

NOMINATION OF HAROLD CRAIG BECKER

HEARING
OF THE
COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS
SECOND SESSION
ON
NOMINATION OF HAROLD CRAIG BECKER, OF ILLINOIS, TO BE A
MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

FEBRUARY 2, 2010

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NOMINATION OF HAROLD CRAIG BECKER

TUESDAY, FEBRUARY 2, 2010

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

The committee met, pursuant to notice, at 4:00 p.m., in Room SD-430, Dirksen Senate Office Building, Hon. Tom Harkin, Chairman of the committee, presiding.

Present: Senators Harkin, Brown, Casey, Merkley, Franken, Isakson, McCain and Hatch.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Committee for Health, Education, Labor, and Pensions will come to order.

We are here today to take the rather unusual step of holding a hearing on a nominee for the National Labor Relations Board. It has not been the standard practice of this committee to hold hearings on NLRB nominations. For the past 25 years, we have confirmed 28 new members to the Board; we have held only one hearing in that time, and that was for the Chairman in 1993. We have not had a hearing on a nominee to serve as a regular Board member since 1980, three decades ago.

However, my colleagues on the other side of the aisle have requested a hearing. And while I am reluctant to further prolong the consideration of an obviously well-qualified nominee, I was willing to bend over backwards to accommodate that request, because I think the work of the NLRB is tremendously important and deserves this committee's attention.

The NLRB is a small agency, but its mission is a large one, to "encourage the practice and procedure of collective bargaining and protect the exercise by workers of full freedom of association." In today's challenging economy, these rights are more important than ever.

When the economy is bad, workers are insecure, and more vulnerable to abuse. It becomes much harder for them to join together to insist on fair treatment. It becomes much riskier to speak out about unsafe working conditions, it becomes an act of real bravery for a worker to stand up and say, "We deserve to be treated with fairness, and decency, and respect."

Well, American workers have the right to do, and say, all of these things because they are protected by the National Labor Relations Act. Even for the majority of workers who may never hold a union card, just having these rights available is an invaluable deterrent against abuse.

But the system only works if there is a strong NLRB to enforce these rights. I made no secret of the fact that I have been troubled by some aspects of the recent Board's performance. In recent years, the Board doesn't seem to be doing all it can to inform workers of their rights, or to assess appropriate penalties for repeat violators of our labor laws.

I'm also concerned with the excessive delays of the Board. Justice delayed is justice denied, and all too often these delays mean there is no real penalty for violating workers' rights. We have a five-member Board, there's only two members there now, and they can't get the job done.

So, I think it's a serious challenge to restore the balance, to revitalize the core mission of this Agency, which I just quoted.

I am confident that Mr. Becker can be an important part of that effort. Craig Becker is one of the pre-eminent labor law thinkers in the United States and, I might add, a proud son of the State of Iowa. He has taught labor law at some of our finest law schools, including Georgetown, UCLA, and the University of Chicago, he has authored numerous articles on labor and employment issues.

Mr. Becker is also a skilled litigator who has advocated for workers' interests in the highest courts of the land, arguing cases in virtually every Federal Court of Appeals, and before the U.S. Supreme Court.

I have met with Mr. Becker, I have spoken with him at length, and I can say with great confidence he will be an invaluable addition to the National Labor Relations Board. He's an expert on the law, he knows the Board, he brings a tremendous depth of experience to this important position.

Despite Mr. Becker's superb qualifications for the Board, some of my colleagues have expressed concern about his nomination. Much of this concern, it seems to me, is focused on Mr. Becker's academic writings. As an academic, Mr. Becker has written extensively on a variety of legal topics. I can't say I've read them all, but I've read some.

He has taken a critical approach to existing law. There's nothing wrong with that—I do that myself. But that's what academics are supposed to do; to contribute to the marketplace of ideas.

Mr. Becker made clear in his responses to this committee's written questions that he understands and respects the distinction between his current role as an intellectual advocate and the role he would play on the Board as an impartial adjudicator. He is fully aware of what his duty as a member of the Board would be.

Some other critics seem to object to Mr. Becker simply because he was a union lawyer—a union lawyer—and I might add, a pretty darn good one. This is hardly cause for concern for a Board member. Most labor lawyers devote their careers either to representing unions and workers or to representing management. And we, on this committee, have confirmed Board members with both union side and management side backgrounds in the past without any great cause for concern.

As with these past members, I'm confident that Mr. Becker will approach the job with an impartial and open mind. There is no question that Mr. Becker has been thoroughly vetted for this position. He has met personally with any Senator who has requested

it. He has answered more than 280 written questions from this committee, the members; more questions than were even asked of Justice Sotomayor, I'm told.

Everyone on the committee has had ample time to review his record and his responses. So, I hope that today's hearing will bring us to the end of this lengthy process, that we can move quickly to confirm Mr. Becker's nomination and let him start his important work.

I will yield now to Senator Isakson for his opening statement.

STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Well, thank you very much, Chairman Harkin. Welcome, Mr. Becker. I enjoyed talking to you in our office, I appreciate your being here today. And I would like to ask unanimous consent that the full statement of Ranking Member Mike Enzi from Wyoming be submitted for the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

I'd like to thank Chairman Harkin for calling this hearing today. As my colleagues know, Mr. Craig Becker is nominated to serve as a member of the National Labor Relations Board. I would also like to thank Chairman Harkin for holding a confirmation hearing prior to a committee vote on this nominee. But I am concerned that the Majority has scheduled a vote on Mr. Becker for Thursday. Typically, under regular order in this committee, we have a 10-day period following a nomination hearing to review what we've learned, and to ask follow-up questions. It is unfortunate that we will not have that opportunity with this nominee. There will be testimony from this hearing and follow-up questions that could help inform our decision on this nominee, but this committee's review will unfortunately be incomplete because of the haste taken in moving to a mark-up.

Serious concerns have been raised by HELP Committee members and the employer community about Mr. Becker's writings—particularly the potential for radical changes in labor law he has advocated, and argued can be implemented, without congressional authorization. I sincerely hope that Mr. Becker will speak to this concern in today's testimony and in follow-up questions as well.

Some will argue that Senators on this committee should accept vague assurance that a nominee will follow precedent and the law, and that the nominee respects the legal rights of employers and individual union members. But I will be looking for specific assurances with respect to specific statutes and regarding specific limits on the Board's authority. I say that upon examination of the current situation at the National Mediation Board (NMB).

Last year, the HELP Committee confirmed two nominees at the National Mediation Board who promised the committee one thing and acted in direct contradiction to their promises almost immediately upon assuming office. I certainly don't want to hold this nominee accountable for the actions of others, but going forward I trust this committee will be vigilant in holding nominees account-

able for their testimony, as we carry out our oversight responsibilities.

Mr. Chairman, independent boards such as the National Labor Relations Board are entrusted with a great deal of autonomy. The decisions they hand down and the regulations they enforce control a very significant portion of our economy, and our Nation's jobs. In the Senate, it is our responsibility to determine if these nominees can be entrusted with this power, or if they would compromise fairness to grant favors to special interest groups and former employers.

I want to raise my concern today that Mr. Becker's ethics disclosure paperwork has not been updated with the Office of Government Ethics since July 2009 as far as I am aware. The career professionals at the Office of Government Ethics and the National Labor Relations Board should determine whether his financial interests have changed since then. His paperwork also needs further review to determine if he has worked on additional matters since last July that could subject him to added recusals, if confirmed. The Administration has pledged its support for transparency and accountability, and I, therefore, question why this committee is rushing this nominee through without the regular review. With any nominee, it is important before we hold any vote in committee that all paperwork is completed.

Finally, Mr. Chairman, I also want to register my concern with hastily moving controversial nominees before the seating of Senator-Elect Scott Brown. Yesterday, the Senate invoked cloture on DOL Solicitor Nominee Patricia Smith, by a vote of 60-32, a nominee who was voted out of committee on a straight party line vote. I have been supportive of nearly all of the nominees who have come before this committee and I have worked hard with the Chairman to swiftly confirm these nominees and put them in place. But the Senate has an important responsibility of advice and consent. It is my view that this committee should refrain from jamming through nominees along party lines, and should not report out nominees before the seating of the new Senator. I urge this Administration to find qualified nominees who will enjoy broad support across party lines in the Senate. And, I commit to doing my part in helping to see that this happens in the upcoming year.

I thank the Chairman for holding this hearing and I join him in welcoming Mr. Becker here today.

Senator ISAKSON. I am standing in for Senator Enzi today as Ranking Member as he has another commitment.

The five-member NLRB supervises union elections, investigates labor practices and most importantly, issues rulings that interpret the National Labor Relations Act. Currently, the Board has two Commissioners—one Democrat and one Republican.

The NLRB oversees a delicate balance of current law and on organizing provides advantages and restrictions for both sides.

Mr. Becker, as mentioned by the chairman, is currently Associate General Counsel to both the AFL-CIO and the Service Employee's International Union. So, it is appropriate, to be sure, that the answer to the question of the willingness to maintain a balance when casting the deciding vote.

Just yesterday, the committee received two letters in opposition to Mr. Becker's nomination; one from 23 major trade associations representing millions of American employers, another from 600 manufacturers nationwide, and I would ask unanimous consent those letters be submitted for the record.

The CHAIRMAN. Without objection.

[The information referred to can be found in Additional Material.]

Senator ISAKSON. Thank you, Mr. Chairman.

All of the members of this committee are aware that Congress is currently considering legislation known as the Employee Free Choice Act, which would essentially end the practice of secret ballot process in union elections. Some have expressed concerns that Mr. Becker's past writings have indicated a belief that the NLRB has the authority to make some of the dramatic changes included in the Card Check bill without congressional action.

I recently questioned Mr. Becker when he was kind enough to come to my office, and I questioned him in writing, as well, about this important matter. I asked him if he would attempt to certify a union even if no secret ballot election had occurred. He replied that he understood that the Board can only certify the results of a Board-conducted election. And I would appreciate his reconfirming that statement that he made to me in that private meeting today.

Mr. Becker has also advocated a new body of campaign rules that would severely limit the ability of employers to voice their opinion on unionization. He has argued that a meeting an employer holds that involves captive audience ought to be grounds for overturning an election. If an employer wants to distribute leaflets that oppose the union, for example, Mr. Becker said, it must allow the union access to its private property to do the same. But Mr. Becker has assured me that these comments as said by the Chairman were scholarly writings, made as a scholar, seeking to further meaningful and wide-ranging analysis of the law.

He went on to say that any such statements will not control his judgment on these questions if he's confirmed as the member of the NLRB.

I raised that question to make this point. Last year we confirmed two nominees to the National Mediation Board on this committee. Both of those nominees I questioned at length over the question of organizing in the aviation industry. The National Mediation Board oversees those elections, and for 75 years, union recognition required a majority vote of all of the employees in the company. Now the new Democrat NMB is seeking to change the rule to a majority of those voting, which as anybody in this room could tell, is a significant sea change in the delicate balance between management and labor.

I questioned both of those nominees on their disposition toward that issue and both assured me that they'd not rush to judgment. Yet, within weeks of their confirmation they—as a majority of two on the three member board—brought forward a rule which is now pending, that will change a 75-year-old practice so that an airline—Delta Airlines, for example, that acquired Northwest—which has a union shop in terms of the flight attendants at Northwest, non-

union at Delta—now a 75-year-old rule is going to be changed by this majority who said they'd give it time to think about it and investigate it. So, if the turnout was 10 percent, 6 percent of a unit could permanently unionize the entire unit.

That's why it is so important for me to have assurances from Mr. Becker as to the approach he's going to take on the critical questions he'll have before him in the not-too-distant future.

So, Mr. Becker, I welcome you to be here today, I hope you'll take the time to answer those two questions, and Mr. Chairman, I thank you for the time to ask them.

The CHAIRMAN. Thank you very much, Senator Isakson.

Harold Craig Becker has been an Associate General for the Service Employees International Union since 1990, also staff counsel for the AFL-CIO since 2004. As I mentioned earlier, a native Iowan, Mr. Becker graduated from Iowa City West High School before going on to Yale University and Yale Law School. Now, wait a second, maybe I have some doubts, now.

[Laughter.]

The CHAIRMAN. No, I'm just kidding. Just kidding about Yale, that's all.

He has since taught labor law at UCLA, University of Chicago and Georgetown Law Schools, he has published numerous articles on labor and employment law in scholarly journals, including the Harvard Law Review and the Chicago Law Review, as I mentioned earlier, has argued labor and employment cases in virtually every Federal Court of Appeals and before the U.S. Supreme Court. He and his wife, Amy Stanley, have two sons, Thomas, 18, and Isaac, 16.

Mr. Becker, welcome to the committee. Your statement will be made a part of the record in its entirety. I was going to ask you to sum it up, but it's a fairly short statement, so please proceed as you so desire.

STATEMENT OF HAROLD CRAIG BECKER, ASSOCIATE GENERAL COUNSEL, THE SERVICE EMPLOYEES INTERNATIONAL UNION AND THE AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS, CHICAGO, IL

Mr. BECKER. Thank you Chairman Harkin, Ranking Member Isakson, and members of the committee. It is a great honor to appear before you today.

I'd like to thank my wife, Amy Dru Stanley, and my two sons, Tom and Isaac, not only for being here today but for their willingness to uproot their happy lives on the South Side of Chicago.

In addition, I would like to thank my parents, Sam and Ruth Becker. My parents instilled in me some of the core values that I hope to carry with me into my service on the Board, should I be confirmed. My mother fled the terror of Nazi Germany. She came to this country and became a nurse. From her, I gained a profound appreciation for the liberties that we enjoy—of speech, of belief, and of association—and of the security I might otherwise have taken for granted growing up, as the Chairman has indicated, among the rolling corn fields of Iowa.

My father grew up playing along the banks of the Mississippi River in Quincy, IL. He fought for our country in the Pacific during

World War II. He came back to college on the G.I. Bill, and became a beloved teacher at the University of Iowa. From my father I learned the value of hard work and the importance of respecting all points of view, no matter how different from my own. From both my parents, I learned a reverence for country and a desire to serve it.

When I was growing up, my father used to tell me stories about growing up just up the stairs from his father's shoe repair shop. My grandfather came to this country from Poland on a steamship with nothing but what was in his pockets. He somehow made his way from New York to Quincy, and there he scraped together the money to start his own shop, the Star Shoe Repair. For my father's family, the shop represented the American dream. And my grandfather in one person, embodied the vital, creative, and productive forces that American labor law seeks to knit together in harmony.

On the one hand he was an entrepreneur. He staked everything on his shoe shop and he was always dependent on being able to satisfy his customers. On the other hand, he was a worker—bent over his bench, hammer in hand, proud of his craft. I still have one of the iron shoe casts from his shop, and I keep it on my shelf to remind me where I come from.

I have devoted my entire professional career to teaching and practicing in the area of labor and employment law. I have represented not only unions but individual employees in diverse trades and professions—prison guards to retail clerks, hospital administrators to home-care workers, before the Board and courts ranging from the courts of common pleas to the U.S. Supreme Court.

I have had the luxury of debating the big questions of labor and employment law with my students and colleagues at a number of law schools in attempting to contribute to the robust debate which is the hallmark of our system of higher education.

As an attorney, I have sat across the table from management and sometimes on the same side of the table as management. I've learned to appreciate the concerns of employers, and often been able to find common ground between labor and management.

It is humbling to sit before you and contemplate serving on the National Labor Relations Board, an institution that—for 75 years this year—has defended the rights of working Americans. During the course of my almost three decades of practice, I have had the opportunity to work with the Board's staff at almost every level. I have participated in representation cases, been present when the ballot boxes were opened and at that often tense moment when the tally is announced.

I have represented both sides in unfair labor practice cases, I've appeared before the Board, I've sat with the Board's counsel and across the courtroom from the Board's counsel in many Courts of Appeals. In every instance, my understanding of labor law has been enriched by the Board's staff. And I would be remiss today if I did not underscore the professionalism and dedication of the current chairman Liebman and member Schaumber. It would be an honor to serve with them.

Finally, should I be confirmed, I want to pledge today that I will remain faithful to the will of Congress. Like other members of the labor bar—both labor and management side who have served on

the Board and applied the law impartially and fairly—if confirmed, I will do the same.

Although the labor relations bar is a divided one, I look forward—if given the opportunity—to rising above partisanship to serve a higher purpose, which is the fair and impartial application of the law. I fully understand that my decision, should I be confirmed to be a member of the Board—unlike the musings of a scholar—will have important, immediate, and concrete implications for labor, for management, and for the general public.

In sum, I understand that, if confirmed, I will have a duty to implement the intent of Congress as expressed in the law, to consider impartially all views expressed to the Board, to deliberate with my fellow Board Members, and to adjudicate cases based on the facts presented and the law. That is exactly what I pledge to do, if confirmed.

I thank you for the opportunity to give these opening remarks and I look forward to your questions.

[The prepared statement of Mr. Becker follows:]

PREPARED STATEMENT OF HAROLD CRAIG BECKER

Thank you Chairman Harkin, Senator Enzi, and members of the committee. It is a great honor to appear before you today as well as to be considered to be a member of the National Labor Relations Board.

I am joined here by my wife, Amy Dru Stanley, and two sons, Tom and Isaac Stanley-Becker. I would like to thank them not only for being here today but also for their willingness to uproot their lives on the South Side of Chicago.

I would also like to thank my parents, Sam and Ruth Becker. My parents instilled in me many of the core values that I will carry into my work at the Board, should I be confirmed. My mother, who is no longer with us, fled the terror of Nazi Germany as a young girl, and later became a nurse in the United States. From her, I gained a profound appreciation for the liberties we enjoy in this Nation—of speech, of belief, and of association—as well as a vivid awareness of the security I might otherwise have taken for granted growing up amidst the rolling corn fields of Iowa. My father, who cannot be with us today, played on the banks of the Mississippi as a boy in Quincy, IL, fought for our country in the Pacific during World War II, returned to college on the G.I. Bill, and became a beloved teacher at the University of Iowa. From him, I learned the value of hard work and the imperative of respecting the views of others—no matter how different from my own. From both my parents, I learned a reverence for our country and a desire to serve it.

My father often told me stories of growing up just up the stairs from his father's shoe repair shop. My grandfather came to America on a steamship from Poland. A young man with nothing but what was in his pockets, he made his way from New York to Quincy, and there somehow scraped together the money to start his own shop—Star Shoe Repair. For my father's family, the shoe shop represented the American dream. And my grandfather embodied the vital, creative, and productive forces that our Nation's Federal labor law seeks to bind together in harmony. My grandfather was an entrepreneur—staking everything on his shop and ever dependent on his customers to stay in business. Simultaneously, he was a worker—bent over his bench with hammer in hand, proud of his craft. I keep one of the iron shoe casts from his shop on my shelf to remind me of where I come from.

