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Consequences of the Employee Free Choice Act: Union and Management Perspectives

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JAMES SHERK: The Employee Free Choice Act is probably the most dramatic potential reshaping of American labor law since at least the Taft–Hartley Act, which was passed in 1947. It would dramatically reshape how employees, employers, and unions relate with one another. And yet it's an act that few Americans know much about beyond the fact that it takes away secure ballot elections for union organizing elections, which is true and important, but it's only a small part of what the act does.

The act replaces secret-ballot organizing elections with card check. It would also take free collective bargaining out of the hands of the unions and the employers and send it to a government agency to impose a contract on workers for two years, and it would dramatically increase penalties not just on illegal firings of workers who want to join a union, but on all unfair labor practice charges.

Unless you're an expert in labor law, describing these changes is probably going to make your eyes glaze over. Interest arbitration versus simply bargaining to an impasse—what does this mean for me?

In order to answer that question, we've got two experts who have worked in this field for quite some time. We have Homer Deakins, who is the former managing shareholder and current shareholder of Ogletree Deakins, one of America's most prominent labor law firms. They have offices in over 34 states, and he has decades of experience during union organizing campaigns and collective bargaining, every aspect of labor law.

Talking Points

- The Employee Free Choice Act would reshape how employees, employers, and unions relate with one another.
- The act would replace secret-ballot organizing elections with card check and take free collective bargaining out of the hands of unions and employers and have a government agency impose a contract on workers for two years.
- The EFCA would dramatically increase penalties not just on illegal firings of workers who want to join a union, but on all charges of unfair labor practices.
- The total loss by management of the right to control labor costs under the act may be a deprivation of the constitutionally protected right of contract.
- The most adversely affected would be small employers, who account for most of the jobs that are being created today.

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We're also joined by Rian Wathen, who brings 15 years of experience in the union movement. He is a former director of collective bargaining and a former organizing director of United Food and Commercial Workers Local 700 in Indianapolis. He was in this position until he uncovered some mismanagement of funds on the part of the president of the local and tried to bring this to the attention of the membership and distribute the financial documents so they could see how their dues were being spent, and he was promptly terminated without notice. He took a very principled stand and paid for it, and he now has experience as a management consultant in these union organizing campaigns, educating workers about what they're not going to be told by the union organizers about union organizing.

—James Sherk is Bradley Fellow in Labor Policy in the Center for Data Analysis at The Heritage Foundation.

HOMER DEAKINS: I suppose most of you were in Washington the other day when they had the big labor demonstration to talk about the Employee Free Choice Act. I was watching TV that evening and listening to one of the major networks, and the pundit that was talking said, "The purpose of this law is to help employees organize unions." I said to myself, what in the world is this guy talking about?

There is a tremendous amount of misunderstanding about what the Employee Free Choice Act is, and I want to dwell for the next 10 or 15 minutes on trying to better understand exactly what this means and what the results could be.

Objectives of the Employee Free Choice Act

This bill basically has two objectives. The first and main objective is to deny employees a free choice. It's called the Employee Free Choice Act; its major objective is to deny employees a free choice and to substitute what has been a free choice by a secret-ballot election to an employee voting in public in the presence of a union organizer and no one else.

The second objective of this bill is to neutralize employers so that employers do not have an opportunity to lay out their side of the case so that employees can hear the union's side and the management's side and then vote on which they prefer. That objective is to make the process go so quickly and to penalize employers so much that employers will be neutralized, and history will tell us that in those cases where employers have agreed to be neutral in union campaigns versus when they try to educate the employees on the disadvantages of unionization, the result is that unions win in far more cases.

The only group that is a beneficiary of this law is organized labor; everyone else gives up rights. Employees give up the right to a secret-ballot election; they also give up the right to vote on whether to ratify a collective bargaining agreement if the union wins the election and becomes the bargaining representative. Employers lose the right to make their case to their employees, and it also says to employers that they will be penalized for misconduct during an organizing campaign in an effort to keep them neutral.

Finally, and I think most importantly, this bill would say to an employer, once that employer is organized, that they will lose control of labor cost in their workplace. That, I think, is something that has perhaps been overlooked by many of the pundits, but it's probably the most important aspect of this legislation.

This bill is clearly one-sided. It says that if employees want to organize a union and a union comes in to organize employees, there will be a card check. Then it turns around and says that if employees want to get rid of a union, there must be a secret-ballot election. So you get in on cards; you get out in a secret-ballot election. It then says that employers will have punitive damages assessed against them if they violate the law. But this law only is designed to help unions, and it does not impose any more severe penalties on unions even though they are the ones that are getting the cards signed.

