

**Statement Of Thomas Beck
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**Senate Committee on Health, Education, Labor, and Pensions
Labor Law Reform Part 2: New Solutions for Finding a Pro-Worker Way Forward**

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Chairman Cassidy, Ranking Member Sanders, and Members of the Committee, thank you for the opportunity to offer a few observations about labor-management relations and labor law. The remarks I share today are not those of any organization with which I am or was affiliated; rather, they are my own, based on 30 years as a labor lawyer, labor regulator, and labor relations practitioner.

There was a time when I would not have expected labor policy to be such a current topic. Thirty-four years ago, when I walked into the first day of my labor law class at the University of Virginia, our professor, Stan Henderson, greeted his students by saying “welcome to the study of a dying area of law.” But, to borrow from Mark Twain, the death of labor law was greatly exaggerated. The pandemic -- and the concerns about workplace safety, job security, and employee voice that came with it -- offered new opportunities to organized labor. And the political realignment that allowed President Trump to gain a second term by winning the popular vote and every one of seven swing states suggests maybe, just maybe, we can find some bipartisan consensus to benefit the American worker.

PROTECT THE SECRET BALLOT

First, labor law should bolster the sanctity of the secret ballot. Most importantly, it protects employees against coercion or retaliation from any direction.¹ If the secret ballot is appropriate for electing a United States senator, or for a Senate conference to elect its leaders, I don't know how it could be inappropriate for employees choosing their exclusive legal representative in the workplace.

Compared to the alternative of card check, the secret ballot facilitates a more informed choice about “union yes” or “union no.” In the card check scenario, employees get the union's perspective, which is, no surprise, pro-union. But they aren't necessarily given any alternative perspective. For example, they don't hear much (or maybe anything) about union dues, or about the important reality that the union cannot guarantee outcomes in collective bargaining.² In contrast, with a secret-ballot election, there's a greater likelihood of an actual campaign with competing viewpoints offered to employees.³ And, again, less chance of social pressure or outright coercion affecting a voter's personal decision about how to vote.

¹ See 85 Fed. Reg. at 18381 (April 1, 2020) (NLRB noting that “both the Board and the courts have long recognized that secret ballot elections are better than voluntary recognition at protecting employees’ Section 7 freedom to choose, or not choose, a bargaining representative”); Richard Epstein, *The Case Against the Employer Free Choice Act* 30 (2009) (explaining that recognition by card check, rather than secret-ballot election, “exposes workers to multiple forms of intimidation and direct coercion”).

² See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (“The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act itself does not attempt to compel.”); see also Daniel V. Johns, *Promises, Promises: Rethinking the NLRB’s Distinction Between Employer and Union Promises During a Union Organizing Campaign*, 10 U. Pa. J. Bus. L. 433 (2008) (generally observing that unions can make promises during campaigns but lack the ability unilaterally to change terms and conditions of employment).

³ 85 Fed. Reg. at 18381 (April 1, 2020) (NLRB finding “the ‘uninhibited, robust, and wide-open debate’ characteristic of a Board-conducted election better fulfills the national labor policy that Congress has established,” citing *Chamber of Commerce v. Brown*, 554 US 60 (2008)); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2nd Cir. 1965) (“it is beyond dispute that secret election is a more accurate reflection of the employees’ true desires than a check of authorization cards collected at the behest of a union organizer”).

END THE TACTIC OF BLOCKING CHARGES

And if we really want workers to be able to express their preferences on unionization, we need to deal with tactics that nullify the votes cast by those workers. These are called “blocking charges” – unfair labor practice charges filed by unions seeking to delay or stop an election, particularly a decertification election, that they perceive will not result in their preferred outcome.⁴

Historically, fewer than half the unfair labor practice charges filed with the NLRB are found to have merit. Most years it’s in the range of 35-40 percent.⁵ If we want to effectuate worker choice, we should not delay elections for charges that, statistically, are more likely than not to be meritless -- and, because they are blocking charges, are even more likely to be frivolous.

Indeed, the very concept of a blocking charge rests on a shaky assumption, which is that an employer can so effectively threaten or coerce an employee that it affects how the employee votes in a secret-ballot election. By definition, the secret ballot means no one but the employee herself knows how she will vote or how she did vote. As a consequence, it’s difficult to see how threats can be effective or retaliation can occur.

The strong presumption should be that, once an election is scheduled, it will take place as scheduled and its result implemented. In the very rare circumstance where it’s

⁴ See, e.g., *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (“it appears clearly inferable to us that one of the purposes of the Union in filing the unfair practices charge was to abort Respondent’s petition for an election, if indeed, that was not its only purpose”); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971) (criticizing Board’s blocking charge policy on grounds of delay and employee free choice); see also Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 Emory L. J. 1647, 1663 (2015) (the availability of blocking charges “provides the party opposed to an election the incentive to file unfair labor practice charges and delay the vote. This tactic is available in all elections, but in practice it is primarily a tool of unions facing a decertification vote.”).

⁵ NLRB General Counsel Memorandum 25-06 (May 16, 2025).

established that some misconduct or irregularity had a material impact on the outcome of a secret-ballot election, the election can be re-run.

RECONCILE SECTION 7 OF THE NLRA AND TITLE VII OF THE CRA

Finally, we should put an end to the unnecessary battle between Section 7 of the National Labor Relations Act and Title VII of the Civil Rights Act. If we care about American workers, we should want them to enjoy Title VII's protections against a racially or sexually hostile workplace. But in some cases, the protections set forth in Section 7 of the NLRA have been so stretched and mis-applied that they have eviscerated the protections of Title VII. For example, in one recent case, an Administrative Law Judge of the NLRB determined that Section 7 insulated from discipline a male employee who referred to a female employee as a "gutter bitch," "crack ho," and "queen of the slums."⁶

In enacting Section 7 of the NLRA, the 74th Congress encouraged workers "to engage in *concerted* activities for the purpose of collective bargaining or other *mutual* aid or protection." Given the language it used, I doubt the Congress of 90 years ago intended to encourage hateful, racially or sexually offensive behavior.

Again, thank you for allowing me to appear today, and I look forward to answering any questions you may have.

Thomas Beck

⁶ *Amazon.com Services LLC v. Gerald Bryson*, No. 29-CA-261755 (2024). See also *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 21-22 (D.C. Cir. 2016) (Judge Millett concurrence noting the NLRB's "cavalier and enabling approach ... toward the racially and sexually demeaning conduct of some employees during strikes").