of such workers has been uncertain because the duties and obligations of employers are split among several parties with

respect to these workers. Often the state or other public entity sets the hourly wage and the hours of work of the home care workers, but the consumers whom they care for hire, supervise and can terminate the workers. As a result, there have been conflicting decisions under a variety of labor and employment laws in various states concerning which entities had which obligations under those laws (for example, to insure compliance with wage and hour law, to pay unemployment insurance, to obtain workers' compensation insurance, and to engage in collective bargaining if the workers duly select a representative). I have provided advice and counsel to SEIU (and in some cases to local labor organizations affiliated with SEIU and working in concert with SEIU) in relation to its efforts to assist such homecare workers who wanted to organize to do so and to obtain recognition for their chosen representative from the state or other public entity which could engage in meaningful bargaining with the homecare workers about the terms of their employment.

4. The Kansas Departments on Aging and Social and Rehabilitation Services have used state funds and taxpayer dollars to gather the names, addresses and telephone numbers of healthcare workers for SEIU. These state agencies sent letters on department letterhead and specifically stated the information would be given to the SEIU. Were you in any way involved in this program with SEIU or aware of its existence in Kansas or any other state? If yes, please provide all briefs and other materials you prepared or reviewed in this effort.

Answer: I have no knowledge of any such use of state funds or taxpayer dollars by the State of Kansas. I have no knowledge of any letters sent by Kansas state agencies of the nature described in your question.

At various time in 2007 and until the middle of 2008, I provided advice and counsel to SEIU, which was working in concert with SEIU Healthcare Illinois-Indiana, in relation to their efforts to assist home healthcare worker in Kansas to organize and obtain representation. I do not believe I communicated in any manner with state official or employees in Kansas and I never traveled to the state. I prepared no briefs related to this matter and cannot provide any other materials that I prepared or reviewed without violating my obligations to maintain client confidences and the attorney-client privilege

I have provided advice and counsel to SEIU and in some cases local labor organizations affiliated with SEIU and working in concert with SEIU in relation to their efforts to assist such homecare workers who wanted to organize to do so as described in my answer to question 3.