The Myth of Employer Intimidation of Employees

As James was saying, this law we're operating under in union organizing today was passed in 1947. We've had this law for over 60 years. So you ask the question, why do we want to change it now? And the answer that's given by organized labor is that employers have taken unfair advantage of the election process by intimidating employees. That's

the total pitch by organized labor as to why this bill should pass. That is not true.

Number one, there are fewer acts of misconduct on the part of management in union elections today than there were back in the days when labor was strong. Labor unions are winning more elections today than they won in the '60s, the '70s, the '80s, or the '90s. So there's less misconduct on the part of management than there used to be; unions are winning elections at a higher rate today than they have in decades past.

Unions are in fact declining as a part of the workforce, and clearly unions are much weaker today than they've ever been since the passage of the original act in 1935. But why is that?

There are a lot of reasons underlying that, but clearly one of the reasons is that unions aren't organizing, and unions aren't willing to spend the money to organize workers. That's the reason that seven unions left the AFL–CIO; they said the AFL–CIO is not spending money on organizing, and we're leaving the AFL–CIO because we're going to spend the money we have on organizing. Those are the unions that are growing today as a result of actually getting out and organizing the workers.

If you look at what the law is today on organizing, it provides for secret ballots. In a typical case, a union petitions for an election, and an election is held within 42 days; on an average, elections are held about 38 days after the petition is filed. Both the union and the employer campaign, and the union ends up winning between 55 and 65 percent of those elections. If the employer engages in misconduct during the campaign that results in there not being a fair election, then the union gets in based on the cards.

That's the existing law. The law sets it up so that the employees hear from both sides. They vote in secret. If the employer engages in misconduct that prevents a free election, then the union gets in based on the cards.

A License for Union Intimidation of Workers

The Employee Free Choice Act says no secret ballot, period. If the union signs up a majority of the employees on cards, the National Labor Relations Board will certify the union with no election. In doing so, this bill sets up no safeguards in dealing with card signing, and it basically is a license for unions to intimidate employees to sign union cards.

If a union organizer intimidates an employee to sign a union card, what's going to happen? The employee who is intimidated is unlikely to speak up. Management cannot interrogate the employee, so the management has no right to question the employees as to why they signed the cards or whether they were intimidated. The National Labor Relations Board will not investigate the question unless the employer can come forward and provide a *prima facie* case that there was intimidation.

The result is that this is a license for unions to intimidate employees to sign union cards, and yet there are no more serious penalties for that than the posting of a notice at the union hall.

The other thing that it invites is fraud. If a union is organizing employees under this bill and it gets close and all they need is a half-dozen more cards, why not forge the signatures and turn them in and get the majority? It's unlikely that that will ever be discovered, because the way the NLRB does this is, they get a list of all the eligible voters from the company, they get the cards with the signatures on them, and they compare the names on the cards with the names on the list, and there's no process for evaluating the authenticity of the signature. That's the way it works today on card checks to see if they have the 30 percent showing; that's the way it would work if this law was passed.

Now, that's the sexy portion of this bill: card check. That's what's gotten all the publicity, and that's what is so unpopular with workers, management, and everyone except the unions.

Interest Arbitration vs. Free Collective Bargaining

The more important provision in this bill to me is that if the union wins, what happens? Today, the way the law works is, if a union becomes the certified bargaining agent of employees, then the employer and the union sit down and bargain in good faith. No one is required to agree to anything; they simply are required to sit down and reason together to see if they can come voluntarily to an

agreement. If they can't, the union can strike or the employer can lock out. It's what we describe as free collective bargaining.

This bill replaces good-faith bargaining with interest arbitration after 130 days, and it says that after bargaining between the parties for 130 days, then an arbitration board is assigned, and the arbitration board will decide what the terms of the contract should be for a period of two years. This board of arbitrators is not going to be a board with experience in that industry. It's not going to be a group of people who have run a business. It is more likely to be a college professor from some university or some law professor at some university, and they are going to set forth all the terms and conditions of employment. They will decide in a contract what the starting and quitting times are, what the layoff policy is, whether or not you should have any restrictions on subcontracting, whether you should be able to use temps, what your pension plan should be: Should you have a defined benefit plan, or should you have a defined contribution plan, or should you have a 401(k) plan? What should your retiree benefits be?