I have devoted my entire professional career to teaching and practicing labor and employment law. I have represented not simply unions but also individual employees, belonging to no labor organization, in diverse trades and professions—from prison guards to retail clerks, from hospital administrators to home-care workers. I have appeared before both the Board and in courts ranging from county courts of common pleas to the U.S. Supreme Court. I have debated central questions of labor law with colleagues and students at Georgetown University, the University of California at Los Angeles and the University of Chicago School of Law. As a scholar, I have had the opportunity to reflect on the broad sweep of the law and join in robust, open, and provocative dialogue, which is the lifeblood of the American system of higher education. As an attorney, I have sat across the table from management and also on the same side of the table, in both postures gaining an understanding of employers' concerns and often finding common ground between labor

and management. It is this range of experience that, should I be confirmed, I will draw on in collaborating with my fellow Board Members to fairly, efficiently and faithfully apply the law.

It is humbling to contemplate serving on the National Labor Relations Board, an institution that has protected the rights of working Americans for 75 years. In my practice, over the course of almost three decades, I have had the opportunity to work with the Board's staff at almost every level. I have participated in representation cases and I have been present when ballot boxes were opened and at the charged moment when the vote tally is announced. I have met with General Counsels—nominated by Presidents from both parties—to discuss whether complaints should issue. I have represented parties on both sides of unfair labor practice cases, argued before the Board itself, and appeared alongside the Board's counsel and across the courtroom from the Board counsel in the U.S. Courts of Appeal. In every instance, my understanding of the law has been enhanced by the Board's highly skilled staff, who are committed to the purposes of the act. And I would be remiss if I did not underscore the dedication and professionalism of current Chairman Liebman and Member Schaumber, particularly during the last 2 years when they have continued to perform the work of the Board while the other three seats on the Board remain vacant. It would be an honor to serve with them and work with the entire staff of the Board and its General Counsel.

Finally, should I be confirmed, I will always remain faithful to the will of Congress. Like other members of both the labor and management bars who have served on the Board and applied the law impartially and fairly, I will do the same. Although the labor relations bar tends to be a divided one, I embrace the opportunity, should I become a member of the Board, to transcend the adversarial process in order to serve a larger purpose—the fair and faithful enforcement of the law. I fully understand that, if confirmed, I will occupy a position far different from the positions I have occupied as a scholar, teacher, and advocate. I fully understand that, if confirmed, my decisions, unlike the views of a scholar, will have practical, concrete, and important consequences for labor, management and the public at-large. In sum, I fully understand that, if confirmed, I will have a duty to implement the intent of Congress as expressed in the law, to consider impartially all views appropriately expressed to the Board, to deliberate with my fellow Board Members, to use the wealth of knowledge and experience possessed by the Board's career staff, and to decide cases fairly based on the relevant facts and applicable law. That is exactly what I pledge to do, should I be confirmed.

Thank you for the opportunity to offer these opening remarks. I welcome your questions.

The CHAIRMAN. Mr. Becker, thank you very, very much for that statement. We'll open a round of 5-minute questions.

Mr. Becker, right off the bat, here, some of your critics have suggested that you are coming to the Board with an agenda, and that you intend to implement Card Check, administratively, requiring the Board to certify a union as employees collective bargaining representative on the basis of signed authorization cards, rather than a secret ballot election.

Now, I have noted in your responses to written questions for the record from my Republican colleagues that you have refuted this claim multiple times, explaining that the Card Check process proposed in the Employee Free Choice Act would require an act of Congress. Can you provide more detail on how the National Labor Relations Act constrains the Board's ability to implement the Card Check certification process administratively?

Mr. BECKER. Well, thank you for the opportunity to address that question, Senator Harkin.

The reason the Employee Free Choice Act has been introduced in Congress and the reason that question is before the Congress and not the Board is that the current act clearly precludes certification in the absence of a secret ballot election. Section 9 of the Act, in two distinct ways, makes clear that Congress has intended that a secret ballot election be preconditioned for certification of the union as a representative of a unit of employees. First, it so

provides explicitly—that is, it provides that the Board shall certify the results of a secret ballot election.

Moreover, it provides that employers—should they be confronted with a demand for recognition based on evidence of majority support, for example, by signed authorization cards—may petition for a secret ballot election.

So, the law is clear that the decision as to whether an alternative route to certification should be created rests with Congress, not with the Board.

The CHAIRMAN. Thank you very much, Mr. Becker. I don't think I could have been any clearer than that. That's the only question I have for this round, I would yield to Senator Isakson.

Senator ISAKSON. Thank you, Mr. Chairman.

Well, on that question—because it is raised, as you are well aware—and it's my understanding from the information I have that a gentleman by the name of Demetri Eglesian—are you familiar with Mr. Eglesian?

Mr. BECKER. I know that he is a lawyer in Seattle, yes.

Senator ISAKSON. He is an attorney—I do not know him—who represented the AFL-CIO and wrote that,

“Mr. Becker would make it easier for workers to unionize based on a card check showing a majority of support for the EFCA, Employee Free Choice Act, would.”

So, this statement that he has written just implies, pretty explicitly, what the Chairman just asked you and you responded to, so I take it your affirmation of his question is a rejection of that quote I just read?

Mr. BECKER. That's absolutely correct, Senator Isakson.

Senator ISAKSON. And the other gentleman was a Mr. Gould, who has made a similar—although not quite as direct—comment as before.

Second question—I mentioned to you the Delta Airlines issue, and I hate to bring up a specific issue, but it's timely and it's appropriate, and it comes on the heels of a confirmation where the questions were asked of the potential nominees. That's why, you should not take the questions of whether a statement is a reflection of your thought to be accurate or not to an insult to your intelligence, rather a need for the committee to know there's going to be an even-handed approach in terms of the issues that have come before it.

But on that question—that is a 75-year precedent in labor law that has served the aviation industry with little or no reservation that summarily on the act of two members of a three-member board has been put up for a comment to change within 60 days. You can see the tremendous magnitude that type of an action on behalf of a board that's supposed to be a mediator, instead, becomes an activist, can bring to industry. I would think you would understand that point.

Mr. BECKER. Yes, I do, Senator Isakson.

Senator ISAKSON. Well, that's the reason for that concern.

And last, in the past you've stated the NLRB is not required to, “Permit the employer to be an active participant either favoring, opposing, or even obstructing such an election,” referring to union elections. Does this mean that you favor the NLRB limiting em-

employers' involvement in the election process as it currently operates?

Mr. BECKER. Well, again, I thank you for giving me the opportunity to address that question, because I know that's been a concern of many interested parties.

When I was a teacher and a scholar, I wrote an extended article, and the purpose of the article was to step back and address the history of Board regulation of union elections—how it evolved over time from 1935 to the point that I wrote that article—and it was an attempt to contribute to a scholarly debate, and ask questions about the regulation of union elections. It asked questions about who the appropriate parties were, to the adjudication process, and what the role of those parties should be. It was intended to be provocative and ask fundamental questions in order for scholars and others to re-evaluate.

I would suggest that that article is addressed to Congress. It asks questions about how labor relations should be governed, what the role of the parties should be. The current law clearly provides a right to employers to express their view—not only the National Labor Relations Act, but the first amendment to the United States Constitution. It's clear that employers have a legitimate interest and have a right, which is indisputable, to express their views on the question of whether their employees should unionize.

So, nothing in that article—if that's what you're referring to—or others of my writing should be construed to suggest that, in any way, I think that employers don't have a right to freely express their views on the question of unionization.

Senator ISAKSON. Summarily put, do you completely respect Congress' authority in terms of writing the labor laws of the United States, and Congress should completely respect the ability of scholars to challenge and discuss—in an academic environment—the application of those laws?

Mr. BECKER. That is absolutely correct, Senator. I understand that there's a different role that I will have than the one I played as a scholar, and I respect that part of that role is to respect the will of Congress.

Senator ISAKSON. Thank you, Mr. Becker.

The CHAIRMAN. Thank you.

Senator Brown.

STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Mr. Chairman.

I just have one question, Mr. Becker. In your opening statement you mentioned you sat with both sides of the table in labor law cases. Based on those experiences, talk to us about how that's instructed and informed your thinking on conflicts—when conflicts between labor and management are involved?

Mr. BECKER. I think one of the very important differences between being a scholar and a practitioner, and I think one of the values of having been both, is that when you're a practitioner engaged in the practice of labor law, you're engaged on a daily basis with employers. It's very different than sitting in your office in the ivory tower. Every day, in order to be a good advocate, you have to understand not only the rights, but the interests of the other

side. You can't be a good labor lawyer without understanding that there's very sound arguments on the other side, and very powerful and legitimate interests on the other side.

I've practiced both employment law—representing individual workers—and labor law. And in litigation, as we all know, most cases end in settlement. So, in most instances, you're reaching an amicable resolution with the employer; you're reaching an accommodation, you're working out the problem.

The same is true in collective bargaining. In most instances, bargaining ends in agreement. The two sides recognize each others' interests, they compromise, they reach an accommodation.

So, I think the practice of labor law—unlike the teaching of labor law—that daily contact, and that need to understand the legitimate rights and interests of the other side—is enriching.

One of the things that I'm most proud of is that while there has been opposition expressed by the business community to my nomination, many of the management lawyers who I've actually worked with for an extended period of time in Chicago, have written to the Senate expressing their confidence in my ability to be impartial. And my ability to be a problem solver.

That experience has enriched me, and I hope will benefit me, should I be confirmed to the Board.

Senator BROWN. Do you, from looking at NLRB decisions over the years, that—you did not use the word empathy, but you suggest that you at least understand the position of the other side, and you understand their interests and their views and their beliefs, which is, I guess, a fairly good definition of empathy. Do you think that members of the NLRB in the past—is that typically a feeling they have? That people understand that—that members of the NLRB really do understand both sides as they make those decisions? And, so how do you get there?

Mr. BECKER. Well, I think the role of a member of the Board—like the role of a judge—starts not with empathy, but with the facts and with the law. I do think that experience is important in order to understand the facts. That is, if you've sat across the table from employers and really grappled with their problems and tried to find a solution which is acceptable to both sides, if you've sat next to an employee who's been terminated, who's been denied a promotion and really understood what that means to them and how that occurred, I think that experience does enrich your ability to understand the evidence and the facts presented.

I'm not sure I would use the word empathy, but I would say that a broad and diverse experience that the members of the National Labor Relations Board should have—and I would bring one set of experiences, the two sitting members bring different experiences, and my two colleagues who have also been nominated bring a different set of experiences—those experiences will inform our ability to fairly adjudicate the facts and apply the law.

Senator BROWN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator McCain.

STATEMENT OF SENATOR MCCAIN

Senator MCCAIN. Thank you, Mr. Chairman.

I would ask to be included in the record, the letters from the National Association of Manufacturers—the Nation's largest industrial trade organization, including a letter with some 600 companies around the country, the NFIB and others who have all weighed in heavily against Mr. Becker's confirmation.

The CHAIRMAN. Without objection, but you didn't mean 600 letters, did you?

Senator MCCAIN. Six hundred organizations have signed the letter.

The CHAIRMAN. Signed off.

[The information previously referred to can be found in Additional Material.]

Senator MCCAIN. Mr. Becker, do you or did you perform work for and provide advice to ACORN, or ACORN-affiliated groups while employed by your current employers or on a volunteer basis?

Mr. BECKER. Senator McCain, I have never done so.

Senator MCCAIN. Never done that?

Have you discussed labor law or SEIU efforts to organize or obtain collective bargaining rights for 37,000 home health-care workers with former Governor Blagojevich or any members of his staff?

Mr. BECKER. I have—while I was in practice in Illinois, I represented and provided counsel to one of the SEIU locals in Illinois. Which, for a long period of time—long preceding the Blagojevich administration—had been working to organize home-care workers.

When the Governor was elected, I did have discussions with members of his staff, and on one occasion I did have a discussion in which the Governor was involved.

Senator MCCAIN. And what were your recommendations?

Mr. BECKER. My discussion with the members of the Governor's staff and with the Governor had to do with technicalities of the drafting of legislation eventually adopted by both houses of the legislature which extended collective bargaining to those workers.

Senator MCCAIN. They needed your technical expertise?

Mr. BECKER. Senator McCain, I'd worked on this particular issue in a number of different States. Preceding Illinois, I'd lived in Los Angeles and worked on legislation that was passed there under a Republican Governor which was quite parallel to the Illinois legislation, so I did have some expertise in the area.

Senator MCCAIN. 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?

Mr. BECKER. No, I did not, Senator.

Senator MCCAIN. How many cases involving the SEIU will you have to recuse yourself from should you become a member of the NLRB?

Mr. BECKER. That, of course, is difficult to predict, but the Service Employees International Union is rarely a party to Board proceedings, historically.

Senator MCCAIN. Aren't they involved in proceedings right now concerning the NUHW, which has petitioned the NLRB to hold

elections at dozens of healthcare facilities where workers are currently represented by the SEIU?

Mr. BECKER. I have not been involved in that particular matter. I know that there are representation proceedings——

Senator MCCAIN. You haven't been involved in it but you worked for the SEIU.

Mr. BECKER. That's correct, Senator. So, I do have some knowledge that there are proceedings pending at various levels——

Senator MCCAIN. Does that mean that you would be recused? You would have to recuse yourself?

Mr. BECKER. Well, my ethical obligations—which I take very, very seriously and, in fact, the question that you asked as to the scope of those obligations and whether it would hinder my service on the Board is one I looked at very carefully, when I was asked if I would consider this nomination. As a result, those considerations led to the execution of an ethics agreement which lay out exactly the steps and the circumstances under which I would recuse myself. And I will—as I pledged in that agreement—recuse myself from any matter in which the SEIU is a party for 2 years after I am confirmed.

If any other matter arises in which any questions can be raised, or might be raised about my impartiality, I will take that very seriously. I will consult with the Agency's ethics officials, I will look at previous adjudication by other Board members that have considered similar questions, and I will recuse myself, if necessary.

Senator MCCAIN. Well, I don't think it's that complicated, Mr. Becker. The quote from the pledge is,

“I will not, for a period of 2 years from the date of my appointment, participate in any particular matter involving specific parties as directly and substantially related to my former employer or former clients, including regulations and contracts.”

It seems to me, since your former employer has been involved with a number of issues before the NLRB, you would have to recuse yourself from them. Since it's your former employer.

Mr. BECKER. I agree that that pledge is clear and I will abide by that pledge.

Senator MCCAIN. Meaning that you will recuse yourself from any issues that come before the Board that have involvement with SEIU?

Mr. BECKER. I will comply, Senator McCain, with the terms of that pledge scrupulously. And as I indicated, if any other matters come up outside of the scope of that pledge in which any party might think that I might not be impartial, I will fully consider the matter in consultation with the Agency's ethics official and other applicable law and prior consideration of Board members of similar circumstances and, if necessary, recuse myself from those cases, as well.

Senator MCCAIN. Well, I see my time has expired. That's not good enough. That's not good enough. If your former employer is involved in issues before the NLRB, you should recuse yourself from them.

My time is expired.

STATEMENT OF SENATOR HATCH

Senator HATCH. Mr. Chairman, unfortunately, I have to leave. Would it be possible for me to submit my questions to Mr. Becker for the record? I'd appreciate that, and with that, I'll have to go.

The CHAIRMAN. Oh, I'd appreciate that. Yes, thank you very much.

[The information referred to may be found in Additional Material.]

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

I want to thank Chairman Harkin and Senator Enzi for scheduling today's hearing on the controversial nomination of Mr. Craig Becker to serve as a member of the National Labor Relations Board.

Over my 34 years in the Senate, I have voted to confirm most nominees to the NLRB in both Republican and Democratic administrations. It has only been in the rarest of cases and with the most divisive nominees that I have voted against an Administration nominee to this board.

I note that I am not opposed to President Obama's other NLRB nominees—Democratic union lawyer Mark Pearce and the Labor Counsel for Republicans on this committee Brian Hayes. That, it seems to me, is a good package that working with the current two members of the board would be able to decide cases without a cloud hanging over it.

Both as Chairman and as Ranking Member of this committee over many years, I worked in a reasonable way with Senator Kennedy to agree on a balanced package of NLRB nominees—thereby avoiding the need for a committee hearing.

Unfortunately, the nomination of Craig Becker and his inclusion in this package of nominees is not such an occasion.

If anyone warrants a hearing it is Mr. Becker.

I hope he views this hearing as an opportunity to clarify his views to convince the skeptics among us that his controversial writings published throughout his career don't represent his views today.

I hope he explains what he meant when he wrote that:

"Employers should have no legally sanctioned role in union elections" and also that "employers should be stripped of any legally cognizable interest in their employees' election of representatives."

If employers should have no role in union representation elections, then employers would be prohibited from insisting on a private, NLRB-supervised secret ballot election to determine employee votes on union representation. Employers could then be forced to accept the equivalent of card check and the increased risks of union intimidation and peer pressure that comes with it.

I hope he explains what he meant when he wrote 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."

I hope he explains what he meant when he wrote about restrictions on employer free speech rights, including whether the same restrictions on the solicitation, distribution of material to and access to employees applies equally to outsiders as it does to employers.

- Does he still believe there should be restrictions on an employer's ability to require employee attendance at meetings to discuss union organizing?

- Does he still believe there should be restrictions on where representation elections are held, when they are held (so-called quickie elections), and whether unions (but not employers) should be allowed to have an observer during the election (similar to poll watchers) to make sure that the election is conducted fairly, that there is no campaigning by employers or unions during the election, and that voters are only those eligible employees entitled to vote in an appropriate agreed-upon bargaining unit?

- Does he still believe unions should be allowed to advocate for increasing the number of strikes by permitting repeated, short-duration, grievance strikes to overcome the current prohibition on partial or intermittent strikes? And I would add with a more than a hint of sarcasm, that this is just what we need in the current economy: numerous, short-term strikes to disrupt production and sales.

These are just some of his controversial views that he needs to explain today. But it doesn't end there. Mr. Becker has written extensively about NLRB decisions that he feels were wrongly decided and should be reversed.

He should also use this hearing to try and convince us that his strong advocacy as a lawyer both with the AFL-CIO and with the SEIU would not interfere with his ability to be a balanced and impartial decisionmaker at the NLRB.

He also needs to explain his controversial actions as a member of President Obama's transition team for the Department of Labor while employed by the SEIU and AFL-CIO. He has admitted drafting the Executive order issued last January revoking the so-called Beck notice-posting requirement for Federal contractors and requiring instead the posting of a notice of employee rights under labor law. That Executive order was unquestionably in his employer's best interests; in fact, the AFL-CIO called for such actions in its written recommendations for the labor department transition team.

He also needs to explain his controversial work on behalf of ACORN. The controversial organization, linked to numerous instances of voter fraud, has praised Mr. Becker's service in working to organize home-care workers.

Finally, and most importantly, he should explain how productive a board member he can be when he is required for at least 1 year, and possibly longer, to recuse himself under the government ethics rules from cases involving the AFL-CIO and the SEIU, when he continues to be employed by both.

Of course, we have had practicing lawyers confirmed to the NLRB in the past where they have been required to recuse them-

selves from cases involving their clients. But this is the first time in my memory—and perhaps ever in the history of the NLRB—where a nominee is from the largest federation of labor unions and one of the largest international unions.

