

**Nominee Craig Becker, Member National Labor Relation Board
Senate Committee on Health, Education, Labor and Pensions
February 3, 2010
Answers to Questions for the Record: Senator Enzi**

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: 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."

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

Answer: If I am confirmed as a Member of the NLRB, I will not assume the position with any preconceived agenda as to such questions of administration. 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 that 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.

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: 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.

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

Answer: Please see my answer to question 3.

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: 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.

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

Answer: 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.

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: 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 backpay 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.

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

Answer: Please see my answer to question 7.

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: 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.

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

Answer: Please see my answer to question 9.

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

Answer: 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.

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

Answer: 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.

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: 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.

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: 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.

Answers to Questions for the Record of the Hearing on Craig Becker

From Senator Johnny Isakson

February 2, 2010

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: 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 one 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.

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: 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).

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: 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.

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: 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.

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: 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.

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: 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 backpay 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 reinstatement with or without backpay. I do not believe the Board has authority to award double or triple backpay 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 issues 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.

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 time frame 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: 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 time frame 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 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.

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 imposition 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.

National Labor Relations Board Member Nominee: H. Craig Becker
Senate Committee on Health, Education, Labor and Pensions
February 2, 2010
Answers to Questions for the Record: Senator Tom A. Coburn, M.D.

In November 2009, the National Mediation Board issued a proposed a 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.

1. 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: 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.

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

Answer: 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.

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: Please see my answer to question 1.

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

Answer: 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.

5. In questions for the recorded 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 if it 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: 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.")

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: 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.

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: 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.

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."

8. 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 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: 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.

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: 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 academic 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.

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

Answer: I hope to engage in a collaborative decision-making 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 rule-making capacity, relying instead on case-by-case decision-making.

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

Answer: The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rule-making 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.

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

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 rulemaking is appropriate.

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

Answer: 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.

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: When it engages in rulemaking, the Board must act in full compliance with its statutory rule making 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.

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

Answer: As I stated in my prior answer, I would cite the Board's rule making 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.

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

Answer: The NLRB may initiate the rulemaking process only in a manner consistent with its statutory rule-making 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 rulemaking as in adjudication.

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."

17. 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: 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.

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

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

19. Have you ever participated in a corporate campaign?

Answer: The term "corporate campaign" is not used in the National Labor Relations Act, as amended, or in any other federal or state law that I am aware of. It has no precise definition. 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.

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

Answer: Please see my answer to your question 19.

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

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

Answer: 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.

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

Answer: 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 reinstatement with or without backpay. 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.

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: No.

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

23. 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: 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.

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

Answer: 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.

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.”

25. 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: No.

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 session second of the 111th Congress. Please include in your written response copies of all letters you are aware of in support of your nomination.

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

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 two-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 one-year period.

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

Answer: 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 one year and the terms of the President’s Executive Order which require recusal for a period of two years. Accordingly, pursuant to 5 CFR 2635.502, for a period of one 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 officials and review applicable rules and precedents to determine whether recusal under the particular circumstances presented would be appropriate.

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: Yes. I will apply the same time periods described in my answer to your question 26.

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

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

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

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

Answer: Please see my answer to your question 28.

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

Answer: 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.

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

Answer: 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.

National Labor Relations Board Member Nominee: H. Craig Becker
Senate Committee on Health, Education, Labor and Pensions
February 2, 2009
Answers to Questions for the Record: Senator Orrin G. Hatch

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: 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.

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's state:

"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: 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.

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

Answer: 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.

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: 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.

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: 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.

- 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: 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.

- 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: 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.

- 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: 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.

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: 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.

10. 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?

A. 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?

B. 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 to subpart A: 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 United States Constitution. It is clear that employers have legitimate interests and have an indisputable right to express their views on that question.

Answer to subpart B: 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 prejudice, consistent with my responsibilities to administer the law fairly and impartially.

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: 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.

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: 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 prejudgment, consistent with my responsibilities to administer the law fairly and impartially. If I am confirmed as a Member of the NLRB and an argument that the Board should 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.

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: 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 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 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.

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: 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.

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: 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 rule making 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.

A. 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: No.

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

Answer: No.

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: 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.

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: 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 policy-making role. I abided by the Transition Team's ethics rules and there was no conflict of interest.

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: 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.

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: 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.

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: 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 USC 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.

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

Answer: Pursuant to 5 CFR 2635.502, for a period of one 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.

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

Answer: 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.

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: 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 decision-making authority and his or her relation to the particular circumstances presented.

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 amici)? 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: Please see my answer to question 22.

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: 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 one 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.

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

Answer: 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.

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

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

29. 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: 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.

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

Answer: No.

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: 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 (many remain pending after petition for review granted by Court of Appeals), as counsel to intervenor in Court of Appeals.

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

Answer: 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.

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: 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.

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

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

If not, do you intend to?

Answer: 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."

34. That pledge at paragraph 2 requires that an appointee recuse himself or herself for two 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 two 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: I intend to comply with the entire pledge.

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: Please see my answers to questions 22 and 32.

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

Answer: No.

37. Are you familiar with 5 CFR Section 2635.02? 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: 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."

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: Please see my answers to questions 22 and 32.