So, you are a foreign automobile manufacturer in the United States and you lose an election to the UAW, and an arbitrator decides what the terms of that contract are going to be. What do you think he's going to say? He's going to say you ought to have the contract of the Big Three. They're going broke, but that's the contract that basically you ought to have. There are no standards, and there is no right of appeal. This clearly is the worst thing in this legislation because it basically says to management, "You no longer control your labor costs; you no longer control the question of whether you're competitive."

Finally, the third thing that this bill does is to say that employers will have punitive damages for violations of the act during organizing. It doesn't do the same thing for organized labor, but only management.

Those, basically, are the three things that this law does.

RIAN WATHEN: I would suspect that I'm probably the only person in this room who's ever sat in a worker's living room and signed them on a union authorization card. James and I have talked about that. There's a transaction that takes place there. You have three parts of the transaction. You have the union organizer, you have the employee, and you have the union authorization card.

I think it's important to understand all three elements of that transaction and what happens with all three elements, because the fact is, unlike most transactions like a business transaction, you have the union organizer sitting there. They are asking the employee to give them something of value, something that they need a lot. Yet it costs the employee nothing to give that to them initially, does it? I think that's a bad transaction, because you've got a person who really needs or wants something—the signature on the authorization card—and you've got an employee who doesn't understand what they're signing, doesn't understand the ramifications of that transaction, and yet it costs them nothing to give that person that signature and get them to go away or leave them alone.

Union Organizer as Salesperson

Let's talk for just a minute about that. First of all, you need to understand the union organizer is a salesperson. I'm not saying anything bad about salespeople; my dad was 100 percent commission sales for 23 years. But the fact is, they are not a member of a benevolent organization out there trying to help workers. They are a salesman; their job is to sign that worker up.

When I was a union organizer, Huthwaite Company trained us using their *SPIN Selling* book. Employers come to me now and ask, what's a good book to read to understand union organizing? And I always tell them they should read *SPIN Selling* by Neil Rackham, because it is a sales book that explains how to sell people through a four-step emotional process, and this is the way that union organizers are trained.

"SPIN" is an acronym; it stands for situation, problem, implication, and need payoff. We were trained in that for days. Every time we met with an employee, the union organizer goes back out to their car and fills out a sheet. On that sheet, they track what stage of those four emotions that

employee is at and write down a list of questions that they need to ask them the next time in order to move them down that emotional scale to get them to that point where you need to have them.

That's how intricate it becomes. Just to give you an example of the training, what you're trying to do is to move people down that emotional scale: It's not about the union. It's not about the card. It's about getting them to understand that signing that card, or voting for the union as it is under the current law, is what will get them what they need to solve whatever problem they have. Let me take you through the scenario.

If I'm a union organizer, I go into someone's home. First, I have to find out the situation. So I'm going to make small talk with them, and I'm going to talk with them about their family, and I'm going to look around. Maybe on their mantle over their fireplace I see a picture of their son in his baseball uniform. Once I see that, I know their son plays baseball, so now I can talk to them about their son's baseball. I find out that the plant that he works at has mandatory overtime sometimes, and the fellow I'm talking to is very upset because when they have mandatory overtime, he misses his son's baseball games.

Now I've got the situation. I know what his problem is, and I know what the implication is. The implication is he misses his son's baseball games; the problem is the mandatory overtime. I move him through that stage, and then I tell him how much I enjoy going to my son's baseball games, and I pour salt in the wound. It's called "building the pain." That's the phrase they use internally. I may not get him to the point where I need to initially. It may take a couple of visits. I'm even going to tell him about my son's baseball games and tell him how much fun I had last weekend, and I'm going to continue to build that pain.

Once I've built that pain long enough, then what's the need payoff? The need payoff is if he signs a union card, or if he votes for the union, he gets to go to his son's baseball games. It has nothing to do with the mandatory overtime; it has nothing to do with the problem. I've moved him beyond that stage, and I've got him to the point where, if he were going through a free election like they have now, when he goes in and the ballot says, "Do you wish to vote for the union? Yes or no?" he doesn't see, "Do you wish to vote for the union?" To him that ballot says, "Do you want to go to your son's baseball games? Yes or no?" Who would vote against that?

The Pressure to Produce

The union organizers are trained in that, and that's the emotional process they're going to take people through. Understand that the union organizer is under pressure to produce. They're a salesperson. So every Friday they have to file a weekly report that shows how many contacts they had, how many people signed cards, how many people didn't sign cards. If you're in a large organizing campaign, you have a morning meeting where all the organizers come in and sit down, and you go around the room and see who has the most cards. It's no different than any other sales organization. You're under that pressure to produce.