Before we vote, we should at least know how many cases Mr. Becker would have to recuse himself from if he were on the NLRB.

Mr. Chairman, that's a lot of explaining to do. That's why his nomination is so controversial.

Unfortunately, his answers to well over 200 written questions I submitted to him last year were entirely unsatisfactory—his replies, for the most part, merely re-stated over and over that: (1) he was acting as a scholar when he wrote all of those articles, (2) that now suddenly he has no views that would prevent him from being open-minded, and (3) that he could not answer because if confirmed he might be required to rule on a case involving similar issues.

So, Mr. Chairman, I am certainly looking forward to more complete, forthcoming, and candid answers this afternoon.

The CHAIRMAN. Senator Merkley.

STATEMENT OF SENATOR MERKLEY

Senator MERKLEY. I thank you, Mr. Chair. I'd be happy to defer to Senator Hatch if he wanted to ask his questions, in person, now?

Senator HATCH. Thank you, but I have to leave.

Senator MERKLEY. Thank you. Thank you, Mr. Becker, for coming before us and tackling these questions. In your testimony, you note that you have appeared before the Board and in courts ranging from county courts to the U.S. Supreme Court. Any interesting stories you can tell us about the issues you wrestled with before the U.S. Supreme Court?

Mr. BECKER. I had a very interesting experience in the U.S. Supreme Court, Senator—very unsuccessful, I might add. But it was certainly a very gratifying moment in my professional career to appear before the Court.

It was an issue—not involving Federal labor law—but rather the Fair Labor Standards Act. I represented a home-care worker, similar to the home-care workers Senator McCain was asking about. This one worked in New York, was employed by an agency and worked overtime, but was not paid for the overtime. And the question was whether such home-care workers should be exempt from the requirements for premium pay for overtime, because she was a so-called “companion” as that term is used in the 1974 amendments to the Act.

So, it was an interesting question involving deference to administrative agencies, the scope of that exemption and I enjoyed the argument, but unfortunately I received no votes from the U.S. Supreme Court.

Senator MERKLEY. Thank you for sharing that story.

You noted that you had had letters from folks you worked with who had been lawyers for the management. Now, I know that labor negotiations and cases can become very intense, because there are issues being contested, and a lot of emotion goes into it—so I was fairly impressed by that. Perhaps you can describe who you worked with and what they said in their letters to help us understand the relationship that you forged with lawyers in that setting.

Mr. BECKER. I appreciate that opportunity. I think one of the questions that's before the committee, legitimately, is about my character, and my ability to enter into this role, adjudicate cases fairly based on the facts and based on the law. And that's why, I think, the letters from management lawyers who I've actually worked with, who actually know me, who I've been an adversary of, are important.

There are two letters I'd like to point to that have been sent to the Senate, both from prominent and longstanding management lawyers in Chicago—one from Dick Marcus—Richard Marcus, he works for the Sonnenschein Nath & Rosenthal firm. He's practiced labor law in Chicago, I want to say, for 35 years or so. He represents the building owners—so all of the major downtown buildings, the Sears Tower—formerly the Sears Tower, etc.—he represents the owners of those buildings. And we've been involved in litigation, we've been involved in collective bargaining, involving the Service Employees Local 1. We have, in other words, engaged on a number of different contexts.

And he wrote a letter to, I believe, the Chairman and the Ranking Member, describing that relationship and indicating that he believed firmly that I could be impartial and fairly adjudicate cases as a Board member.

The other letter is from Joseph Gagliardo, he's with the Laner Muchin firm in Chicago, again, a long-time management firm, and I think what's gratifying to me, in that letter from Joe is that he indicates, again, that we've been involved in matters which were very important to his clients, and very important to my client. But that he perceived me as a problem solver, someone he could sit down with, who understood not only his own clients' interests, but the other lawyer's clients' interests. And could solve problems in that manner.

Senator MERKLEY. Well, thank you very much.

Mr. Chair, that satisfies my questions. Thank you.

The CHAIRMAN. Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Well, thank you, Mr. Chairman.

Thank you, Mr. Becker for being here today for this unusual hearing, almost unique hearing. I am a member of four labor unions—I'm not sure how many members of this committee are. So, I appreciate how important this area of the law is.

And I would imagine that most people who are nominated to the NLRB have had some experience in labor law, would that be a fair thing to say?

Mr. BECKER. That's absolutely correct, Senator Franken.

Senator FRANKEN. And most of those people would—if they practiced labor law—would have either had to represent, usually, management or workers, right? That's kind of what the labor law is about, right?

Mr. BECKER. That's been the history. It is—for better or for worse—a divided bar.

Senator FRANKEN. Yes, OK. So, most people sort of specialize in one area or the other. And we have nominees—Brian Hayes—who's Mr. Enzi's labor counsel here. He came to my office and we had a

nice conversation, and he's represented management for his entire career as a labor lawyer, so that happens—that's very frequent—we do that a lot, right?

Mr. BECKER. That has certainly been the pattern of appointments to the Board.

Senator FRANKEN. It's not unusual that someone who has represented labor would be nominated and confirmed to the NLRB, is that right?

Mr. BECKER. That's correct, Senator.

Senator FRANKEN. This whole thing about the SEIU has happened before?

Mr. BECKER. It has happened before and members of both side of the labor bar—both labor and management—

Senator FRANKEN. If someone had represented a certain somebody in management they might have to recuse themselves if that company or corporation came before them, right?

Mr. BECKER. That's correct, and there are written opinions by former board members—current and former board members—where such issues have come up and they have either decided to recuse themselves when appropriate, or found that it was not appropriate.

Senator FRANKEN. Nothing unusual there.

Now, you have answered, I understand, over 280 written questions from members of this committee, is that correct?

Mr. BECKER. That is correct.

Senator FRANKEN. Now, how long do they have to submit those questions?

Mr. BECKER. Let me recall. There was an initial set of questions, we were nominated, I believe, in July and I received a written set of questions in late July which were answered during the summer, and then there was a set of follow-up questions in the fall, which were also promptly answered.

Senator FRANKEN. In other words, whoever had questions had months and months, really, to submit questions to you, is that correct?

Mr. BECKER. That's correct.

Senator FRANKEN. Let me ask you this—this is an unusual hearing, as I understand, and I'm fairly new to the Senate, but it was kind of impressed upon me that this is unique, really. That the only other hearing for an NLRB Board Member was for the Chair of the Board. So, this is unusual, and I guess this was really the result of the insistence of a member who put a hold on this process. Did that Senator, during all of these months and months, submit any of those written questions?

Mr. BECKER. I do not believe so, Senator Franken.

Senator FRANKEN. Really? I mean, he or she had months and months to do that, right?

Mr. BECKER. That would have been correct, from July of last year.

Senator FRANKEN. OK.

Well, thank you for bringing your family here, and it's nice to see you and again, as a member of four unions myself, I am someone who—while he was campaigning for this office—got his healthcare

from the American Federation of TV and Radio Artists. I really appreciate the work that everyone in your field does. Thank you.

Thank you, Mr. Chairman.

Mr. BECKER. Thank you.

[The prepared statement of Senator Franken follows:]

PREPARED STATEMENT OF SENATOR FRANKEN

Thank you, Mr. Chairman. I just want to very briefly express my support of today's nominee, Mr. Craig Becker.

As I said in Tuesday's hearing, I am very pleased to have Mr. Becker before us as a nominee. He has devoted his entire career to educating others about the challenges faced by today's ordinary workers. I very much admire his work and career.

While Mr. Becker has faced much opposition, there is absolutely nothing in his background that precludes him from a seat on the National Labor Relations Board. Like all nominees to the NLRB, he has an extensive background in labor law. It's true that during his career, he most frequently represented workers . . . but other nominees to the board have mostly represented management. This is simply not an issue.

Mr. Becker has a wealth of experience and impressive credentials. The NLRB plays a vital role in ensuring worker protections, and Mr. Becker will be a valued addition to the board. Today, I urge my colleagues to support the confirmation of Mr. Becker.

Thank you.

The CHAIRMAN. Senator Franken, are your dues paid?

Senator FRANKEN. [No response.]

The CHAIRMAN. I will move on now.

Senator FRANKEN. Three of them. Three of the unions.

[Laughter.]

The CHAIRMAN. Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Thank you very much.

Mr. Becker, thank you for your appearance here, and for the work you've put forth already to be confirmed. I know it's a laborious, difficult process for anyone, but especially when your nomination is the subject of conflict and debate. And we're grateful for the time you've spent.

We're also grateful for your willingness to serve. We don't say that enough around here. And I know that when you make a commitment to serve it's not—in most cases singular, you have a family that makes that commitment along with you. So we're grateful.

I wanted to ask you a couple of questions—I've always thought that when the Congress or in this case, the Senate, is making a determination about whether to confirm a nominee or not—and especially one who would be in a quasi-judicial role or decisionmaking role, where you have to make decisions based upon evidence and the presentation of evidence—that you ought to have a set of characteristics that would lead the Senate to confirm you. We confirm District Court judges, and Appellate Court judges, and U.S. Supreme Court Justices, and we also confirm a lot of other people who have similar jobs.

I've always thought that there was a series of considerations that should be weighed and analyzed. Obviously, someone's experience is very important—you've had experience—is it 27 years?

Mr. BECKER. I think it's now 28 years.

Senator CASEY. Twenty-seven years of experience which is vitally important to a position like this and to the confirmation process. So, I think experience is a very important factor, you've demonstrated that.

I also believe that when you're confirming someone to a position like the one that you're seeking, the National Labor Relations Board, that it should be someone who has the kind of judgment or temperament—for a Federal Court judge we call it judicial temperament or something similar to that. And from the review that so many of us have undertaken with regard to your nomination, there's nothing in the record that I would see that would, in any way, question that temperament or judgment, the objectivity that you would bring to the work that you have, even though you've been an advocate. We don't confirm judges around here that are robots or mechanical beings. We confirm people that are human beings—that have a point of view—and know how to argue and battle and be advocates.

I would hope that someone in your position would be someone like that. We want some people who understand what it's like to advocate for a position. But that doesn't mean that you can't exercise a kind of objectivity that I think you can exercise.

And finally, and we could add more to this list but I think certainly skill is very important. Experience is relevant, judgment and temperament is relevant, but skill is very important. I think that's obvious from your record.

In conclusion, about the main assertion against your nomination. That because you have been an advocate in the labor-management field where, in some ways, it's a unique field in that you don't want—those who are on the management side or the labor side—to have conflicts of interest. That's the nature of that engagement.

So, I guess I'd ask you the main question which is, on that question of objectivity and on that question of the kind of temperament and approach you bring to decisionmaking, in light of your role as an advocate for the men and women of organized labor, how do you respond to that? I know this is probably the 444th time you've done this but—

Mr. BECKER. Two hundred and eighty, I think, was the case.

That is obviously a very important question, and the ability to be fair and impartial is, of course, absolutely critical to the integrity of the Board. Maybe it would be best to answer based on some of my experiences. When I graduated from law school, I worked for the then-Chief Judge of the 8th Circuit, Donald Lay. I watched the adjudicative process, and it was a process, obviously where, in the Courts of Appeals or judges appointed by different Presidents, have to talk to one another, have to come to a conclusion. Judge Lay had been a trial lawyer, plaintiff's side trial lawyer in Omaha, NE before he was on the bench. He came to the bench as a very accomplished advocate and yet was able to set aside that role once he became a judge.

I watched him and saw how his experiences enriched his ability to be a judge, but were separated from his being a judge. And I think that experience is an inspiration to me and a model for me—the fact that I've played different roles already in my career. It's very different to stand in front of a class and have to explain labor law and the different interests that are at issue in labor law and the various provisions and how they fit together or sometimes come into conflict then to advocate a particular position before the Board or in court. You have to be able to understand that those are different roles.

I've moved from one role to another, and I think that has prepared me to move to yet another. I completely understand that if I'm confirmed the role I will play will be different from those roles, and I look forward to that.

Senator CASEY. Thank you very much.

Mr. BECKER. Thank you.

The CHAIRMAN. Thank you very much, Senator Casey.

Just a couple of things here to wrap it up. I know that a few members have come in and expressed a desire to submit additional questions for the record. Any questions—and I say that to the staff who are here since there are no other Senators here except Senator Casey, of course, and me—but any questions to be submitted must be submitted prior to 10 a.m. tomorrow. Must be submitted prior to 10 a.m. so that Mr. Becker will have adequate time to reply before Thursday's markup.

There will be a markup of this committee in this room at 10 a.m. on Thursday, to report out Mr. Becker's nomination. I want to point out that Mr. Becker has already responded, as I said, to more than 280 written questions. He has always made himself available to meet with any member who wished and has now appeared before us for this virtually unprecedented hearing.

So, any questions and I am hopeful that they will be limited in terms of the number. I hope we don't see another couple of hundred questions submitted.

Regardless, the hearing will go forward at 10 a.m. on Thursday. So, Mr. Becker, again I want to congratulate you. I'm sorry—I have one final question I have to ask for the record. Just to confirm, consistent with your ethics pledge, will you recuse yourself from matters in which your former client, the Service Employees International Union, is a party for 2 years?

Mr. BECKER. Yes, I will, Senator Harkin.

The CHAIRMAN. Well, Mr. Becker, thank you very much. First of all, in many ways, perhaps this was a good hearing, so that people could see—both on television, on the internal C-Span network here at the Senate—so people could see that you are indeed a very calm, informed, judicious and accomplished individual.

I congratulate you on your history, on what you've done in your life. I can say to your two sons and your wife, you've got to be very proud of Craig Becker. I say that as someone who comes from a working-class family, someone whose own immediate members of my family have been mistreated in ways that I won't go into, on their job, and so those who represent working people and who represent them in terms of helping them secure their rights—their rights under law—to me, I can think of no better calling than that.

I'm very proud of you, Mr. Becker, and I'm proud you're going to be on the National Labor Relations Board. We will report this out on Thursday. I don't know what the floor will be like, but I can assure you that we will move this as expeditiously as possible on the floor, and get you down there so you can get to work. We've only got two members, it's about time this Board starts doing things and addressing the backlog.

So, I thank you very much.

Mr. BECKER. Thank you, Senator Harkin.

The CHAIRMAN. Thank you, congratulations.

The committee will stand adjourned until 10 a.m. on Thursday.
[Additional material follows.]

ADDITIONAL MATERIAL

RESPONSE TO QUESTIONS OF SENATOR ENZI BY HAROLD CRAIG BECKER

Question 1. An article in *The Nation* magazine this weekend supporting your confirmation noted that labor law changes in many areas could be made without congressional action. Could NLRB take action to impose a deadline of, for example, 10 or 15 days, in which to hold certification elections?

Answer 1. Section 9 of the Act vests in the Board broad authority to conduct and regulate representation elections. Subject to the constraints of the principle of *stare decisis* and the requirements of the Administrative Procedure 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 election process. The statute does not establish a specific time period during which elections must be conducted, but section 9(c) requires that before an election can be held, the Board must provide for "an appropriate hearing upon due notice."

Question 2. Would you ever support imposing such a certification election deadline?

Answer 2. 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. Whether I would ever support imposing any form of deadline of the sort you describe would depend on the arguments, both in favor and against doing so, properly addressed to the Board; the evidence relevant to the impact of such an action; the views of the Board's career staff, particularly staff in the representation unit and in the regional offices who actually conduct elections; and any other considerations relevant to the particular proposal at the time it is made. In evaluating any such proposal, I would also 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.

Question 3. The same article stated that NLRB could act under current law to require an employer to turn over employee personal contact information in any union organizing drive. Does NLRB have the ability to make this requirement under current law?

Answer 3. Under current Board precedent, upheld by the Supreme Court, employers are required to provide to a petitioner labor organization the names and addresses of employees after the direction of an election. See *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Current NLRB procedures require that an employer prepare a list of eligible voters and their addresses for an NLRB-conducted representation election and file it with the NLRB's regional director who then makes the list available to all parties, including individuals and/or labor organizations which have filed a representation petition or intervened in the proceedings. See NLRB Casehandling Manual paragraph 11312.1. If I am confirmed as a member of the NLRB and if the Board is presented with an argument that the standards governing the requirement to make a list of employees' names and addresses available to a labor organization seeking to represent the employees 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.

Question 4. Would you ever support requiring an employer to turn over employee personal contact information in any union organizing drive, either through rule-making or Board decisions?

Answer 4. Please see my answer to question 3.

Question 5. The article also declared that NLRB could require inside the workplace access for union organizers during campaigns. Could NLRB require inside the workplace access for union organizers?

Answer 5. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992), the Court held that absent discrimination, nonemployee union organizers are not entitled to access to an employer's private property except in the "rare" case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels"—for example, where the employees work at a remote logging camp. Unless Congress amends the statute to overrule that decision, the Board is bound to follow it.

Question 6. If you are confirmed, would you ever support interpreting NLRA to allow inside the workplace access to union organizers?

Answer 6. Absent a claim of discrimination, I believe that the 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.

Question 7. The *Nation* article proposed that NLRB could act without new statutory authority to increase penalties on employers for NLRA violations. Does NLRB have the power to increase penalties under current law?

Answer 7. 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 section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. 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, nor do I believe that section 10 of the Act currently vests in the Board the authority to impose civil penalties. 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.

Question 8. Would you support exercising any ability to increase penalties on employers, either through rulemaking or Board decisions?

Answer 8. Please see my answer to question 7.

Question 9. Under the *Gissel* decision, in cases of employer misconduct the NLRB may impose a duty to bargain, even if there is no showing that a majority of employees want to unionize. Do you believe *Gissel* could be applied more broadly under current law?

Answer 9. As you note, 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 *Gissel* 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.

Question 10. Would you support broadening *Gissel* absent any changes to the statute?

Answer 10. Please see my answer to question 9.

Question 11. Is it possible to impose mandatory binding interest arbitration under the current NLRA and existing precedent?

Answer 11. Under current law, employers and unions may voluntarily agree to submit contract issues they have been unable to resolve through bargaining to binding arbitration. However, the Supreme Court has stated that "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the act is based." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-108 (1970). Thus, in my view, it would not be possible to require binding arbitration of contract disputes under the current law and existing precedents.

Question 12. Would you ever support imposing mandatory binding interest arbitration without new congressional authority, either through rulemaking or a Board decision?

Answer 12. Please see my answer to question 11. Nevertheless, if I am confirmed as a member of the NLRB and if an argument that the Board could impose mandatory binding interest arbitration 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 13. How do you define the term “secret ballot election” as used in the NLRA? Under your definition, what specific safeguards must be in place to preserve the secrecy of the ballot?

Answer 13. The act does not define the term “secret ballot election.” In general, a secret ballot election has been understood to be an election in which voters cast their ballot in a manner such that no one can see or otherwise determine how any individual voter marked his or her ballot and in which that secrecy is maintained, to the extent possible, throughout the election and any post-election proceedings. The Board and Federal Courts of Appeals have developed an extensive jurisprudence concerning what steps are necessary to insure the secrecy of the ballot and what actions constitute objectionable conduct, requiring that the election be rerun, on the grounds that they interfered with the secrecy of the ballot. 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 14. 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? Can you please also explain why the metrics you identify are appropriate under the National Labor Relations Act?

