

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

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**SEIU**

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

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

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

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

**2. Have you counseled SEIU regarding corporate campaigns?**

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

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

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

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

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

**5. Have those techniques been effective?**

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

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

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

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

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

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

**7. What is your view of such conduct?**

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

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

Answer: Please see my answer to question 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**14. What standards of recusal will you apply?**

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

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

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

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

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

**17. What standards of recusal will you apply?**

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

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

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

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

**HARVARD UNION OF CLERICAL AND TECHNICAL WORKERS, AFSCME LOCAL 3650**

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

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

**AFL-CIO**

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

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

**TEACHING**

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

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

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

## **BOARD PROCEDURES**

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

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

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

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

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

Answer: Please see my answer to question 20.

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

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

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

Answer: Please see my answer to question 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**32. When should mail ballots be used?**

Answer: Please see my answer to question 31.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**39. Do you continue to maintain that view?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Please see my answer to question 47.

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

Answer: No.

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

**Were such graduate school teaching assistants unionized?**

Answer: Please see my answer to question 48.

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

**50. Do you still maintain that position?**

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

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

**51. Is that still your belief?**

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

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

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

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

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

Answer: Please see my answer to question 52.

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

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

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

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

Answer: Please see my answer to question 54.

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

Answer: Please see my answer to question 54.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Please see my answer to question 63.

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

Answer: Please see my answer to question 63.

**Would this lead to unit fragmentations?**

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

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

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

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

**67. Is that still your belief?**

Answer: Please see my answer to question 63.

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

Answer: Please see my answer to question 63.

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

Answer: Please see my answer to question 63.

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

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

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

Answer: Please see my answer to question 70.

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

Answer: Please see my answer to question 70.

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

**73. Is that still your belief?**

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

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

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

Answer: Please see my answer to question 63.

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

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

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

Answer: Please see my answer to question 74.

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

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

**76. Is this still your belief?**

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

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

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

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

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

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

**79. Is this still your belief?**

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

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

**80. Is this still your belief?**

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

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

Answer: Please see my answer to question 79.

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

Answer: Please see my answer to question 79.

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

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

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

**84. Is this still your view?**

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

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

Answer: Please see my answer to question 84.

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

Answer: Please see my answer to question 84.

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

**87. Do you maintain that position?**

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

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

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

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

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

**89. Do you still maintain this view?**

Answer: Please see my answer to question 58.

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

Answer: Please see my answer to question 58.

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

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

**91. Do you still maintain this view?**

Answer: Please see my answer to question 63.

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

Answer: Please see my answer to question 63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Should such reforms be done by decisions or by rulemaking?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**What should be done to reverse the decline?**

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

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

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

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

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

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

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

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

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

**113. Should collective bargaining representatives be chosen in elections?**

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

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

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

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

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

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

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

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

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

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

**If not, why?**

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

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

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

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

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

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

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

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

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

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

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

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

**Has your position changed since your nomination?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Please see my answer to question 130.

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

Answer: Please see my answer to question 130.

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

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

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

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

Answer: I do not believe existing Board law provides a basis for not certifying the results of an election based on low turnout alone. In *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671, 673 (D.C.Cir. 1996), the Court reversed the Board on other grounds and expressly declined to base its decision on low turnout.

Employees' rights under section 7 of the Act include the right not to participate in a union representation election. Nevertheless, if I become a Member of the NLRB and an argument that the Board should not certify the results of an election based on low turnout is made to the Board, I will consider it with an open mind based on the terms of the Act and relevant Supreme Court precedents. Because questions concerning these issues could arise before the Board, I do not believe it would be appropriate to address them further in this context.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

Answer: Please see my answer to question 139.

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

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

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

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

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

Question: Please see my answer to question 139.

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

**150. Do you continue to hold that view?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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