Right now, you have an election process that somewhat filters that out, because there are good union organizers and bad union organizers. There are union organizers out there that are very sincere and believe in what they're doing. They may be naïve and misguided, but they believe in what they're doing. Then you also have people who are out there who lie to people, who will intimidate people, who will threaten people, who will do all the bad stuff that we're talking about under the Employee Free Choice Act.

The good union organizer knows that those people's cards will not what we call "stick," because you're going through a 42-day election process. If someone goes out and blatantly lies to an employee in their home, sometime during that 42-day election process the truth is going to come out, and when that truth comes out, that employee is going to go into that voting booth and vote against the union. That's why most unions do not sign 50 percent of the people on cards before they file a petition for election. They sign 70 or 80 percent, because they know they're going to lose at least 20 to 30 percent during that process.

The election is the fire that tests that. The election process is what makes sure, or tries to hold that organizer responsible for telling people the truth

and not blatantly lying to them. If you take that process away, the organizer that wants to lie to them and tell them blatant falsehoods gets the card signed and gets out the door. Understand: There is no right of rescission on that card. You can't get that card back. Once the union has it, there's no legal obligation for them to bring it back.

What does that do to the union movement internally? People are promoted in every sales organization based on bringing in revenue. People are promoted based on bringing in members. That's how people get promoted in the labor movement. The people that are promoted into the higher-paying job—let's face it: I can tell you they're not elected; they're promoted. It's a reward. It's a reward for bringing in revenue and bringing in members.

So now we have no election process. We have no way to find out whether they lied to people or not. The person that can bring in the most cards, by hook or by crook, is the person who looks productive, and they're the ones who get promoted.

What does that do? Doesn't that make the bad apples in the organization rise to the top? I don't think it's good for the labor movement internally, because I think it's going to destroy them from within because you're going to have all your decision-makers at the top of every union being the most unethical people out there. They're going to be the ones that could get the most cards signed even if they did it through bad means.

It will take away their interest in being truthful. There is absolutely no incentive for the union organizer to tell the truth, because it doesn't matter; the election process will not happen.

Targeting the Uninformed Employee

What about the employee in that transaction? Let me explode a myth for you: Employees do not contact unions and beg to be organized; unions contact employees. If a union sat there and waited for employees to find their name in the Yellow Pages and call them and say, "Please come sign me on a card," unions would go hungry. They target companies by getting a list of employees and going and knocking on employees' doors.

The employees didn't research this decision. It's not like they went to buy an automobile. Before you go out and buy an automobile, maybe you look some things up online. You do some research, try to figure out what's the best deal, look up safety records, all those types of things that you would do before you made a serious financial decision.

This is a serious financial decision that's going to have implications for this worker and their family and their work future, but they don't get the chance to research it because they answer the door in their bathrobe and there's a union organizer standing there, and the union organizer comes in and sits down and starts to take them through that emotional process that we talked about. So the worker is completely uninformed. They have absolutely no idea what the implications are for them or their job. They don't understand the risk or uncertainty.

The Employee Free Choice Act seems to assume that every worker out there, every employee, has this depth of knowledge of the National Labor Relations Act, and that's just simply not true. In fact, I saw a poll last week where the Employment Law Alliance said that 75 percent of the people in the United States don't even know the Employee Free Choice Act exists, and that's after all the money that's been spent on both sides.

So how can we assume that the workers understand the intricacies and risk involved in collective bargaining under the National Labor Relations Act? The fact is they don't. So that worker is completely uninformed, they're surprised.

What if they're in an emotional state? Maybe their supervisor yelled at them that day at work. Maybe they got a bad line supervisor, and that line supervisor said something rude to them that day. Are they going to sign just because they're mad at the company? Absolutely. Is that a decision that maybe after a week or so they would say, "I don't know whether I really wanted to do this and put things at risk" and maybe go vote no? Sure, that's what happens. But now, under the Employee Free Choice Act, when they sign, that's it: It's over, no matter what their emotional state is.

Maybe the card is offered by a coworker, because a coworker can offer cards too. There's nothing that says that the union organizer has to be the one to do it, so maybe it's their coworker in the break room

offers them a card. They have no idea what it is, but because they like that person, they sign it because they're asking them to sign it. Or maybe the coworker just gives them blatantly false information that they would find out later was untrue.