Answer 14. 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 implements 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.

RESPONSE TO QUESTIONS OF SENATOR BURR BY HAROLD CRAIG BECKER

Question 1. Do you believe the NLRB must maintain an online database of all card check recognitions and any subsequent union decertification elections?

Answer 1. The National Labor Relations Act does not require that the NLRB make any particular data publicly available, but I am not at this point familiar with any other statutory or other requirements that may be applicable. If confirmed, it would certainly be my intent to comply with any such requirements. I am aware that the Board has historically and continues to maintain publicly available data on elections and unfair labor practice proceedings, and that this data is increasingly available on the Board’s Web site. If confirmed, I would be supportive of that effort.

Question 2. Do you support “voluntary unionism,” i.e., that employees have the right to voluntarily choose to participate in unions or refrain from doing so?

Answer 2. Yes. The act vests in employees the right to self-organization and to form, join, or assist labor organizations and the right to refrain from doing any and all of such activities with the limited exception provided in section 8(a)(3) as modified by section 14(b). If I am confirmed, I will faithfully apply those provisions of the law.

Question 3. Do you believe that a secret ballot election better reflects the true freedom of choice guaranteed workers by Section 7 of the NLRA to engage in collective bargaining or to refrain from doing so?

Answer 3. Please see my answer to Senator Alexander’s July 30, 2009, Question 25:

“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.”

Question 4. Do you agree with the Supreme Court that “[b]y its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers.” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

Answer 4. The Board is bound by the holding in *Lechmere*. In *Lechmere*, the Supreme Court construed the terms of section 7 of the Act which vests rights in “employees.” In the context of the statement provided by the Supreme Court in *Lechmere*, I agree that section 7 expressly vests rights only in employees. Other provisions of the act vest rights in labor organizations and employers, for example, section 9 which permits both labor organizations and employers to file petitions for an election under specified circumstances.

Question 5. Do you fully support the North Carolina Right To Work law—N.C. Gen. Stat. §§95–78 to 84? Would you use your position at NLRB to challenge any aspect of this law or its prior interpretation?

Answer 5. Section 14(b) of the Act permits States to enact laws that prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. If I am confirmed, I will faithfully apply that provision of the NLRA, and I will fully respect any law that North Carolina has enacted pursuant to the permission contained in NLRA §14(b). Accordingly, I would not, nor could I, use my position to challenge any such law.

RESPONSE TO QUESTIONS OF SENATOR ISAKSON BY HAROLD CRAIG BECKER

Question 1. I understand from your testimony today that you will recuse yourself from any cases involving the Service Employees International Union. Will you also recuse yourself from cases involving SEIU locals?

Answer 1. In the course of my work for SEIU, I have represented a small number of local unions affiliated with SEIU. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including any such locals, I will not participate in any particular matter involving specific parties in which a former client is 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 under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including any such locals, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU, an SEIU local or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 2. Do you believe the NLRB has the authority under current law to compel a non-union employer to bargain with a union in the absence of a secret-ballot election?

Answer 2. The National Labor Relations Act was amended in 1947 to give employers the right to petition for a secret-ballot election if presented with a demand for recognition by a labor organization. This right is specified in Section 9(c)(1)(B) of the Act and cannot be changed except by Congress. The Supreme Court has held, however, that where an employer has engaged in unfair labor practices “likely to destroy the union’s majority and seriously impede the election” the employer may not insist on an election and can be ordered by the Board to bargain. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969).

Question 3. You stated today that that the SEIU is not party to many NLRB cases. Do you know how many cases in the current NLRB backlog are ones in which SEIU is a party?

Answer 3. I am not personally aware of any cases in which SEIU is a party currently pending before the NLRB itself and a review of available public records does not reveal any. There are a small number of cases pending before the Board in

which a local labor organization affiliated with SEIU and currently in trusteeship, as that term is used in 29 U.S.C. 462, is a party.

Question 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? Are there any existing decisions that you believe the Board decided improperly and should be revisited? What standard would you apply in determining whether to overrule a prior Board decision?

Answer 4. 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.

I believe that is the standard applied to the Board in the courts of appeals and it is the standard I would apply in considering whether to overrule a prior Board decision.

Because the question of whether a particular decision was incorrect and should be overruled may arise before the Board, I do not believe it would be appropriate to address the question in this context.

Question 5. 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? Can you please also explain why the metrics you identify are appropriate under the National Labor Relations Act?

Answer 5. 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.

Question 6. I understand from your response to me today that the change from certification by secret ballot to certification by card check requires congressional action. However, there are multiple sections of the Employee Free Choice Act. Which provisions of EFCA could be implemented without congressional action? Which provisions require congressional action?

Answer 6. The Employee Free Choice Act has three substantive sections. The first section establishes a procedure by which a union could be certified as a bargaining representative on the basis of signed authorization cards. As I stated at the hearing, this change would require action by Congress and could not be accomplished administratively.

The second section establishes procedures for mediation and, if necessary, binding arbitration in circumstances where a union or employer engaged in bargaining for a first contract are unable to reach agreement. Under current law, employers and unions may voluntarily agree to submit contract issues they have been unable to resolve through bargaining to binding arbitration. However, the Supreme Court has stated that "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the act is based." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-108 (1970). Thus, action by Congress would also be required to implement these procedures.

The third and final section of EFCA would establish civil penalties and a treble back pay remedy for certain unfair labor practices, and require the Board to seek injunctions where it finds reasonable cause to believe certain violations of the act have occurred. 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 section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. Section 10(c) vests in the Board authority to order a party to take affirmative action, including re-instatement with or without back pay. 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 nor do I believe that section 10 currently vests in the Board the authority to impose the penalties discussed above. 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.

As for the ability to seek injunctive relief, section 10(j) of the current Act provides that the Board has power to seek an injunction in any case where a complaint issue alleging the statute has been violated, therefore, it is currently within the discretion of the Board to decide in any particular case whether it will petition in Federal district court for an injunction. Of course, only Congress can require that the Board do so under the circumstances specified in the EFCA.

Question 7. Recently, in *The Nation* magazine, Dmitri Iglitzin, an attorney that has represented the AFL-CIO, wrote:

"Most legal scholars and labor experts believe that the NLRB has the authority to enact procedural changes that could, among other things:

- drastically shorten the timeframe for holding union elections;
- eliminate cumbersome pre-election procedures that allow employers to dispute who is eligible to vote in such elections;
- require the employer to turn over employee names, addresses and phone numbers early in any union organizing drive;
- require equal access to both workers and the workplace for unions during campaigns; and
- increase the penalties on companies that violate their workers' legal rights."

In which of these items, in your opinion, could be accomplished without congressional action?

Answer 7. It is my understanding that Dmitri Iglitzin has never represented the AFL-CIO in any matter.

With regard to the suggestion that the Board "could drastically shorten the timeframe for holding union elections," I would note that the Board is constrained in that regard by the current statutory requirement in section 9(c) that before an election can be held, the Board must provide for "an appropriate hearing upon due notice." This hearing requirement is often cited as the primary reason for the time it currently takes to schedule and conduct a Board election. Only congressional action could eliminate the hearing requirement. The statute does not establish any specific time period during which such elections must be conducted except the hearing requirement described above.

With regard to the suggestion that the Board could "eliminate cumbersome pre-election procedures that allow employers to dispute who is eligible to vote in such elections," as explained above, section 9(c) requires that the Board provide for "an appropriate hearing upon due notice" prior to directing an election. That pre-election procedure cannot be eliminated without congressional action.

With regard to the suggestion that the Board could require "equal access," in *Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527, 535 (1992), the Court held that absent discrimination, nonemployee union organizers are not entitled to access to an employer's private property except in the "rare" case where "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels"—for example, where the employees work at a remote logging camp. Unless Congress amends the statute to overrule that decision, the Board is bound to follow it.

With regard to requiring employers to turn over contact information for employees, under current Board precedent, upheld by the Supreme Court, employers are required to provide to a petitioner labor organization the names and addresses of employees after the direction of an election. See *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Current NLRB procedures require that an employer prepare a list of eligible voters and their addresses for an NLRB-conducted representation election and file it with the NLRB's regional director who then makes the list available to all parties, including individuals and/or labor organizations which have filed a representation petition or intervened in the proceedings. NLRB Casehandling Manual paragraph 11312.1. The Court held that the promulgation of such a requirement was a proper exercise of the Board's authority to oversee the conduct of elections. Because questions concerning whether the Board has authority to, in any manner, alter the timing or preconditions for im-

position of such a requirement may arise before the Board, I do not believe it would be appropriate to address them specifically in this context.

Finally, with regard to penalties on employers who violate their workers' rights, please see my response to your Question 6.

RESPONSE TO QUESTIONS OF SENATOR MCCAIN BY HAROLD CRAIG BECKER

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

Answer 1. I have provided legal counsel to SEIU and, in some cases, to local labor organizations affiliated 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 have subsequently engaged 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.

Question 2. Mr. Becker, as counsel to the SEIU, you are familiar are you not with the dispute between the SEIU International and the National Union of Healthcare Workers formed by ousted members of an SEIU local in California?

Answer 2. I am aware that there is a controversy involving SEIU and the National Union of Healthcare Workers.

Question 3. Are you aware that the NUHW has petitioned the NLRB to hold elections at dozens of health care facilities where workers are currently represented by the SEIU?

Answer 3. Although I have had no personal involvement in the matters, I am aware that petitions have been filed seeking elections at some facilities where employees are currently represented by a local labor organization affiliated with SEIU which is currently in trusteeship, as that term is used in 29 U.S.C. § 462.

Question 4. And you know that some of those elections have been blocked by charges of unlawful conduct filed by the SEIU against the NUHW with the NLRB General Counsel?

Answer 4. Although I have had no personal involvement in the matters, I am aware that some unfair labor practice charges have been filed that may have blocked some elections for some periods of time.

Question 5. All of these petitions and the unlawful conduct charges are likely to come before the NLRB. Do you intend to recuse yourself from all those cases?

Answer 5. Yes.

Question 6. Have you ever performed work for and/or provided 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 6. No.

Question 7. Have you ever met with or spoke to Mr. Wade Rathke? 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 7. I am not certain whether I have ever met or spoken with Mr. Rathke, but if I believe it would have been on a casual, unplanned, nonprofessional basis. I have never worked with or provided advice to Mr. Rathke or 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. I have worked with officials of Local 880, but never provided them advice as individuals.

Question 8. 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 or memos you authored in this area as referenced by Mr. Rathke.

Answer 8. 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-careworkers 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). I have already provided a copy of that brief to the committee. 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) in relation to its efforts to assist such home-care 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 home-care workers about the terms of their employment.

Question 9. To the extent Mr. Rathke’s statement regarding your having written briefs for others to file is correct, please provide a list of all briefs or pleadings you wrote for other parties to file (if any) and list the courts or administrative agencies in which they were filed.

Answer 9. I have described all briefs and pleadings that Mr. Rathke might have been referring to in my answer to Question 9.

Question 10. Have you discussed labor law or SEIU efforts to organize or obtain collective bargaining rights for 37,000 home health-care workers with former Governor Blagojevich or any members of his staff? 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? Please provide details and specific pieces of legislation, Executive orders or memos you worked on.

Answer 10. As I testified in response to your question at my confirmation hearing on February 2, 2010, while I was in practice in Illinois, I represented and provided counsel to one of the local labor organizations affiliated with SEIU in Illinois which, for a period of time long preceding the Blagojevich administration, had been working to organize home-care workers. As explained in my answer to your Question 9, 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). In Illinois, the agency which administers the State’s public sector collective bargaining law had declined to assume jurisdiction over a petition concerning the representation of home-care workers. I was party to discussions of this matter with representatives of several prior administrations in Illinois. After Governor Blagojevich was elected, I had discussions with members of his staff, and on one occasion, I participated in a discussion that included the Governor. My discussion with the members of the Governor’s staff and with the Governor had to do with the legal technicalities involved in the drafting of an executive

order and legislation, eventually adopted by both houses of the State legislature, which extended collective bargaining to home-care workers. I participated in these discussions because of my expertise in this area, having previously provided counsel concerning similar legislation in California which was adopted by the legislature and signed by a Republican Governor.

Question 11. 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 11. I have had no involvement with these matters.

Question 12. 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 12. No.

Question 13. 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 13. No.

Question 14. Enshrined in our Constitution, and implemented in numerous statutes, Executive orders, and court decisions, is our Nation's recognition of the status of Indian tribes as "domestic dependent" sovereign governments. In fact, our Nation has long acknowledged its great moral duty toward these sovereign tribes contains a "trust responsibility" to protect and encourage tribal governments. However, as you may know, in 2004, the NLRB overruled 30 years of precedent and held the NLRA applicable to a tribally-owned enterprise located on tribal lands. Therefore, as I read this decision, the NLRB believes it can countermand the laws and policies we have enacted to support tribal employment laws, like tribal employment rights laws. These laws are critically important on the reservation, which have struggled to create employment opportunities for Indians. Do you agree with this *San Manuel* decision? What Federal law principles can justify this decision?

Answer 14. Because questions concerning the application of the NLRA to enterprises located on tribal lands may come before the Board, I do not believe it would be appropriate to address them in this context.

Question 15. I am very concerned that, unless the *San Manuel* decision is overturned, it could apply to many other entities operating on Indian tribal lands—including schools, hospitals, construction crews, etc., especially if the current Congress were to actually enact the so-called "Employee Free Choice Act". Many in Congress, including Senator Inouye, Indian Affairs Committee Ranking Member Senator John Barrasso, Congressmen Dan Boren and Tom Cole and others have urged that the governmental status of Indian tribes be respected if the EFCA bill proceeds. What are your thoughts on this?

Answer 15. Please see my answer to Question 14 above. To the extent this question concerns issues beyond the scope of the NLRA as currently written, it is appropriately addressed by Congress.

Question 16a. Have you ever spoken to Andy Stern or any person affiliated with the SEIU as to what the SEIU's expects from you if you are confirmed for a seat on the National Labor Relations Board?

Answer 16a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 16b. With whom did you speak and what did they say?

Answer 16b. Please see my prior answer.

Question 17a. Have you spoken with any person affiliated with the AFL-CIO as to what the AFL-CIO's expectations are for you if you are confirmed for a seat on the National Labor Relations Board?

Answer 17a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 17b. With whom did you speak and what did they say?

Answer 17b. Please see my prior answer.

Question 18a. Have you discussed with Andy Stern or any person affiliated with the SEIU or the AFL-CIO Board decisions that SEIU or the AFL-CIO would like to see reversed?

Answer 18a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 18b. With whom did you speak and what decisions did they say they wanted to see reversed?

Answer 18b. Please see my prior answer.

Question 19a. Have you discussed with Andy Stern or any person affiliated with the SEIU or the AFL-CIO how provisions of the Employee Free Choice Act could be administratively adopted by the Board either through rulemaking or Board decisions.

Answer 19a. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 19b. With whom did speak and what did they say?

Answer 19b. Please see my prior answer.

Question 20. Have you played any role in the public statements issued by the SEIU and the AFL-CIO critical of Board decisions issued during the past 10 years? If yes, statements involving which decisions?

Answer 20. I may have given legal counsel to SEIU and the AFL-CIO concerning public statements critical of Board decisions issued during the past 10 years. I cannot, however, recall giving such legal counsel relating to specific statements involving specific decisions.

Question 21. Have you discussed with Wilma Liebman, the Board's current Chairman, and/or Mark Pearce, the other Democrat nominee, what changes the political majority on the Board plan to make in Board law?

Answer 21. No, at no time have I discussed with Wilma Liebman, the Board's current Chairman, and/or Mark Pearce, the other Democrat nominee, what changes the political majority on the Board plan to make in Board law.

Question 22. Have you ever discussed with anyone whether card check could be imposed by the Board under the NLRA?

Answer 22. No, at no time have I discussed with any person any action I would or would not take as a member of the Board.

Question 23. What is your view on whether the timeframe should be shortened from the date a petition is filed to the date a representation election is held?

Answer 23. 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 elections. 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 timeframe should be imposed. If suggestions for mandating such a timeframe 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.

Question 24. Do you think that any form of employer speech should be limited during an organizing campaign in any manner?

Answer 24. As I stated at my confirmation hearing, in answer to a question from Senator Isakson, the current law clearly protects employers' ability to express their views—not only the National Labor Relations Act, but the first amendment to the U.S. Constitution. It is clear that employers have legitimate interests and have an

indisputable right to express their views on the question of whether their employees should unionize. The Board, with the approval of the Supreme Court, has, however, held that the Act bars employer expression that contains a threat of reprisal or force or promise of benefit. The Board has also held that making speeches on company time to massed assemblies of employees during the last 24 hours before an election is objectionable conduct and grounds for overturning the results of an election.

Question 25. Have you participated in any cases currently pending before the Board?

Answer 25. Yes.

Question 26. How many? In what capacity? Please provide a list?

Answer 26. Dana Co., No. 7–CA–46965, as counsel to amicus curiae; Hacienda Resort Hotel & Casino, 351 NLRB 504 (2007), as counsel to amicus curiae on review of prior Board decision in Ninth Circuit and on prior remand to Board; Correctional Medical Services, 349 NLRB 1198 (2007), as counsel to petitioner in Court of Appeals; Tribune Publishing Co., 351 NLRB 196 (2007) (may remain pending after petition for review denied for purposes of compliance), as counsel to putative intervenor in Court of Appeals; Guardsmark, LLC, 344 NLRB 809 (2005) (may remain pending after petition for review granted by Court of Appeals), as counsel to petitioner in Court of Appeals; Randell Warehouse of Ariz., Inc., 328 NLRB 1034 (1999) (may remain pending after petition for review granted by Court of Appeals), as counsel to intervenor in Court of Appeals.

Question 27a. Have you taken the Administration's "Ethic's Commitments by Executive Branch Personnel?"

Answer 27a. If confirmed, I will take the President's Ethics Pledge upon confirmation. Please see my answer below.

Question 27b. Do you intend to?

Answer 27b. Yes. I have entered into an ethics agreement with the NLRB that provides:

"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 commitments I have made in this and any other ethics agreement."

Question 28. Do you intend to seek a waiver from the Director of OMB [permitted by paragraph 3]?

Answer 28. No.

Question 29. Are you familiar with 5 CFR Section 2635.02 which provides that an employee is required to consider *whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons with certain personal or business relationship with the employee are involved. If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance and received authorization from the agency.*

Answer 29. Yes, I am familiar with 5 CFR Section 2635.502 which provides:

"Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section."

Question 30. Apart from the Executive Order, don't you believe that if you participated in decisions raising issues on which the AFL–CIO or the SEIU have taken a public position while you were employed by them that your impartiality would reasonably be questioned?