Again, the election process is what sorts all that out, and without the election process, we have people making an uninformed decision. That's the mindset, and that's why I think the employee's really at a disadvantage.

How Authorization Cards Can Be Used

Last, let me talk about the authorization card itself. This is a copy of a union authorization card. This is from United Food and Commercial Workers, Local 700, where I worked, and it asks for your name and all kinds of information. The fact is, it looks kind of like a mortgage document because you've got to put all this information on there. This is one version of the card.

There is nothing in the law and nothing under the Employee Free Choice Act that says the card has to look like this. The card can be any size, any color, and it can have any language on it as long as it has one line on it, which is the suggested language from the National Labor Relations Board that says, "I hereby authorize [whatever the union is] to represent me for the purposes of collective bargaining." That's the only line that has to be on it; there can be a lot of other lines on it.

If you have a situation where only your signature is required to bring in a union, how creative can unions be with the authorization card? There's nothing under the law that restricts them; in fact, they're already starting to do some things.

This is the authorization card for the Service Employees International Union in California. I have a black and white copy here, but it's a color pamphlet, and it has nice pictures on the front and a bunch of fluff about SEIU and how they're going to get better wages and benefits and all this wonderful stuff. Buried in the middle of that paragraph on the front is the line off of this authorization card that says, "I hereby authorize SEIU to represent me for the purposes of collective bargaining." It's buried in a paragraph. You could also bury it in two or three paragraphs at the top of a petition.

But most interesting is the inside of the card. It's just a line of signatures. Put your name, your address, your phone number. I don't see anything on that page on the inside of this pamphlet that says, "I hereby authorize SEIU to represent me for the purposes of collective bargaining." So I have this pamphlet. I'm a union organizer. I hold a meeting at the local pizza joint where I'm buying pizza and beer, and I lay this down on the table like this and say, "Here, sign in on our sign-in sheet." Not against the law. This is the card that they're using right now in California.

How creative can they become with this? They can become very creative with it. They can use it as a sign-in sheet for parties like that. They can offer people rides to work if they'll sign the card. What about a low-wage worker whose car is broken down but they know that they need to get to work? That's great: "Get in the car with me, and on the way you fill this out, and I'll be happy to give you a ride to work." It saves you bus fare, doesn't it? Absolutely.

Those are the kinds of things that happen—besides the intimidation factor, besides the annoyance factor where they come to their house every day and knock on their door until they sign the card. But there's a lot of creative ways that they can get them to sign the card. They can take them out and have a few drinks. So what if they sign it under the influence of alcohol? It's a legal document. If you signed a mortgage under the influence of alcohol, what would happen? It probably wouldn't be valid, but this is. There's no way to test it.

I'll give you something that union organizers did years ago. They have what they call "red card/blue card." A union organizer would carry two different colors of cards—one in each jacket pocket, a red one and a blue one—and knock on your door and say, "I'm Joe with the union. I want to sign you up for the union." You say, "I don't want the union. I want no part of that." And he says, "Great, that's what we were trying to find out. We were polling workers. We're asking those who are opposed to the union to sign the red one and those who are for the union to sign the blue one, and then we're going to compare and see how many people want the union." And workers would do it.

The election process itself would ferret that out, because the worker would realize they'd been deceived. If you take away that election process, I think it's going to bring all of that deception and all of that creativity, if you will, back into it. UFCW Local 7 out of Denver, Colorado, has it right on their Web site. You can Google their Web site and go to health care organizing and look at it. They have it right on their Web site that if you sign your coworkers on cards, they will pay you for every card you bring them.

Most people think that's against the law. It's not against the law. So why couldn't a union pay someone who worked at a place $10 per card to bring them cards? You've got 300 people there. You bring me their cards, and I'll pay you 10, 20 bucks a card. There's nothing illegal about that. They've got it blatantly posted on their Web site.

No Obligation to Tell the Truth

How many other unions will start doing things like that if it's all about the cards? The union organizer, when they lay that card out, is under no obligation to tell the person the truth. That's shocking to people, but there is nothing in the law that requires the union organizer to tell people the truth about the union authorization card, to tell people the truth about the union; in fact, they can blatantly lie to people.

The National Labor Relations Board has actually endorsed that to a degree. I'll tell you what they said on the Shopping Kart food market decision. The National Labor Relations Board said that it will permit unions to issue misleading campaign propaganda because it does not think that employees are naïve enough to believe all that they are told during the course of a union election campaign. That's the government's official position: that it is okay for unions to lie to employees because the employees have 42 days to figure it out. Why should we take away that 42 days?

I guess the last thing I would say to you is, if the unions have the right to mislead people and lie about signing that card and the government's official position is that we're going to give that employee 42 days to figure it out, I think that employee deserves that 42 days. And what we're talking about is taking that time period away from them.

Questions & Answers

JAMES SHERK: I have one question for both of you. On the binding arbitration provision, how will that affect how management and unions approach the collective bargaining process for these first contracts?

HOMER DEAKINS: The way it's set up, you have to begin bargaining in 10 days; then you have bargaining for 60 days or so; and then, if you don't reach an agreement in that period, there is a mediation. It all amounts to about 130 days from the day you first meet.

Just think about that from a realistic standpoint. Why would anyone have the idea that they should go through that process and not ask for the most outrageous thing that they could think of, thinking that whatever an arbitrator resolves is going to be something less than that?

There's really no practical collective bargaining that's going to occur during that period of time. It's going to be strictly a matter of posturing. Management's going to posture its best position; unions are going to say something that's exaggerated, thinking that something in the middle is where they're going to end up in the arbitration process because most arbitrators like to split the baby. They want that arbitration case the next time, and when their name appears on that list that comes from the Federal Mediation and Conciliation Service, they don't want either side striking on them. Most arbitrators think that the way to do that is to do something in the middle.

So the reality is that, for all practical purposes, this bill would eliminate good-faith bargaining and would substitute interest arbitration. There is no interest arbitration that I'm aware of today that is either not involving government employees who do not have the right to strike or in the private sector where the parties have agreed to interest arbitration, and that's very, very seldom. If they do, then parameters are set within which that arbitrator must act.

Under this bill, there are no parameters. An arbitrator is wide open in deciding whatever he or she thinks that collective bargaining agreement should say.

RIAN WATHEN: I would add that the one positive for our economy will be that the FMCS will be

hiring, and they'll probably need enough arbitrators that it will take care of most unemployment situations. With what Homer has said, why would every collective bargaining agreement in the United States not end up in interest arbitration? Why would the union have any incentive to settle at all? They simply go in, ask for the moon, and then hope that they get a little bit of it. They have no incentive to be realistic or practical at all.

So if this passes, they better hire a bunch of arbitrators, because that's what they're going to need.

HOMER DEAKINS: The difficulty is that this part of the bill isn't getting much attention. This is described as "the card check bill," and there are a lot of people that think that ultimately the unions will back away from card check and will say, "We'll have quickie elections in five days," or whatever. That permits some of these Congressmen to say "Oh, we got rid of card check; we got rid of the bad part. We're still going to have secret-ballot elections."

More emphasis has got to be placed on the total loss by management of the right to control labor costs. That is just as un-American as you can get, and it's certainly opposed to free enterprise. There is a question as to whether that portion of the bill is unconstitutional. It may very well be a deprivation of the right of contract, which is a constitutionally protected right. But that is a right that they have carved down pretty narrowly, and I don't think it's anything that management can rely upon.

Q: I want to follow up on that. I know during the New Deal period there was a lot more mediation and arbitration, kind of a corporatist thing going on with the unions and the government, and I wonder, under this bill, whether there would be any possibility that it could get taken over by government in that way.

I know what FDR did a lot of times was influence the way that decisions would come out rather than actually impose wages and prices. So I wonder, if there was a lot more arbitration, even if it was done by a private lawyer or something like that, whether it could be politically influenced and, instead of splitting the baby in half, whether it would end up getting politically influenced towards always giving the unions what they want.

HOMER DEAKINS: You start with the proposition that the arbitrators that would be assigned to determine these contracts are coming through the Federal Mediation and Conciliation Service and that the director of the Federal Mediation and Conciliation Service, who is a government person, is going to be deciding who's on that panel that the parties strike from. So even initially, you have the government in a position to really influence where the bad arbitrators go.

I don't know long-term whether I can envision the government simply coming in and taking over unless it's in a bailout situation like we're going through right now, in which clearly they will take control. They're going to be, to some very large extent, controlling two of the big three automakers as a result of the bailout. Certainly, if it goes that far it could happen.

Q: My question deals with the FMCS and their jurisdictional enforcement capabilities. They were formed under the Labor Management Relations Act, and it specifically says that the FMCS has to take cases that have a significant contact with interstate commerce, and after that it says specifically that if the contract does not have a specific contact with interstate commerce, then they can't take it.