Answer 30. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL–CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute

a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 31. Since 1990 you have been a member of the office of General Counsel for the SEIU in Los Angeles and Chicago and since 2004 Staff Counsel for the AFL-CIO in Chicago. Mr. Becker, do you understand that you are the first person in the history of the National Labor Relations Board to be nominated for a full term on the Board who, if confirmed, would go on the Board directly from a labor organization, in your case two of the Nation's largest international unions, the AFL-CIO and the SEIU International? Are there any unique challenges posed by your background that members of the committee should take into consideration as they consider whether you can fulfill your obligation to carry out your duties as a member of the Board fairly, impartially and in a non-biased fashion?

Answer 31. I do not believe that there are unique challenges. Many NLRB members came from private practice where they had represented labor or management or employees on issues that could come before the Board. One former member came to the Board directly from service as Director of Labor Law Policy at the U.S. Chamber of Commerce. As I testified at my confirmation hearing and repeated in answer to your Question 31, above, if confirmed, I will avoid any conflicts of interest and carry out my Board duties fairly, impartially and in strict accordance with law.

Question 32. You testified that if confirmed to the National Labor Relations Board you intended to scrupulously comply with paragraph 2 of the President's Executive Order, Ethics Commitments by Executive Branch Personnel. I accept that to mean that you do not intend to seek a waiver from the application of paragraph 2 from participating in any matter that comes before the Board that is directly or substantially related to the AFL-CIO or the SEIU International. Is that correct?

Answer 32. Yes.

Question 33. Do you agree that a charging or a charged party in a case before the NLRB is a "party" under the Ethics Pledge?

Answer 33. Yes.

Question 34. Do you intend to participate in cases that are directly or substantially related to the AFL-CIO or the SEIU International after your first 2 years on the Board are concluded?

Answer 34. Please see my answer to Question 31 above.

Question 35. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board you do not intend to participate in any case that is filed by the NLRB General Counsel based on the recent charges filed by the SEIU International alleging that the National Union of Healthcare Workers (formed by leaders whose SEIU local was put into trusteeship by the SEIU International) was engaged in unlawful conduct. Please answer "yes" or "no" and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 35. I have had no involvement and am not familiar with any charges alleging unlawful conduct by the National Union of Healthcare Workers. However, if I am confirmed, if the charges you describe result in the issuance of a complaint, if the issuance of a complaint results in the matter coming before the Board, and if the matter comes before a panel to which I am assigned, I will recuse myself from any consideration of the matter.

Question 36. Do you intend to participate in cases involving the petitions for election that were blocked by the latter charges of the SEIU local? If your answer is in the affirmative, please explain how you can ethically participate in such cases.

Answer 36. Please see my answer to Question 6 above.

Question 37. Do you intend to participate in any such cases referred to in Questions 5 and 6 after your first 2 years on the Board are concluded?

Answer 37. Please see my answer to Questions 6 and 31 above.

Question 38. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board, you do not intend to participate in any case that is filed by the NLRB General Counsel based on charges filed by an SEIU local alleging that the NUHW, which petitioned for an election, was engaged in unlawful con-

duct? Please answer "yes" or "no" and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 38. Please see my answers to Questions 6 and 31 above.

Question 39. Do you agree that the SEIU International has a substantial interest in the resolution of cases filed by the NLRB General Counsel based on charges filed by an SEIU local alleging that the NUHW, which petitioned for an election, was engaged in unlawful conduct? Please answer "yes" or "no." If your answer is in the negative, please explain?

Answer 39. Please see my answer to Question 6 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 40. Does your answer to Question 33 mean that, if confirmed, during your first 2 years on the Board you do not intend to participate in any case involving a petition filed by the NUHW seeking an election in units represented by an SEIU local? Please answer "yes" or "no" and then explain. If your answer is in the negative, please explain how you can ethically participate in such cases.

Answer 40. Please see my answer to Question 6 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 41. Do you agree that without regard to the Ethics Pledge that if you were to participate in any of the cases referred to in the above Questions 36, 39 and 41, your impartiality as a result of being a former Associate General Counsel of the SEIU International for nearly 20 years could reasonably be questioned?

Answer 41. Please see my answers to Questions 6, 31, 36, 39 and 41 above. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 42. If your answer to the above Question 42 is in the affirmative, will you commit now as a member of the Bar and without regard to the Ethics Pledge and 5 CFR Section 2635.502 to recuse yourself from all such cases? Please answer "yes" or "no." If your answer is in the negative, how will it be possible to protect the integrity of the NLRB and the perception of that Board as an impartial adjudicator of disputes?

Answer 42. I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time. If confirmed, once the facts of a particular matter involving specific parties are presented to me, I intend to follow the commitments I described in my answer to Question 31 above.

Question 43. Do you believe your ethical obligations as a member of the Bar are limited to the Ethics Pledge and 5 CFR 2635.502? Please answer "yes" or "no" and then fully explain your answer.

Answer 43. No. If at any time during my service on the Board a case comes before me in which recusal is not required by 5 CFR 2635.502 or by my ethics pledge, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 44. As to each of the following cases did the AFL-CIO or the SEIU International file an amicus brief or, after the case was issued, take a public position that the case was wrongly decided and/or should be reversed? In answer to your question, for each case please indicate whether the AFL-CIO or the SEIU International filed an amicus brief or took a public position that the case was wrongly decided and/or should be reversed. Did you have any role in writing, reviewing or approving any comments on the following cases?

Answer 44. Please see my answer to Question 46.

Question 45a. Dana Corp & Metaldyne, 351 NLRB 434 (2007)

Answer 45a. The AFL-CIO filed an amicus brief in this case. SEIU did not file an amicus brief. Please see my answer to Question 21.

Question 45b. Oakwood Healthcare Inc., 348 NLRB 686 (2006)

Answer 45b. The AFL-CIO filed an amicus brief in this case. SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45c. Oil Capitol Sheet Metal, 349 NLRB 1348 (2007)

Answer 45c. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45d. Toering Electric Co., 351 NLRB 225 (2007)

Answer 45d. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45e. Harborside Healthcare, 343 NLRB 906 (2004)

Answer 45e. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 45f. Brown University, 342 NLRB 483 (2004)

Answer 45f. The AFL-CIO filed an amicus brief in this case. SEIU did not file an amicus brief in this case. Please see my answer to Question 21.

Question 45g. BE&K Construction Co., 351 NLRB 451 (2007)

Answer 45f. To the best of my knowledge, neither the AFL-CIO nor SEIU filed an amicus brief in this case. Please see my answer to Question 21.

Question 46. Do you agree that whether or not they are a party to the particular case seeking the reversal, the AFL-CIO and the SEIU International believe they have a substantial interest in seeing the cases referred to in the above Question 45 reversed?

Answer 46. I do not believe it is appropriate to speculate about what the beliefs of these organizations will be at some time in the future concerning hypothetical cases, cases that have not yet been filed, and cases involving facts of which I am not aware at this time. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL-CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 47. Do you agree that without regard to the Ethics Pledge that if you were to participate in a case seeking the reversal of one of the cases referred to in Question 45 in which the AFL-CIO or the SEIU International filed an amicus brief or, after the case issued, took a public position that the case was wrongly decided and/or should be reversed, that your impartiality as the result of being a former Associate General Counsel of the SEIU International and AFL-CIO could reasonably be questioned?

Answer 47. I do not believe my impartiality concerning a particular case could be reasonably challenged solely because when I was in private practice I represented a client that took a position on a legal issue. Whether my impartiality could be reasonably questioned would depend on the particular facts of the situation. If at any time during my service on the Board a case comes before me relating in any way to SEIU or the AFL-CIO or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Moreover, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 48. If your answer to Question 47 is in the affirmative, will you commit now as a member of the Bar to recuse yourself from cases seeking the reversal of such precedent. Please answer "yes" or "no".

Answer 48. My answer to Question 47 was not in the affirmative. Please see my answer to Question 31.

Question 49. If your answer to Question 47 is in the negative, please explain how your impartiality would not reasonably be questioned since you were an Associate General Counsel of both labor organizations at the time?

Answer 49. My answer to Question 47 was not in the negative. Please see my answer to Questions 31 and 48.

Question 50. If you are confirmed as a member of the NLRB, when your term ends do you have plans to return to work for the AFL-CIO and/or the SEIU International or to work for another labor organization?

Answer 50. I have no such plans.

Question 51. Without regard to Board certification of the results, do you favor recognition of a union based on card check over the secret ballot election and, if so, why?

Answer 51. Under the NLRA as currently construed, employees can choose a representative either through a Board-supervised election or (with their employer's consent) 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 are questions 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 nonelectoral evidence of majority support may arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 52. Do you believe that a card check, with the cards solicited and collected by the union, is as reliable an indicator of employee free choice as the secret ballot election?

Answer 52. 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.

Question 53. Do you believe that an employer's recognition of a union based on a card check must be voluntary?

Answer 53. An employer is generally free to decline to recognize a representative chosen by means other than a Board-supervised election. The Supreme Court has held, however, that where an employer has engaged in unfair labor practices "likely to destroy the union's majority and seriously impede the election" the employer may not insist on an election and can be ordered by the Board to bargain. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969).

Question 54. If an employer's recognition of a union occurs after a vigorous corporate campaign conducted by that union which negatively impacts on the employer's business is that recognition voluntary? Should it be recognized by the Board?

Answer 54. 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. If the recognition is the result of a violation of the act, it is subject to challenge before the Board.

RESPONSE TO QUESTIONS OF SENATOR HATCH BY HAROLD CRAIG BECKER

Question 1. The January 20, 2010 issue of *The Nation* magazine, in an article entitled "Obama's pro-union nomination to labor relations board stalled," the authors commented as follows regarding your ability to enact far-reaching labor law reforms at the NLRB:

"The NLRB even could make it easier for workers to unionize based on a card check showing of majority support—just as the EFCA would. It could force employers to recognize a union as the representative of its employees so long as a neutral third party verified that more than 50 percent of those employees had signed a written statement expressing a desire to be represented by that union. That's a fairer way for workers to become unionized than the current cumbersome and flawed NLRB election process, which is often abused by employers who threaten retaliation against their workers."

Subsequently, the editors of *The Nation* clarified that they did not mean to suggest that you had made such a suggestion in your writings with reference to card-check recognition. Do you agree with that original statement?

Answer 1. I do not believe that the Board has authority to implement the card check provisions of EFCA. As I stated at my confirmation hearing, in response to a question from Senator Harkin, the reason the Employee Free Choice Act has been introduced in Congress and the reason that question is before the Congress and not the Board is that the current act clearly precludes certification in the absence of a secret ballot election. Section 9 of the Act, in two distinct ways, makes clear that Congress has intended that a secret ballot election be a precondition for certification of the union as a representative of a unit of employees. First, the act provides explicitly that the Board shall certify the results of a secret ballot election. Second, the act provides that employers—should they be confronted with a demand for recognition based on evidence of majority support, for example, by signed authorization cards—may petition for a secret ballot election. So the law is clear that the decision as to whether an alternative route to certification should be created rests with Congress, not with the Board.

Question 2. Former NLRB Chairman Bill Gould apparently agrees with *The Nation* magazine article. In the July 2009 issue of *Workforce Magazine*, in an article entitled "NLRB decisions could make card check a reality" the author states:

"If the card-check provision of the Employee Free Choice Act fails to survive legislative negotiations, it may not necessarily die. If the right case comes along, the National Labor Relations Board could rule that a company must recognize a union formed through the card-check process."

When asked, former NLRB Chairman Gould responded: "in my judgment, yes, the Board could issue such a ruling."

Do you agree or disagree with Chairman Gould? That is, do you agree that as a member of the NLRB, you could vote for a card check system which would force employers to recognize and bargain with a union, without a secret ballot election, even without the employer having committed any unfair labor practices or without having engaged in any objectionable conduct, just as EFCA would?

Answer 2. I do not believe that the NLRB can order an employer that had not committed any unfair labor practice or engaged in any objectionable conduct to recognize and bargain with a union without a secret ballot election. Please see my answer to Question 1.

Question 3. Would you assure us now that should you be confirmed, you will not vote, either through rulemaking, decisionmaking, or administrative interpretation, to force employers to recognize and bargain with a union based solely on signed cards?

Answer 3. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held 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. Since that decision, the Board has issued such orders and they have routinely been upheld in the Courts of Appeals. If I am confirmed as a member of the Board and if an argument for categorically refusing to issue *Gissel* bargaining orders as you suggest 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.

Question 4. You do agree that under the *Gissel* decision, the Board has the authority to issue what are known as Gissel Bargaining Orders to force an employer to recognize a union without an election, or even without a showing of majority support to remedy an employer's unfair labor practices?

Answer 4. The Supreme Court stated in *Gissel* that the Board has authority to issue bargaining orders directing an employer to bargain with a union that has not won an election in two situations. Where the employer has committed "outrageous" and "pervasive" unfair labor practices, the Board may issue a bargaining order even if the union had never demonstrated majority support. Where the unfair labor practices are less severe but nonetheless tend to undermine majority support and impede the election process, the Board may also issue a bargaining order if the union had at one time achieved majority support and the possibility of erasing the effects of the unlawful conduct and ensuring a fair election through traditional remedies is slight.

Question 5. Are you in favor of using this existing power more frequently? In other words, are there cases where you believe a Gissel Bargaining Order was warranted, but not awarded, such as the Board's decisions in *Abramson* (2005), *Hialeah Hospital* (2004), *Register Guard* (2005), *Internet Stevensville* (2007), and *First Legal Support Services* (2004) all of which contained dissents from member—Liebman or member Walsh?

Answer 5. The appropriateness of the issuance of a *Gissel* order depends on the facts of a particular case. I would not form any conclusion about the appropriateness of such an order without fully reviewing the record in a particular case and having the benefit of adversarial presentation of the arguments by all parties.

Question 6. Are you in favor of increasing the Board's use of extraordinary remedies, such as Gissel Bargaining Orders, even where the union has never demonstrated majority support among the employees (so-called "non-majority bargaining orders") even based on signed union authorization cards?

Answer 6. If I am confirmed as a member of the NLRB and if an argument for a particular remedy is presented to me as a member of the NLRB in a case where the Board has found that a labor organization or an employer has engaged in an unfair labor practice, 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 appropriate remedies could arise before the Board, I do not believe it would be appropriate to address them further in this context.

Question 7. Do you agree with the statement in *The Nation* Magazine article that card check is "a fairer way for workers to become unionized"—that is fairer than a secret ballot election? Is a public card check really fairer than an NLRB-Supervised private ballot, or secret ballot, election?

Answer 7. Under Federal labor law as currently construed, employees can choose a representative either through a Board-supervised election or (if their employer consents) by otherwise demonstrating that a majority of employees wish to be represented by the representative. I believe the answer to your 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 a 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.

Question 8. The article refers to the current secret ballot election process as being "cumbersome and flawed" and "often abused by employers who threaten retaliation against their workers." Of course, democracy sometimes is cumbersome and flawed, as we know from political elections. Do you believe that the NLRB-Supervised secret ballot election process—what has been referred to in the past by both labor and management as the NLRB's crown jewel—is so cumbersome and flawed that it should be rejected in favor of a union card check certification process?

Answer 8. As I testified at my confirmation hearing on February 2, 2010, in response to a question from Senator Harkin, the question of whether the secret ballot election process should be rejected in favor of or supplemented with a card check certification process rests with Congress.

Question 9. Is it not just as true that unions threaten workers who do not agree to vote for the union? And would it not be likely—and perhaps even more likely—for unions to abuse the card check process by threatening or coercing workers to sign cards?

Answer 9. 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. Such threats by employers or unions are grounds for objections that may result in overturning the results of an election. Such threats by employers or unions are also grounds for unfair labor practice charges that may result in an order that an employer cease recognizing a union. Different procedures for gauging majority support present different opportunities for such unlawful coercion by both unions and employers. 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 10a. In that same *Nation Magazine* article, the authors state:

“NLRB nominee Craig Becker has written that in National Labor Relations Board proceedings related to unionizing, where a union or workers file for a Board election in order to form or dissolve a union, there is nothing in the National Labor Relations Act which compels the NLRB’s current policy, which is to permit the employer to be an active participant either favoring, opposing or even obstructing such an election.”

I know that the editors have clarified that you did not write those views in exactly those terms. But do you agree with the statement that there’s nothing to compel the Board’s current policy?

If yes, then you agree that you would have the power as a member of the NLRB to vote to exclude employers from being an active participant in the representation election process?

Answer 10a. As I stated at my confirmation hearing, in answer to a question from Senator Isakson, the current law clearly protects employers’ ability to express their views on the question of whether their employees should vote to be represented by a labor organization—not only the National Labor Relations Act, but the first amendment to the U.S. Constitution. It is clear that employers have legitimate interests and have an indisputable right to express their views on that question.

Question 10b. If no, then did you not advocate in the 1993 Minnesota Law Review that: “Employers should have no legally sanctioned role in union elections” and also that “Employers should be stripped of any legally cognizable interest in their employees’ election of representatives?”

Answer 10b. In my 1993 Minnesota Law Review article, I suggested that employees should be afforded party status in proceedings concerning whether or not they should be represented and that employers could protect their legally protected interests in a subsequent unfair labor practice proceeding. I did not suggest that employers should be barred from freely communicating their views on union representation. 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 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.

Question 11. In your 1993 Minnesota law review article you advocated in favor of “Altering the nature of the choice presented to workers in union elections. And that such a reform would mandate employee representation, and the question posed on the ballot would simply be which representative.” Your response to my previous written question on this point was, I have to say, rather weak. You responded that in the article you “did not suggest that your argument should be accepted,” but you do not deny that it was your view. Do you really believe that employees’ options should be limited to “which representative” and that employees should, in that way, be mandated to join a union?

Answer 11. That was not my view. 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. I also stated in my 1993

article that such a change would “require fundamental statutory revisions.” 77 Minn.L.Rev. at 584. Only Congress could mandate employee representation.

Question 12. At another point in your written advocacy you state that employers should be bound by their own restrictions on solicitation, distribution, and access rules that they apply to outsiders and other strangers to the workplace. In response to my previous written question on this point, you confirmed that is your view, but that you wrote that as a “scholar” and that you have no personal views that would prevent you from being open-minded.

Does that not mean that, in your view, in spite of the free speech provisions of section 8(c) of the Act, employers should be prohibited from solicitation, distribution, and access to their own employees on the employer’s own property, to communicate about union organizing, just as they prohibit outsiders and strangers from doing?

Answer 12. In my 1993 Minnesota Law Review article, I did not suggest that employers should be prevented from speaking to their employees at work without offering a labor organization the same opportunity. 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 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 prejudice, 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 somehow alter its solicitation, distribution or access rules in some 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 13. You also wrote in the Minnesota law review that defining employer requirements that employees listen to speeches opposing or supporting unionization as being “objectionable conduct” sufficient to overturn the results of a representation election, would be consistent with section 8(c) of the act—the “free speech” provision. Apparently, in your view, it would be objectionable even absent “threats, coercion, or promises of benefit.” Simply requiring employees to listen—whether or not they agree with what is being—said would be objectionable conduct. Is it your position, therefore, that—employers should be prevented from mandatory workplace meetings with employees at work? What about such meetings elsewhere?

Answer 13. 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 “evidence of an unfair labor practice” absent a threat or promise of benefit. I did not suggest that it would be consistent with section 8(c) to prevent an employer from expressing its views. I suggested only that defining employer requirements, undergirded by an express or implied threat of discipline, that employees listen to speech opposing or supporting unionization 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 prejudice, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a member of the NLRB and if any such argument 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.

Question 14. You also have advocated in an article entitled “Better Than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act” that repeated, short-term grievance strikes should replace the prohibited “intermittent” or “partial” strikes. In your opinion, is that what we need in this country—more strikes and short-term disruptions, especially in this economy? Isn’t one of the purposes of the National Labor Relations Act to prevent obstructions to interstate commerce?

Answer 14. It is the declared policy of Federal labor law to “promote the full flow of commerce” and to “eliminate the causes of certain substantial obstructions to the free flow of commerce.” My 1994 Chicago Law Review article suggested that short strikes over specific grievances are less disruptive of production than open-ended

strikes and would lead to greater labor-management cooperation than open-ended strikes. The article did not suggest that any existing precedent should be overruled. The article suggested that existing law should be applied to such strikes. 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 article explained that the suggestions were 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 suggestions 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 any argument concerning strikes 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 15. What are your views on expanded rulemaking? What types of representation issues should be considered? And I ask you to respond not as a candidate for the NLRB as to what you may or may not do if confirmed, but as a long-time union lawyer.

Answer 15. 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 promulgated rules governing procedures in unfair labor practice, representation, and other types of cases. I would cite the Board's rulemaking procedures in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Would this not be a way to inject your views on representation elections, as expressed in your articles, even without having to wait for a case to decide, and possibly be reversed in a Federal court of appeals?

Answer 15. No.

Question 16. Have you had conversations with Chairman Liebman concerning NLRB rulemaking?

Answer 16. No.

Question 17. Have you had conversations with any of your colleagues at the SEIU or the AFL-CIO, or anyone else, about NLRB rulemaking? What rules have they advocated with regard to the representation process?

Answer 17. Over the course of my 28 years in the practice of labor law, I may have had conversations with colleagues and other labor lawyers, professors, and students about rulemaking. I do not recall discussing any specific proposals. At no time have I discussed with any person any action I would or would not take as a member of the Board regarding rulemaking or any other matter.

Question 18. You are a very strong and effective advocate for the interests of the SEIU and the AFL-CIO, and have been throughout your legal career. When you drafted president Obama's executive order on employees rights under labor laws while still employed by the SEIU and AFL-CIO [on paid vacation] were you not, in effect, acting as an advocate for their interests? And, isn't that the type of conflict that president Obama sought to avoid?

Answer 18. I have not represented the SEIU or the AFL-CIO throughout my legal career. I have represented many other clients and I have also taught at three different law schools. I served as a volunteer member of the Presidential Transition Team while using vacation leave from my employment. I was asked to provide advice and information concerning possible executive orders consistent with policies that the President had publicly announced during the campaign. While serving on the Presidential Transition Team, I spoke and acted solely for myself. I did not have any policymaking role. I abided by the Transition Team's ethics rules and there was no conflict of interest.

Question 19. The recently proposed notice from the Department of Labor required by the Executive order to be posted in the worksites of all Federal contractors and subcontractors was inaccurate, and in most cases simply incomplete or incorrect interpretations of employees' rights to organize, bargain collectively, and engage in

other forms of concerted activity under the National Labor Relations Act. In fact, if workers followed the advice on the proposed notice, they may find themselves subject to lawful discipline under current board law. It has been widely discussed that the NLRB also may be considering requiring a notice to be posted in all workplaces covered by the National Labor Relations Act—not just the workplaces of Federal contractors—concerning the rights of employees under the act. I would have to believe that the NLRB would do a better job of it than the Department of Labor, so what happens when the two posters conflict?

Answer 19. The NLRB has primary jurisdiction to enforce and administer the National Labor Relations Act. While I do not know what incomplete or incorrect interpretations the question refers to, no statement in the Department of Labor's notice would be binding on the NLRB.

Question 20. Do you think that advice in the form of written materials drafted by union and management lawyers and provided by union and management lawyers to their clients regarding employees' decisions to exercise or not exercise the right to organize and bargain collectively, should be subject to broader financial reporting requirements under the Labor-Management Reporting and Disclosure Act (LMRDA)?

Answer 20. The National Labor Relations Board does not enforce or administer the Labor-Management Reporting and Disclosure Act. This question is appropriately addressed by Congress and the Department of Labor.

Question 21. Don't unions, union lawyers, and union consultants try to persuade employees (which is their right), just as it is the employer's free speech right under the caveats of section 8(c) of the LMRDA? Shouldn't both unions and union lawyers therefore be subject to the same rules as employers and management lawyers?

Answer 21. The National Labor Relations Board does not enforce or administer the Labor-Management Reporting and Disclosure Act. The provision of the LMRDA to which you refer, 29 U.S.C. 433(b), currently refers only to persons who "pursuant to any agreement or arrangement with an employer" undertake specified activities. This question is, therefore, appropriately addressed by Congress.

Question 22. If confirmed, how long do you intend to recuse yourself from matters involving your current employers?

Answer 22. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former employer, I will not participate in any particular matter involving specific parties in which the former employer is 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 under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former employer as those terms are defined in Executive Order No. 13490, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to a former employer or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 23. Are you covered by President Obama's Executive Order 12490?

Answer 23. If I am confirmed, I will be covered by the Executive Order 13490, Ethics Commitments by Executive Branch Personnel (January 21, 2009). Please see my answer to Question 22.

Question 24. If some exception applies, do you believe it is appropriate that different standards should apply to NLRB members as apply to Executive Branch nominees?

Answer 24. The Executive Order does not expressly create different standards for NLRB members than apply to other executive branch nominees. Any further views I might form on this question would depend on the nature of the executive branch

official's job duties and decisionmaking authority and his or her relation to the particular circumstances presented.

Question 25. Will you recuse yourself only from those cases where the SEIU or the AFL-CIO are a party, or also those cases in which they have an interest (such as an amicus)? What about cases that the SEIU or AFL-CIO has taken a formal position in, though may not have participated formally in the case?

Answer 25. Please see my answer to Question 22.

Question 26. How will you draw this line if it is a local SEIU chapter, rather than the international, that is the charged or charging party? Will you recuse yourself from all such cases or draw the line in some other way?

Answer 26. In the course of my work for SEIU, I have represented a small number of local unions affiliated with SEIU. Pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including any such locals, I will not participate in any particular matter involving specific parties in which a former client is 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 under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including any such locals, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU, an SEIU local or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 27. The SEIU, the AFL-CIO or their locals are often parties in cases before the NLRB, correct?

Answer 27. The SEIU and the AFL-CIO are rarely parties to cases before the NLRB. Only four local labor organizations are directly affiliated with the AFL-CIO and they are rarely parties to cases before the NLRB. Local labor organizations affiliated with SEIU are, on occasion, parties to cases before the NLRB.

Question 28. In how many cases are the SEIU or AFL-CIO currently a party?

Answer 28. I am not aware of any cases currently pending before the Board in which either the SEIU or the AFL-CIO is a party.

Question 29a. Isn't the SEIU involved and likely to become involved in quite a few cases before the Board involving its dispute with the National Union of Healthcare Workers?

Answer 29a. I have had no involvement in the dispute between SEIU and the National Union of Healthcare Workers and I am not in a position to know or predict what cases, if any, related to that dispute may come before the Board in the future.

Question 29b. Have you provided legal advice to the SEIU on that dispute in any way?

Answer 29b. No.

Question 30. Have you participated in any cases currently pending before the Board? If so, how many and in what capacity? Can you provide a list?

Answer 30. Yes, as follows: Dana Co., No. 7-CA-46965, as counsel to amicus curiae; Hacienda Resort Hotel & Casino, No. 28-CA-13274, as counsel to amicus curiae; Correctional Medical, 349 NLRB 1198 (2007), as counsel to petitioner in Court of Appeals; Tribune Publishing, 351 NLRB 196 (2007) (may remain pending after petition for review denied for purposes of compliance), as counsel to putative intervenor in Court of Appeals; Guardsmark, LLC, 344 NLRB 809 (may remain pending after petition for review granted by Court of Appeals), as counsel to petitioner in Court of Appeals; Randell Warehouse of Ariz., Inc., 328 NLRB 1034 (may remain pending after petition for review granted by Court of Appeals), as counsel to intervenor in Court of Appeals.

Question 31. The SEIU and the AFL-CIO have publically advocated the reversal of certain Board precedent, correct? Which precedents?

Answer 31. I do not know whether the SEIU or the AFL-CIO have publicly advocated reversal of specific Board precedents outside the context of advocacy in a specific, pending case. It is likely, however, that both organizations have publically criticized Board decisions over the course of the past 75 years.

Question 32. Do you intend to recuse yourself from that case and other cases in which the SEIU or AFL-CIO have taken a public position?

Answer 32. I do not believe my impartiality concerning a particular case could reasonably be questioned solely because when I was in private practice I represented a client that took a position on a legal issue. However, please see my answer to Question 22. Beyond that, I do not believe it is appropriate to opine on hypothetical cases, on cases that have not yet been filed, or on cases involving facts of which I am not aware at this time.

Question 33a. Have you taken the Administration's "Ethic's Commitments by Executive Branch Personnel?"

Answer 33. If confirmed, I will take the President's Ethics Pledge upon confirmation. Please see my answer below.

Question 33b. If not, do you intend to?

Answer 33b. Yes. I have entered into an ethics agreement with the NLRB that provides,

"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 commitments I have made in this and any other ethics agreement."

Question 34. That pledge at paragraph 2 requires that an appointee recuse himself or herself for 2 years from any particular matter involving specific parties in which a former employer or client is or represents a party, if the appointee served that employer or client during the 2 years prior to the appointment. Specifically it reads:

"I will not for a period of 2 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 regulations and contracts."

Do you intend to comply with paragraph 2?

Answer 34. I intend to comply with the entire pledge.

Question 35. Does that mean that you will recuse yourself not only from all cases that you have participated in any way while working for the SEIU and AFL-CIO but also from all cases raising issues that the SEIU or AFL-CIO have taken a public position?

Answer 35. Please see my answers to Questions 22 and 32.

Question 36. Do you intend to seek a waiver from the Director of OMB [permitted in Paragraph 3]?

Answer 36. No.

Question 37. Are you familiar with 5 CFR Section 2635.502? This provides that an employee is required to consider *whether the employee's impartiality would reasonably be questioned if the employee were to participate in a particular matter involving specific parties where persons with certain personal or business relationship with the employee are involved.* If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, *then the employee should not participate in the matter unless he or she has informed the agency designee of the appearance and received authorization from the agency.*

Answer 37. Yes, I am familiar with 5 CFR Section 2635.502 which provides:

"Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency

designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.”

Question 38. Apart from the Executive order, don’t you believe that if you participated in decisions raising issues on which the AFL–CIO or the SEIU have taken a public position while you were employed by them that your impartiality would reasonably be questioned?

Answer 38. Please see my answers to Questions 22 and 32.

RESPONSE TO QUESTIONS OF SENATOR COBURN, M.D. BY HAROLD CRAIG BECKER

Question 1. In November 2009, the National Mediation Board issued a proposed rule in which it relied on the “broad discretion” that the majority opinion believed was provided to it under the Railway Labor Act. Outrageously, this proposed rule threatens to overturn 75 years of standing labor policy (*Federal Register*/Vol. 74, No. 211/Tuesday, November 3, 2009/Docket No. C–6964). Under the proposed rule, a union could be certified through a simple majority of the employees *who vote*.

Do you think the National Mediation Board has the authority under current law to reverse the current, long-standing rule on its Representation Election Procedure?

Answer 1. The National Mediation Board administers the Railway Labor Act. The National Labor Relations Board (NLRB) administers the National Labor Relations Act (NLRA). I have never appeared before the National Mediation Board and have not practiced under the Railway Labor Act. I cannot at this time offer an informed opinion about this question.

Question 2. Do you think the National Mediation Board’s proposed rule is in keeping with precedent?

Answer 2. As I understand the National Mediation Board’s proposal based on reading the notice of proposed rulemaking, the proposal is to revise an existing rule.

Question 3. Do you think the majority of the National Mediation Board, in proposing this rule, fulfilled its duty under the Administrative Procedures Act to explain adequately its departure from agency precedent?

Answer 3. Please see my answer to Question 1.

Question 4. Do you think the NLRB has broad discretion under the law to make changes to election procedures through administrative means?

Answer 4. Section 9 of the Act sets forth certain standards for the conduct of elections that the Board must honor. For example, section 9 specifies preconditions for the conduct of an election and bars an election in a unit in which an election has been conducted in the prior 12 months. The Board cannot depart from the standards established in section 9. Consistent with those statutory standards, the Supreme Court has held that the Board has broad discretion concerning the conduct and regulation of elections.

Question 5. In questions for the record submitted to you on July 30, 2009, Senator Michael Enzi, Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, asked you the following question: “In your opinion, what changes could be made under current law to improve the union certification process?” You replied that,

“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 fit determined after appropriate deliberation that they were consistent with Congress’ intent and would improve the process” (emphasis added).

Please explain more fully your comment that the act vests broad discretion in the Board to conduct and regulate representation elections and certify results.

Answer 5. I was referring to decisions of the Supreme Court which have so held. See, for example, *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226 (1940) (“The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.”); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946) (“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.”); and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (“Congress

granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives.”)

Question 6. What types of changes in election procedures and rules could be made under the current broad discretion available under law that you mention? What changes could be made under current law to improve the union certification process? What changes could be made under current law to improve the decertification process?

Answer 6. In the past, the Board has changed the election procedures and rules in a number of respects. For example, in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), the Board held that misrepresentations by a union or employer during an election campaign were grounds for overturning the election results. Later, in *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982), the Board overruled its prior decision and held that it would no longer regulate the content of campaign propaganda in that manner. Examples of more recent cases in which the Board has changed its election-related rules include *Kalin Construction Co.*, 321 N.L.R.B. 649 (1996), holding that an employer's changes to its paycheck process during the period beginning 24 hours before the opening of the polls and ending with the closing of the polls is objectionable; and *Fessler & Bowman, Inc.*, 341 N.L.R.B. 932 (2004), holding that when either union or employer agents collect or otherwise handle voters' mail ballots it is grounds for objection. All of these changes, as well as the prior rules they overturned, applied to decertification elections as well as certification elections.

Question 7. What role does precedent play limiting interpretation of the law? 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 7. 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.

Question 8. During the February 2, 2010 hearing before the HELP Committee, comments were made that those with concerns about your nomination are opposing you solely on the basis of your having represented labor interests. Your past writings, however, provide ground for concern. These concerns are heightened by recent actions of the National Mediation Board in which precedent was seemingly dumped in favor of the personal agenda of recent Board appointees. In testimony before the HELP Committee on February 2, 2010, you responded to questions on your controversial remarks in the *Minnesota Law Review*, stating at the hearing that: "If confirmed, my decisions, unlike the views of a scholar, will have practical, concrete and important consequences. I will have a duty to implement the intent of Congress."

Please explain this comment more fully. If confirmed, how would your analysis of labor law and precedent differ as a practitioner studying the body of law, as opposed to a scholar studying that same body of law? As a practitioner, would you reach the conclusion reached in your 1993 *Minnesota Law Review* article that "employers should be stripped of any legally cognizable interest in their employees' election of representatives?" What restraints would factor into your analysis as a practitioner that do not factor into your analysis as a scholar?

Answer 8. A scholar does not take an oath and has no duty to uphold and fairly enforce the law. Scholars can and often do advocate for changes in existing law. Scholars do not have the benefit of or a duty to consider a full and fair presentation of arguments by both sides as takes place in adjudication. Scholars do not have the benefit of collaborative deliberation of the type I will engage in with my fellow Board members should I be confirmed. Only after full and fair procedures, consideration of all arguments appropriately expressed to the Board, and on the basis of specific facts would I reach any conclusions concerning questions that might come before the Board.

Question 9. As a member of the NLRB, would you consult and factor into your decisionmaking any scholarly or academic work related to the topic you are considering?

Answer 9. If I am confirmed as a member of the NLRB, I will be bound by the law as enacted by Congress. I will also fully respect and apply any applicable precedents of the Supreme Court. I will also respect the prior precedents of the Board itself, consistent with the principle of *stare decisis*. I would review scholarly and aca-

demic work cited by parties to Board proceedings or otherwise brought to my attention. They would, of course, be given no controlling weight of any sort.

Question 10. How do you plan to work with all members of the Board to ensure that decisions reached are in full keeping with the law and precedent?

Answer 10. I hope to engage in a collaborative decisionmaking process with my fellow Board members, should I be confirmed. Just as the adversarial process helps to insure that all arguments about what the law requires or what prior precedent provides are fully aired and considered, I believe that a collaborative process in which any disagreements are fully discussed and considered will result in decisions that are faithful to the law and respect prior precedent.

The NLRB has rarely exercised its rulemaking capacity, relying instead on case-by-case decisionmaking.

Question 11. What conditions do you believe are necessary for the NLRB to initiate the rulemaking process?

Answer 11. The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rulemaking authority, with the Administrative Procedure Act, and with any other applicable laws. The NLRB should have a sound policy basis for a decision to proceed through rulemaking.

Question 12. What types of issues should be the subject of rulemaking?

Answer 12. I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Question 13. Do you think the Board should break from tradition and begin utilizing the rulemaking process?

Answer 13. The Board has promulgated rules governing procedures in unfair labor practice, representation, and other types of cases. As I indicated above, I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where rulemaking is appropriate.

Question 14. Do you believe it is necessary to have the full participation of all Board members in the rulemaking process, including the drafting of all documents related to that process before decisions are issued? Do you think minority views need to be consulted and their views carefully considered before significant regulatory decisions are made?

Answer 14. When it engages in rulemaking, the Board must act in full compliance with its statutory rulemaking authority, the Administrative Procedure Act, and any other statutory requirements. If I am confirmed and a proposal for rulemaking were to come before the Board, I would fully familiarize myself with those statutory requirements and act in full compliance with those statutory commands. I believe all Board members have a statutory right and obligation to participate in any rulemaking process. Of course, full and adequate consultation among Board members will better insure that all relevant considerations are raised. If there is disagreement among members, the majority should fully consider the views of the minority before acting and the minority should fully consider the views of the majority before acting.

Question 15. What benefits do you believe the NLRB could gain through rulemaking that exceed the Board's traditional reliance on adjudication?

Answer 15. As I stated in my prior answer, I would cite the Board's rulemaking proceedings in 1989 establishing presumptively appropriate units in acute care hospitals, see 29 CFR 101.30, approved by the Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), as an example of the types of circumstances where the Board has achieved benefits in the areas of stability and greater predictability for employers, employees and labor organizations that it had not been able to obtain through adjudication.

Question 16. What role should law and Supreme Court precedent have in rulemaking?