So my first question is: What happens if there is a small shop that's trying to get unionized, they get unionized, then they want to go to this binding arbitration, but it doesn't have a specific interstate commerce connection? After that, even if they do, the FMCS has no enforcement capabilities; in fact, the statute that created the FMCS specifically says that there will be no enforcement capabilities. So what if the employer just says no?

HOMER DEAKINS: You're telling me something about that federal mediation statute I really hadn't looked at, but I think that would probably be interpreted to mean affecting interstate commerce, and if it affects interstate commerce—

Q: But we're not talking about affecting sales in another state, and if it doesn't, they have to kick it to another state or board.

HOMER DEAKINS: This bill would specifically apply to employers that are covered by the National

Labor Relations Act, which is a much broader definition. Once you're covered by the National Labor Relations Act, then the statute itself says that the FMCS will assign a panel of arbitrators. So I think that would override any limiting language in the act authorizing federal mediation.

Q: Historically, how long has this card check idea been around? Was it around from the very beginning in 1947 and they just were not at that time able to get it into the bill? I know McGovern's quotes are 30 years old or so; how far back does the idea go?

RIAN WATHEN: I honestly don't know. I started with the labor movement in 1990, and at that time, obviously, we had the card checks where we could get an employer to voluntarily agree to a card check, and I know that there was some thought within the labor movement that management was cheating in the elections. We didn't lose elections because we had a bad product; we lost elections because they cheated.

So there was always some idea germinating inside the labor movement about how to rebalance the playing field, and I know the card check like this was always talked about, or the utopian idea of completely eliminating the election process was always talked about. When it actually became formalized I don't know, but that talk was always there.

Q: I'd like to ask Homer: You made reference to punitive damages that could be awarded under this new act. Who gets to decide whether punitive damages are awarded? Do you get a right to a jury of your peers, or how exactly is that decided?

HOMER DEAKINS: The NLRB would decide on the punitive damage issues, and that's a five-member board. Three of the members are appointed by the party that holds the presidency and two others by the opposition. So the NLRB would decide all issues of punitive damages, and that includes treble damages for back-pay cases and fines of up to $20,000 per violation for other violations that occur during an organizing campaign.

So we're putting all of those severe penalties on management under this act, and we're not putting any additional penalties on organizers who are licensed to intimidate and to engage in fraud under this act. If a union turns in fraudulent cards, there is no remedy for that. If they intimidate workers, then they might have to post a notice at the union hall. That's the only remedy for those types of violations.

Q: If card check has been available for years, and if the unions are winning more votes, if there are some other individuals such as Rian who are friendly to your situation within some unions—particularly in California—I was wondering if it might not behoove you to try to organize a certain vineyard in a certain hotel in the San Francisco area with someone whom I'm sure would be willing to have her husband's labor forces organize by use of a card check, and possibly go on offense in this situation by showing a certain powerful lady in the Congress of the United States to be somewhat hypocritical on the issue, since her husband's facilities aren't unionized.

RIAN WATHEN: Let me layer on a little bit more hypocrisy there. I have a collection of petitions that were filed by union staff people who signed authorization cards to be organized. A union is an employer, and I was a member of a union when I worked for the union. We had our own internal organization, and we collectively bargained just like we did with any other employer.

I have a collection of petitions where union staff people have signed cards, and the union leadership has forced them to go through the electing process, refused to grant them a card check. In fact, we have board charges where they actually broke the law and threatened them. But what's good for the goose is good for the gander, right? How can you say that your union employees that sign up have to go through an election process but you want the employer to give you a card check?

HOMER DEAKINS: It's also interesting that the Colombia Free Trade Act is so focused on the fact that they've done this terrible job in the way that they treat union organizers, and yet the Congress said that in Colombia, there needs to be secret-ballot elections where these employees can decide whether to unionize.

RIAN WATHEN: To protect the rights of workers.

Q: Maybe you can speak to the uncertainty that this adds to businesses. I don't understand how it

works in current law, but after a union secret-ballot election, is there a period of time before a union can try again, and does this in essence sort of have open-ended uncertainty as to whether or not your employees are going to be unionized? Or are employers under current law protected after a failed union attempt for a certain period of time, and does that change under this proposed law?

HOMER DEAKINS: Under the existing law, if there is an election, there cannot be another election for one year from the date of that election. The union could come back and begin organizing; there's no restriction on organizing. You simply can't file a petition again for one year. If a union tries to organize workers and files a petition asking for an election and then withdraws the position, then they're barred for six months; but if they go through the election, they're barred for a full year.