Answer 16. The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rulemaking authority, with the Administrative Procedure Act (APA), and with any other applicable laws. Of course, any rules must be consistent with Federal labor law itself. The Supreme Court's decisions under the APA,

Federal labor law, and any other applicable law are binding on the Board in rule-making as in adjudication.

Question 17. In 2007, you represented the plaintiff in *Long Island Care at Home v. Coke* before the Supreme Court. You were unsuccessful in arguing that the Court should overturn a Labor Department regulation that exempted home-care aides employed by third-party companies from the Federal minimum wage and overtime coverage under the Fair Labor Standards Act. Following the Supreme Court's decision, you testified before the House Education and Workforce Committee where you stated that DOL's adopted regulations "... radically broadened the companionship exemption in a manner inconsistent with both Congress' intent and the DOL's treatment of babysitters."

If the NLRB were to undertake rulemaking, how would you handle instances where your personal interpretation of congressional intent and current regulation is in direct conflict with Supreme Court precedent?

Answer 17. I would act in accordance with congressional intent and Supreme Court precedent.

The Daily Labor Report recently reported¹ that organized labor is increasingly turning to "corporate campaigns" that attack a company's reputation as a way to achieve union goals.

Question 18. Do you think the law should be amended to specifically define a corporate campaign?

Answer 18. I believe that question is properly addressed by Congress.

Question 19. Have you ever participated in a corporate campaign?

Answer 19. 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. As counsel to various labor organizations, I have provided advice concerning efforts to assist employees to organize and obtain representation and efforts to reach agreement in collective bargaining.

Question 20. Have you ever, through your work at the SEIU or AFL-CIO given counsel on how to organize and/or implement a corporate campaign?

Answer 20. Please see my answer to your Question 19.

Question 21. Do you think there should be any restrictions on anti-employer corporate campaigns?

Answer 21. As stated above, 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 Federal labor law 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.

Question 22a. Do you think penalties for union misconduct should be increased?

Answer 22a. As I have stated in answers relating to the Board's authority to implement the provisions of the Employee Free Choice Act without congressional action, 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 section 10 and relevant Supreme Court precedent. Outside those bounds, use of new remedies must be authorized by Congress. Section 10(c) vests in the Board authority to order a party to take affirmative action, including re-instatement with or without back pay. I do not believe that section 10 currently vests in the Board authority to impose penalties. Thus, this question is one for Congress to resolve.

Question 22b. As you know private union membership has steadily declined over the years and is currently at record lows. Do you think the NLRB has the responsibility under law to increase union participation?

Answer 22b. No.

Question 23. In a February 9, 2008 letter to Andy Stern, Sal Roselli, President of the SEIU United Health Care Workers West, wrote that:

"An overly zealous focus on growth—growth at any cost, apparently—has eclipsed SEIU's commitment to its members. As labor leaders, we are obligated to place the needs of our members first and to uphold democratic principles not

¹*Daily Labor Report*, "Management Attorneys Say Unions Increasingly Using Corporate Campaigns," By: Janet Cecelia Walthall, 1-19-10.

only in the workplace, but also in our union. That is increasingly being blocked, circumvented and manipulated.”

How do you assure members of Congress that the win-at-all-costs culture noted by Mr. Roselli as permeating your current place of employment will not carry over into your work at the NLRB, or impair or limit your judgment as a member of the NLRB?

Answer 23. I have had no involvement in the dispute between SEIU and Mr. Roselli and the organization with which he is currently affiliated. If confirmed, I will apply the law as written fairly and even-handedly.

Question 24. Do you believe that the rights of SEIU United Health Care Workers West members were blocked, circumvented or manipulated in any way?

Answer 24. As stated above, I have had no involvement in the dispute between SEIU and Mr. Roselli and the organization with which he is currently affiliated.

Question 25a. Mr. Roselli also noted that:

“You [Stern] and other international officers interfered in the affairs of the SEIU California State Council—our collective vehicle for State legislation and electoral action—using the imposition of a revised constitution and bylaws to prompt a presidential election when none was anticipated, then manipulating the per capita voting formula and procedures in order to produce the outcomes you desired.”

Did you provide counsel to the SEIU concerning the affairs of the SEIU California State Council, or the implementation of a revised constitution and bylaws? Please explain.

Answer 25a. No.

Question 25b. In testimony given before the Senate Committee on Health, Education, Labor, and Pensions on February 2, 2010, you mentioned letters of support that were issued by management teams you have worked with in the past while representing the interests of labor. I regret that I have not been able to see a copy of the support letters you mentioned. A published hearing record will not be available so that I can access such letters prior to the vote on your confirmation due to the expedited nature of your hearing this second session of the 111th Congress. Please include in your written response copies of all letters you are aware of in support of your nomination.

Answer 25b. Copies of all letters of support within my possession are attached.

Question 26. In testimony before the HELP Committee on February 2, 2010, you clearly stated in response to a question to Chairman Tom Harkin that you will recuse yourself from all cases involving the SEIU. In testimony, you said this would apply to the first 2-year period following your resignation from the SEIU. However, in the questionnaire you submitted to the committee you said you would recuse yourself for a 1-year period.

For how long a period will you recuse yourself from cases involving the SEIU?

Answer 26. Two years, as I explain below. My answers to the HELP Committee questionnaire stated that I would abide by both the terms of the Code of Federal Regulations which require recusal for a period of 1 year and the terms of the President's Executive Order which require recusal for a period of 2 years. Accordingly, pursuant to 5 CFR 2635.502, for a period of 1 year after I last provided services to a former client, including SEIU, I will not participate in any particular matter involving specific parties in which a former client is 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 under Executive Order No. 13490 and that I will be bound by the requirements and restrictions therein in addition to the requirements of 5 CFR 2635.502. Accordingly, I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to a former client as those terms are defined in Executive Order No. 13490, including SEIU, unless I am first authorized to participate, pursuant to Executive Order No. 13490 Sec. 3. I have entered into an ethics agreement with the National Labor Relations Board to fully abide by both of these sets of restrictions. Moreover, if at any time during my service on the Board a case comes before me relating to SEIU or any other entity in which recusal is not required by law, by my ethics pledge, or by my ethics agreement, but where the particular circumstances are such that my participation would constitute a conflict of interest, I will recuse myself. Finally, in any such case where there is no actual conflict but my participation might be perceived as creating an appearance of conflict, I will consult with agency ethics offi-

cials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

Question 27. Will you also similarly excuse yourself from cases involving your other employer, the AFL-CIO? For what period of time would you remove yourself from participation on matters related to the AFL-CIO?

Answer 27. Yes. I will apply the same time periods described in my answer to your Question 26.

Question 28. In questions for the record submitted to you on July 30, 2009, Senator Michael Enzi, Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, asked you the following question: "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?"

In your written response, you said:

"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 suggestions to improve the evaluation of programs until I have fully informed myself about the existing programs should I be confirmed."

Since this time, have you reviewed the Board's evaluation and reporting procedures?

Answer 28. No, I have not had the opportunity to do so.

Question 29. If so, do you have suggestions for the Board to improve the evaluation of programs?

Answer 29. Please see my answer to your Question 28.

Question 30. Do you think the NLRB has adequate fiscal resources to carry out its work effectively and efficiently?

Answer 30. I have not had a full and complete opportunity to review appropriations to the Board, the Board's budget, and other relevant documents or to confer with all knowledgeable staff at the Board. Until I have the opportunity to do so, I will not form any conclusions about this matter.

Question 31. Do you think the NLRB has sufficient staff to meet the demands placed on it?

Answer 31. I have not had a full and complete opportunity to review appropriations to the Board, the Board's budget, and other relevant documents or to confer with all knowledgeable staff at the Board. Until I have that opportunity to do so, I will not form any conclusions about this matter.

LETTERS OF SUPPORT

NEW YORK UNIVERSITY,
NEW YORK, NEW YORK 10012-1099,
January 19, 2010.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
428 Dirksen Building,
Washington, DC 20510.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
428 Dirksen Building,
Washington, DC 20510.

Re: Confirmation of Craig Becker as a Member of the NLRB

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: I have practiced and taught labor and employment law for over 30 years, hold the Dwight D. Opperman professorship at New York University School of Law, direct NYU's Center for Labor and Employment Law, and serve as Chief Reporter for the American Law Institute's Restatement (Third) of Employment Law.

I am writing in support of the confirmation of Craig Becker to be a member of the National Labor Relations Board (NLRB or Board), and I do on the following basis.

The President, in my view, should enjoy a broad latitude in selecting members of his administration, including members of independent agencies like the NLRB. Congress has the responsibility to make sure that the President's selections do not have disqualifying problems of competence or character; if the President's nominees do pass that test and fall within a broad zone of acceptability, Congress has a reciprocal duty to confirm the President's choices. That is particularly true with respect to the NLRB. There is a good deal of controversy over whether the NLRB still functions as an effective agency in enforcing statutory rights and obligations. Much of this controversy has played a role in the debates over the proposed Employee Free Choice Act, still under consideration in Congress. It is therefore in the interest of all—employees, employers, unions, judges and lawyers—that the Board operate with a full complement reflecting the various Presidential choices over time as to the best people for the job.

It is clear that Mr. Becker passes the tests of competence and character and falls within the broad zone of acceptability. Although I have sometimes disagreed with his legal positions and his writings, I have consistently found his work to be the product of a highly intelligent, thoughtful person who knows and understands the labor law materials and is open to reasoned discussion.

Based on my interactions with him, I am confident that he will be a most able member of this distinguished agency.

I urge you to confirm Mr. Becker as a member of the Board. If you have any questions or wish to discuss this further, please advise.

Sincerely,

SAMUEL ESTREICHER,
*Dwight D. Opperman Professor of Law Director,
 Center for Labor & Employment Law;
 Co-Director, Institute of Judicial Administration.*

UNIVERSITY OF CALIFORNIA, SCHOOL OF LAW,
 IRVINE, CA 92697-8000,
January 21, 2010.

Hon. HARRY REID, *Majority Leader,*
U.S. Senate,
Washington, DC 20510.

Hon. MITCH MCCONNELL, *Minority Leader,*
U.S. Senate,
Washington, DC 20510.

Re: Confirmation of Craig Becker as a Member of the NLRB

DEAR SENATOR REID AND SENATOR MCCONNELL: As teachers and scholars of labor law, we write to express our strong support for the confirmation of Craig Becker to be a member of the National Labor Relations Board. We believe firmly that, if confirmed, Mr. Becker will prove to be one of the most respected Board members in the history of the NLRB.

Mr. Becker possesses unparalleled qualifications to be a member of the Board. He has practiced labor law for many years and also taught and written extensively about labor law and related subjects. Mr. Becker has had an enormous range of practical experience in the field of labor law, having represented a broad range of unions in the public and the private sector as well as many individual workers, both union members and nonmembers. He has argued cases in virtually every U.S. Court of Appeals and in the U.S. Supreme Court, many of them among the most important labor law cases of the last several decades. He has also taught labor law at several of our Nation's finest law schools, including the University of Chicago, Georgetown and UCLA. His scholarship reflects a great respect for and deep knowledge of the law and weighs and considers all arguments in a fair and honest manner. His articles are widely cited, regularly used in law school classes, and admired by labor law scholars across the political spectrum.

Despite Mr. Becker's obvious qualifications to be a member of the NLRB, his opponents have made a series of misleading and inaccurate statements about him and, in particular, about his published work. We urge anyone considering Mr. Becker's nomination not to rely on sound bites, fragments taken out of context, and misquotations, but to actually read Mr. Becker's scholarly writing.

Those of us who know Mr. Becker personally as well as those of us who have read his work and are familiar with his professional reputation can attest to his integrity, fairness, and dedication to advancing Congress' purposes in adopting Federal labor law and to the role of the NLRB. Without qualification we urge prompt confirmation of Mr. Becker to be a member of the NLRB.

Sincerely,

CATHERINE FISK,
University of California, Irvine—School of Law.

I am authorized to state that the following have read this letter and join it. The institutional affiliations are listed for purposes of identification only.

James Brudney, Ohio State University, Moritz College of Law; Cynthia Estlund, New York University School of Law; Benjamin Sachs, Harvard Law School; David Abraham, University of Miami School of Law; James Atleson, State University of New York at Buffalo School of Law; Mark Barenberg, Columbia University Law School; Esta Bigler, Cornell University ILR School; Susan Bisom-Rapp, Thomas Jefferson Law School; Christopher Cameron, Southwestern University Law School; Susan Carle, American University, Washington College of Law; Kenneth Casebeer, University of Miami Law School; Carin Clauss, University of Wisconsin Law School; Lance Compa, Cornell University ILR School; Laura Cooper, University of Minnesota Law School; Roberto Corrada, Denver University School of Law; Marion Crain, Washington University School of Law; Charles Craver, George Washington University Law School; Ellen Dannin, Penn State University Dickinson College of Law; Kenneth Dau-Schmidt, Indiana University, Bloomington—School of Law; Henry Drummonds, Lewis & Clark—Northwestern School of Law; Fred Feinstein, University of Maryland School of Public Policy; Janice Fine, Rutgers University School of Management and Labor Relations; Matthew Finkin, University of Illinois Law School; Michael Fischl, University of Connecticut Law School; William Forbath, University of Texas Law School; Ruben Garcia, California Western School of Law; Julius Getman; University of Texas Law School; Michael Goldberg, Widener University School of Law; Alvin Goldman, University of Kentucky Law School; Jennifer Gordon, Fordham University Law School; Robert Gorman, University of Pennsylvania Law School; William B. Gould, Stanford University Law School; Joseph Grodin, University of California, Hastings College of Law; Michael Hayes, University of Baltimore Law School; Dorothy Hill, Albany Law School; William Hines, University of Iowa School of Law; Ann Hodges, University of Richmond Law School; Alan Hyde, Rutgers University Law School, Newark; Linda Kerber, University of Iowa College of Law and Department of History; Karl Klare, Northeastern University Law School; Thomas Kohler, Boston College Law School; Howard Lesnick, University of Pennsylvania Law School; Ariana Levinson, University of Louisville, Louis Brandeis School of Law; Anne Marie Lofaso, University of West Virginia Law School; Deborah Malamud, New York University Law School; Martin Malin, Chicago-Kent College of Law; Carlin Meyer, New York Law School; Gary Minda, Brooklyn Law School; Charles Morris, Southern Methodist University, Dedman School of Law; Maria Ontiveros, University of San Francisco School of Law; James Pope, Rutgers Law School—Newark; Cornelia Pillard, Georgetown University Law Center; Theodore St. Antoine, University of Michigan Law School; Paul Secunda, Marquette University Law School; Lorraine Schmall, Northern Illinois University Law School; Sidney Shapiro, Wake Forest University Law School; Joseph Slater, University of Toledo College of Law; Susan Stabile, St. Thomas University Law School; Katherine V.W. Stone, UCLA Law School; Lea VanderVelde, University of Iowa College of Law; Joan Vogel, Vermont Law School; Marley Weiss, University of Maryland Law School; Martha West, University of California, Davis—Law School; Donna Young, Albany Law School; and Noah Zatz, UCLA Law School.

LANER MUCHIN,
January 29, 2010.

Hon. HARRY REID, *Majority Leader,*
U.S. Senate,
Washington, DC 20510.

Hon. MITCH MCCONNELL, *Majority Leader,*
U.S. Senate,
Washington, DC 20510.

Re: Confirmation of Craig Becker as a Member of the NLRB

DEAR SENATOR REID AND SENATOR MCCONNELL: As a lawyer who has represented employers in the private and public sectors for over 30 years, I am writing to describe my experiences with Craig Becker.

Over the years, I have worked with Mr. Becker on a number of complex issues and cases that had significant implications for his union clients, and my employer clients. Although we were both aggressive advocates for our respective clients and their positions, we were always able to have an open dialogue. I believe that Mr. Becker always took the time to understand the issues from the employer's side, and was willing to work creatively toward amicable resolutions of the issues. In other words, he is a problem-solver, a characteristic that is highly-valued in a lawyer.

Based on my many experiences, I believe that Mr. Becker's integrity is exceptional, as is his knowledge of labor law, and he will be fair, hard-working, and an asset to the National Labor Relations Board.

Very truly yours,

JOSEPH M. GAGLIARDO.

SONNENSCHN NATH & ROSENTHAL LLP,
CHICAGO, IL 60606-6404,
January 28, 2010.

Hon. MITCH MCCONNELL, *Minority Leader*,
U.S. Senate,
Washington, DC 20510.

Re: Confirmation of Craig Becker as a Member of the NLRB

DEAR SENATOR MCCONNELL: As an attorney who, for more than 47 years, has practiced exclusively in the area of Labor and Employment Law representing management, I am writing to urge the confirmation of Craig Becker as a member of the National Labor Relations Board.

I have had the opportunity to work together with and in opposition to Mr. Becker on a number of matters involving a significant number of employers and employees, including litigation and collective bargaining negotiations. Throughout, he has consistently demonstrated an impressive grasp and appreciation of and deeply felt commitment and dedication to the principles enunciated by Congress and embodied in the National Labor Relations Act.

I have read of the concerns expressed by some that Mr. Becker would prove "doctrinaire" and/or biased toward unions in his application of the NLRA. It is my honest opinion, based upon first-hand experience dealing with him, that these concerns are completely unfounded. On the contrary, I am convinced that Mr. Becker would demonstrate fairness, integrity, sound judgment and an abiding respect for all of the congressionally mandated rights of employers, unions, and employees alike. I respectfully urge you to support his confirmation.

Sincerely,

RICHARD L. MARCUS.

LETTERS OF OPPOSITION

January 29, 2010.

Hon. TOM HARKIN, *Chairman*,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

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

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: The undersigned trade associations represent millions of employers of every size, in every sector, and region of the country. Unfortunately Mr. Craig Becker has been renominated to serve as a member of the National Labor Relations Board (NLRB) despite concerns that the employer community has previously expressed. We continue to urge you to oppose the nomination of Mr. Becker to the NLRB, however our letter is not intended in any way to express an opinion about the nominations of Mr. Mark Pearce or Mr. Brian Hayes to serve as members of the NLRB.

Mr. Becker's unorthodox views have been demonstrated through his previous written commentary of the National Labor Relations Act, the law he would be charged

with interpreting and enforcing should he be confirmed. Many of his beliefs would disrupt years of established precedent and the delicate balance in current labor law. We have significant concerns with the Board's ability to radically interpret existing labor law should Mr. Becker be confirmed.

As we have expressed before the public still deserves an opportunity through a formal confirmation hearing to hear from Mr. Becker directly as to whether he still believes in the positions espoused in his writings or whether his views on these issues have changed over time. It is troubling that despite our concerns the Administration has made it clear that they do not intend to nominate a more appropriate individual to serve on the Board.

For these reasons, we continue to urge you to oppose the renomination of Mr. Craig Becker to become a member of the National Labor Relations Board.