Under this statute, there is a one-year protection for unions if they win, but it's unimportant. You're going to have a contract in place before that year is up, and that contract is going to extend for two years. So the result is, if the union gets a majority signed up, that's the end date right there, and the union's in for at least 120 days plus two years.

RIAN WATHEN: I'll add that, from a practical standpoint, again, the union organizer is under pressure to produce, and they go out and sign cards at a workplace. Let's say that they hit a wall. Let's say they get 45 percent of the people in that workplace signed up, but they can't get over that 50 percent. Understanding that election process, they normally would try to sign up 70 or 80 percent in order to go through with the election. If they hit a wall at 45 percent, they know that they're never going to get to where they need to go, and it becomes a futile exercise. They're under pressure each week to produce, so they move on to a new employer.

Now, if you have a situation where they only have to get the legal majority 50 percent plus 1, they are going to grind and grind and grind to try to get those last few cards, and that really becomes important when you look at the numbers. Almost 70 percent of the elections under the National Labor Relations Board involve 50 employees or less. So we're not talking about large units here; we're talking about small units where they may be within one or two cards of needing to sign. Do they continue to harass those employees to try to get them to sign, hoping maybe one of them quits and a union-friendly person gets hired, or a person gets tired of having their door knocked on three times a day so they finally say, "Give it here, I'll sign it, go away"?

I didn't mention this, but employees never know where that number is. The union organizer never tells them, "We have 39 percent of the cards" or "We have 52 percent of the cards." The union organizer controls that and keeps that internally. The employee that signs that card may sign the one card that pushes them over, and they did it just to get that organizer to go away, but they don't realize it because it's not a public number. No one knows. That organizer has those cards in the pocket, and they don't reveal that.

So I think it does provide incentive for the organizer to stay there and continue to grind away, and there's no time limit on that. They can continue to harass those employees as long as they need to.

HOMER DEAKINS: The employer that is the most affected adversely by this is the small employer with a small unit of employees who can be organized before management even knows what's happening. I don't know how many times in my long career I have answered the telephone for some small employer that said, "I just got these papers from the NLRB; what does this mean?" I start off by saying it means that probably 70 percent of your people have already signed union cards.

In that situation, it's over for that small employer. If you've got an automobile assembly plant with 5,000 employees in it, you're going to find out that something's going on, and you're going to have the opportunity to respond. It's the small employer, the small shop, that's not going to, and that's where most of the jobs are being created today.

JAMES SHERK: We hear so much about the employers intimidating workers, and that's what all these unfair labor practice charges are. Since you've both had experience in union organizing campaigns, how much reality is there to those claims of widespread intimidation and firings?

RIAN WATHEN: There just isn't. That's not been my experience, both in union organizing cam-

paigns or working as a management consultant. In a union organizing campaign, what would normally happen is you would go out and sign these people up because you would tell them that everything was going to get better. The union organizer's going to paint one side of it, this positive side, and the company comes back and put up one NLRB decision that says that you can lose wages and benefits in collective bargaining, and half the people stop coming to union meetings.

Did management intimidate them at that point? No. They didn't intimidate them; they didn't threaten them; they didn't fire them. They gave them a fact. They gave them a fact that those people didn't know when they signed the card.

And that's what the unions want to do: They want to eliminate that process. They don't want management to be able to give them the facts, because the union organizer didn't tell them those things. Frankly, in most cases, the union is trying to portray the employer as a bad guy because they want to create this wedge between the employees and the employer. If the employer at the company fires somebody, wouldn't that play right into the union's hands? Wouldn't that paint the employer out to be this bad person?

I did not have any organizing campaigns where a person was fired for union activity that I can remember. And from the management side, working as a management consultant, what I have found is that most companies and their attorneys are very conservative and err on the side of caution. They don't want to do anything, because you want to go through the election and win it, and win it correctly and win it in the right way as a company. You want to win it because your employees believe in you. You want to win it because you've given them the facts.

If you fire someone or if you commit any egregious violation of the law like that, you know what the remedy normally is? It could be a bargaining order where they force you to bargain with the union even though the union didn't win the election. Or it's a rerun election, and you have to go through that whole 42-day process again.

No employer, no company wants to do that, and I have not seen it happen on either side. I think they've really distorted the numbers on that. That is probably the biggest falsehood out there.