Sincerely,

American Hotel and Lodging Association; American Organization of Nurse Executives; American Trucking Associations; Associated Builders and Contractors, Inc.; Associated General Contractors of America; College and University Professional Association for Human Resources Food Marketing Institute; HR Policy Association; Independent Electrical Contractors, Inc.; International Foodservice Distributors Association; International Franchise Association; National Association of Manufacturers; National Association of Wholesaler-Distributors; National Federation of Independent Business; National Pest Management Association; National Ready Mixed Concrete Association; National Retail Federation; National Roofing Contractors Association; Printing Industries of America; Retail Industry Leaders Association; Society for Human Resource Management; Steel Manufacturers Association; and U.S. Chamber of Commerce.

FEBRUARY 1, 2010.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

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

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: The undersigned manufacturing employers and associations are united in our concern with the renomination of Craig Becker to serve as a member of the National Labor Relations Board (NLRB).

The nomination of Mr. Becker poses a threat to our labor law system, as his views and interpretation of labor law would radically change the nature of the NLRB. In numerous academic journals and other writings, Mr. Becker has espoused views that indicate he believes the NLRB has the authority to make certain decisions that are pending in proposed legislation. Such views would limit employers' ability to communicate with their employees regarding union organizing efforts and would promote a system of adversarial employee relations. Based on his previous statements, we feel Mr. Becker would direct the NLRB to rewrite current union election rules in favor of union organizers, a decision that should be left to Congress. In particular, we are concerned that Mr. Becker would use the actions of the NLRB to advance aspects of the jobs-killing Employee Free Choice Act.

As employers, we feel that members of the NLRB should be unbiased and committed to the principles of fairness and balance that have developed our labor law system. Mr. Becker's radical interpretation of these laws is not appropriate for members of the Board, who are charged with administering our Nation's labor laws in an unbiased manner.

For these reasons, we continue to urge you to oppose the renomination of Craig Becker to become a member of the National Labor Relations Board.

Sincerely,

A.O. Smith Corporation; A. Schulman; Accurate Castings, Inc.; Accuride International Inc.; Ace Manufacturing Industries; Aeries Enterprises LLC; Ahaus Tool and Engineering, Inc.; Ahresty Wilmington Corporation; Air Logistics Corporation; All American Mfg. Co.; Allegheny Technologies Incorporated; Allied Machine & Engineering Corp.; Allied Plastics Co., Inc.; Alloy Resources Inc.; Altadis USA, Inc.; AM Castle; AMB Enterprises, LLC; American Circuits, Inc.; American Coolair Corporation; American Dehydrated Foods, Inc.; American Felt & Filter Company;

American Foundry Society; American Hydro Corporation; American Lawn Mower Company; American Safety Razor Company; American Shizuki Corporation; American Shower Door; Amsco Windows; Anchor Fabricators, Inc.; Anthony Timberlands, Inc.; Aries Electronics Inc.; Arkansas State Chamber of Commerce/Assoc. Ind. of Arkansas; Arm-R-Lite Door Mfg. Company, Inc.; Arobotech Systems, Inc.; Arrow Adhesives Company; Artwoodworking & Mfg. Co.; ASC Profiles Inc.; Ashley Furniture Industries; Associated Industries of Massachusetts; Atlantic Mold & Machining Corp.; Atlas Machine and Supply Inc.; ATS Medical, Inc.; Auburn Gear, Inc.; Auto Truck, Inc.; Avtron Aerospace, Inc.; Bannish Lumber, Inc.; Batesville Products, Inc.; Beacon Converters, Inc.; Bead Industries, Inc.; Beck Steel; Bell Laboratories, Inc.; Belton Industries, Inc.; Bergsen Inc.; Berkley Screw Machine Products, Inc.; Berlin Metals; Bertch Cabinet Mfg., Inc.; Best Chairs, Inc.; BesTech Tool Corporation; Better Baked Foods, Inc.; Betts Industries, Inc.; BH Electronics, Inc.; Bicorn Electronics Co.; Big D Metalworks; BioResearch Associates, Inc.; Bison Gear & Engineering Corp.; Blue Bell Creameries, L.P.; BlueScope Steel North America; Bollinger Shipyards, Inc.; Bommer Industries, Inc.; Boston Steel & Mfg. Co.; BPI, Inc.; Braun Northwest, Inc.; Brick Industry Association; Bridgestone Americas, Inc.; Brigham Exploration Company; Brinkman International Group, Inc.; Broan-NuTone LLC; Broderson Manufacturing Corp.; Brush Engineered Materials; Buckeye Fabricating Company; C and M Manufacturing Incorporated; Calgon Carbon Corporation; Cambridge Specialty Co.; Cameron Manufacturing & Design, Inc.; Cardinal Systems Inc.; Carter Products Co., Inc.; Case Systems, Inc.; CASHCO Inc.; CB Manufacturing & Sales Co., Inc.; CEMCO Inc.; Cemen Tech, Inc.; Centennial Bolt, Inc.; Central Bindery Company; Central States Fire App LLC; CFX Battery, Inc.; Chaney Enterprises; Channellock Inc.; Chatsworth Products, Inc.; Chemstar Products; Clinch-Tite Corp.; Clow Stamping Co.; CMD Corporation; Coast Controls, Inc.; Coastal Forest Resources; Coastal Plywood Company; Coating Excellence International; ColorMatrix Corporation; Commercial Cutting and Graphics, LLC; Conestoga Wood Specialties Corporation; Construction Specialties, Inc.; Con-way, Inc.; Cooper Tire & Rubber Company; Corbett Package Company; Crafted Plastics, Inc.; CrossCountry Courier; CRT, Custom Products, Inc.; Crysteel Manufacturing Incorporated; Custom Applied Technology Corp.; Custom Tool and Grinding, Inc.; Dakota Awards, Inc.; Dakota Specialty Milling, Inc.; Dart Container Corporation; Davron Technologies, Inc.; Dayton Industries Inc.; Deist Industries, Inc.; Delta Power Company; Dews Research Laboratories, LLC; Dietz & Watson, Inc.; Dixie Printing & Packaging Corporation; Dixon Insurance Inc.; DLH Industries, Inc.; Domain Communications LLC; Don R Fruchey, Inc.; DORMA Architectural Hardware; Dorner Mfg. Corp.; Drawn Metals Corporation; Drenth Brothers Inc.; DRT Mfg. Co.; DTR Industries, Inc.; Duke Manufacturing Co.; DuPage Machine Products; Duraclash by TBEL; Du-Well Grinding Enterprises, Inc.; E&E Manufacturing Co. Inc.; E.D. Bullard Company; East Penn Manufacturing Co., Inc.; East-Lind Heat Treat, Inc.; Eclipse Inc.; Edison Price Lighting; Elan Technology, Inc.; Electro Arc Mfg. Co. Inc.; Electronic Systems, Inc.; Ellwood Group, Inc.; EM-CO Metal Products, Inc.; Emery Corporation; Energy Exchanger Company; Engineered Building Design, L.C.; Ervin Industries; Everhard Products, Inc.; Exxel Outdoors, Inc.; F.C. Brengman & Associates; F.N. Sheppard & Co.; Falcon Plastics, Inc.; Fargo Assembly Co.; Fiber Resources, Inc.; Fiberglass Coatings Inc.; Flambeau, Inc.; Flexcon Industries Inc.; FONA International; Food Services of America; Forrest Machine, Inc.; Foster Transformer Co.; Founders Insurance Group, Inc.; Fox Valley Molding, Inc.; Foxx Equipment Company; Franklin International; Frasal Tool; Fredon Corporation; Freedom Corrugated, LLC; Freeport Welding & Fabricating, Inc.; GCR Associates; Gemini, Inc.; General Machine Products Co.; General Steel and Supply Company; Genest Concrete Works, Inc.; Geokon Inc.; Glas-Col, LLC; Glasforms Inc.; Glastender, Inc.; Glier's Meats Inc.; Globe Products Inc.; Gold'n Plump Poultry; Gossner Foods Inc.; Grande Cheese Company; Granite Rock Company; Graphite Metallizing; Green Bay Packaging Inc.; Grossman Iron & Steel Company; Gruber Systems Incorporated; Guardian Industries Corp.; Hamilton Caster & Mfg. Co.; Hammond Group, Inc.; Harden Furniture Company, Inc.; Hardwood Products Company; Harold Beck & Sons, Inc.; Henry Brick Company, Inc.; Henry Molded Products; Hercules Drawn Steel Corporation; HES Inc.; HFI, LLC; Hialeah Metal Spinning, Inc.; High Company LLC; High Industries, Inc.; Hiwassee Manufacturing Company, Inc.; Hobson & Motzer, Inc.; Holden Industries, Inc.; Horizon Steel Co.; HTI Cybernetics; Hudapack Metal Treating Companies; Huron Automatic Screw Co.; Huron Automatic Screw Company; Illinois Tool Works Inc.; Industrial Fasteners Institute; Industrial Metal Fab, Inc.; Industrial Nut Corp.; Industrial Spring Corporation; Interlocking Concrete Pavement Institute; International Hydraulics Inc.; Iten Industries; J.C. Steele & Sons, Inc.; J.T. Fennell Co., Inc.; Jaquith Industries Inc.; Jasper Desk Company, Inc.; JELD-WEN; Jesco Industries Inc.; Jobbers Moving & Storage; John Sterling Corporation; Johnsen Trailer

Sales, Inc.; Johnsonville Sausage LLC; Jorgensen Conveyors, Inc.; Kapstone Paper and Packaging Corp.; Kell-Strom Tool Company Inc.; Kercher Machine Works, Inc.; Keystone Nitewear Co. Inc.; Kitchen Cabinet Manufacturers Association; Klann Incorporated; Kleenair Products Co.; Kleenair Products Co.; Koike Aronson, Inc.; Koller-Craft Plastic Products; Konz Wood Products; Kuryakyn Holdings, Inc.; L.D. McCauley, LLC; La Deau Hinge Company; Lamiglas, Inc.; Lapp Insulators LLC; Laserage Technology Corporation; Layton Truck Equipment Co., LLC; Leech Carbide; LEECO Spring International; Leed Himmel Ind; Lifoam Industries; Liftmoore, Inc.; Lord Corporation; Lovejoy Tool Company, Inc.; LSI Industries Inc.; LSI Metal Fabrication Division of LSI Industries Inc.; LSI MidWest Lighting; Luick Quality Gage & Tool, Inc.; Lunar Industries, Inc.; M&M Hi Tech Fab, LLC; Mack Boring and Parts Co.; Mansfield Industries Inc.; Markel Corporation; Mar-Mac Wire, Inc.; Martindale Electric Company; Massachusetts Container Corp.; Materials Processing, Inc.; Mathews Brothers Company; Mathison Metalfab, Inc.; Mazak Corporation; McAlpin Industries, Inc.; McNaughton & Gunn, Inc.; McNichols Company; M-D Building Products, Inc.; Meadows Mills Inc.; Merrick Pet Care; Merritt Equipment Co.; Metal Moulding Corp Metal Powder Industries Federation; Metal Products Company; Metallized Carbon Corporation; Metals Service Center Institute; Metalworks Inc.; MET-L-FLO Inc.; Metl-Span LLC; MFRI, Inc.; Micro Abrasives Corporation; Mid Atlantic Manufacturing; & Hydraulics Inc.; Middletown Tube Works, Inc.; Midmark Corporation; Midwest Fabricating Company; Midwest Metal Products, Inc.; Mike-sells Potato Chip Company; Milbank Manufacturing Company; Miles Fiberglass And Composets; Mina Safety Appliances Co.; Mississippi Lime Company; Modern Metal Processing, Inc.; Molded Fiber Glass Companies; Montana Silversmiths Inc.; Moore Industries International Inc.; Morgan Ohare, Inc.; MTD Products Inc.; MTH Pumps; Mullinix Packages, Inc.; N.C. Industries, Inc.; NACCO Industries, Inc.; National Association of Manufacturers; National Bronze Mfg.; National Capital Flag Co. Inc.; National Ceramic Company; National Solid Wastes Management Association; National Tube Form; Nebraska Chamber of Commerce & Industry; Nevada Heat Treating, Inc.; Nevada Manufacturers Association; New Jersey Business & Industry Association; Nordex, Incorporated; North American Association of Food Equipment Manufacturers; North American Die Casting Association; North Dakota Chamber of Commerce; North Dakota Petroleum Marketers & North Dakota Retail Associations; Northeast PA Manufacturers & Employers Association; Northeast Prestressed Products; Northern Concrete Pipe Inc.; Nosco CTX; Nosco, Inc.; Novelis; NPC, Inc.; O. F. Mossberg & Sons, Inc.; Oil City Iron Works, Inc.; Oil-Dri Corporation of America; Olympian Precast, Inc.; Olympian Precast, Inc.; OMCO Holdings, Inc.; Omega Design Corporation; Omega Precision Corp.; Open-Ended Response; OSI/ISI/SunnyMaids; Paper machinery corporation; Parkway Products; Parts Depot Inc.; Paulo Products Company; Pawling Corporation; Peerless Saw Company; Pella Corporation; Pennsylvania Manufacturers' Association; Penske Corporation; Penske Truck Leasing; Pepsi-Cola Bottling Co., Inc. of Norton; Pepsi-Cola Bottling Company of New Haven, MO; Pequot Tool & Mfg., Inc.; Perlick Corporation; Pete Lien & Sons, Inc.; Peterson Manufacturing Co.; PGT Industries, Inc.; Phoenix Electric Mfg. Co.; Pine Hall Brick Co., Inc.; Plastic Molded Concepts; Plastics One; PMF Industries, Inc.; Polyfab Corp; Portec, Inc.; Power Curbers Inc.; PPG Industries; PQ Corporation; Prairie Tool Co. Inc.; Precision Automation Company, Inc.; Precision Machined Products Association; Precision Steel Warehouse, Inc.; Pretzels, Inc.; Price Pump Company; Printed Specialties Inc.; Process Equipment, Inc.; Production Specialties Corporation; Quadrant Tool and Manufacturing; Quality Chaser Company; Radiant Steel Products Company; Radix Wire Company; Rain Flow USA, Inc.; Rainey Road Holdings, Inc.; Rampe Mfg. Co. Torque Transmission Division; Ramsey Products Corporation; Ranco Fertiliservice, Inc.; RdF Corporation; Red Bud Industries, Inc.; Reed Mfg. Services; Remanco Hydraulics Inc.; Reuther Mold & Mfg. Co.; Riggs Industries and subsidiaries; Roaring Spring Blank Book Co.; Roberts Automatic Products, Inc.; Robroy Industries; Rock Industries, Inc.; RoMan Manufacturing, Inc.; Roppe Corporation; Roquette America, Inc.; Roth Horowitz, LLC; Route 94 Consulting; ROW, Inc.; RTI International Metals, Inc.; Rugby Manufacturing; Schatz Bearing Corporation; Scot Forge Company; Scott Douglas Porter, Esq.; Scott Metals, Inc.; Seals Eastern, Inc.; Searing Industries; SGS Tool Company; Shar Systems, Inc.; Showplace Wood Products, Inc.; Shultz Steel Co.; Signal Mountain Cement Company; Silbond Corporation; Sioux Corporation; Siplast, Inc.; Sirois Tool Co., Inc.; SJE Rhombus; Smith Setzer & Sons, Inc.; Solar Atmospheres Corporation; Sommer Metalcraft Corporation; Southco Industries, Inc.; Southeastern Hose, Inc.; Southern Alloy Corporation; Southern Champion Tray LP; Southland Tube, Inc.; Spirax Sarco, Inc.; Spuncast, Inc.; St. Armands Baking Co.; Standex International Corporation; Star Cutter Company; Star Iron Works, Inc.; Steel Manufacturers Association; Steelscape, Inc.; Steffes Corporation;

Stellar Industries, Inc.; Sterking Engineering Corp.; Sterling Engineering Corporation; Sterling Machine Co., Inc.; Stone City Products, Inc.; Stoner, Inc.; Stoneridge Inc.; Streater Dependable Mfg.; Strongwell; Sturm, Ruger & Co., Inc.; Suhner Manufacturing, Inc.; Summers Manufacturing Co., Inc.; Sunnyside Corporation; Superior Graphite Co.; Superior Oil Company, Inc.; Superior Woodcraft, Inc.; Surpass Chemical Co., Inc.; Swanson Industries, Inc.; Sweet Street Desserts; Syncro Corporation; Systems Services of America, Inc.; Tailored Label Products; TB&I, Inc.; TCI, LLC; Teakdecking Systems, Inc.; Techsys Chassis, Inc.; Tecumseh Packaging Solutions, Inc.; Tegrant Corporation; TekTone Sound & Signal Mfg., Inc.; Templeton Coal Company, Inc.; Tennessee Chamber of Commerce & Industry; Tennsco Corp.; Ten-Tec, Inc.; Texas Association of Business; Textile Rental Services Association of America; The Adams Company; The Challenge Machinery Company; The DUPPS Co.; The Envelope Printery, Inc.; The Hill and Griffith Company; The Kirk-Habicht Company; The Knapheide Manufacturing Company; The Manitowoc Company, Inc.; The MasonBox Co.; The Nelson Co. Inc.; The ROHO Group; The Schwan Food Company; The Scotts Miracle-Gro Company; The Sheffer Corporation; The Shockey Companies; The Timken Company; ThermoSafe Brands; Thomas Instrument Co.; Thompson Management Associates; Thomson Lamination Company, Inc.; ThyssenKrupp Waupaca, Inc.; Tiefenbach North America, LLC; Tiffin Powder Coating Specialists; Timber Truss Housing Systems, Inc.; Torco Inc.; Transducers Direct, LLC; Transportation Costing Group, Inc.; Tree Top, Inc.; Trim-Tex, Inc.; Trumpf Inc.; Tubodyne Company Inc.; Twin City Roofing, LLC; Tyco Electronics; Ultra Tech Machinery Inc.; Unex Manufacturing Inc.; United Equipment Accessories, Inc.; Uniweld Products Inc.; Unlimited Services; USG Corporation; Utility Trailer Manufacturing Company; Valley Converting Co., Inc.; Vanamatic Company; Ventahood, Ltd.; Vermeer; Virginia Manufacturers Association; WMI; W.R. Meadows, Inc.; Wagstaff, Inc.; Wahpeton Breckinridge Area Chamber of Commerce; Walnut Custom Homes, Inc.; Walters Brothers Lumber Mfg., Inc.; Warren Distribution, Inc.; Waste Equipment Technology Association; Waukesh Metal Products; Weiss-Aug Co. Inc.; Weldon Solutions; Werthan Packaging, Inc.; WESCO International, Inc.; Western extrusions; Westside Finishing Co., Inc.; Wildeck, Inc.; Williams-Pyro, Inc.; Winslow LifeRaft Company; Wire Belt Company of America; Wisconsin Valley Concrete Products Co.; Wood Connection, Inc.; Wood's Powr-Grip Co., Inc.; WPT Power Transmission Corp.; Xybix Systems, Inc.; Yancey's Fancy, Inc.; Young's Welding, Inc.; Zippo Manufacturing Co.

[Whereupon, at 5:07 p.m. the hearing was adjourned.]

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