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Cracking the Bedrock of Democracy: Destroying the Secret Ballot in Union Elections

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Repealing a right—to secret ballots—long considered fundamental to democratic culture would be a radical act.

—George F. Will, 2007[1]

If the act of voting were performed in secret, no bribed voter could or would be trusted to carry out his bargain when left to himself.

—*The Nation*, 1888[2]

The Employee Free Choice Act of 2009 (EFCA), also known as the "card check" bill, has been reintroduced in Congress.[3] The EFCA would fundamentally change the nature of the relationship between unions, employers, and employees. Professor Richard Epstein of the University of Chicago School of Law calls the EFCA "the most transformative piece of labor legislation to come before Congress since the enactment of the National Labor Relations Act of 1935 (NLRA)."[4]

The EFCA would destroy the underpinnings of the National Labor Relations Act, which established a structured system in which unions and employers—not the government—would negotiate the terms and conditions of their collective bargaining agreements. Section 3 of the EFCA mandates that if the parties cannot agree to a contract within 130 days after a union is first recognized, an arbitration panel established by the Federal Mediation and Conciliation Service will be able to impose the terms and conditions of a collective bargaining agreement that is "binding upon the parties for a period of 2 years." As the Supreme Court has said:

Talking Points

- The Employee Free Choice Act of 2009 would fundamentally change the nature of the relationship between unions, employers, and employees.
- The EFCA would destroy the underpinnings of the National Labor Relations Act, which established a system in which unions and employers, not the government, would negotiate the terms and conditions of collective bargaining agreements.
- The EFCA's effective elimination of the secret ballot in union elections is its most shocking provision because it creates ideal conditions for individuals to be subjected to intimidation, threats, and coercion. The secret ballot was implemented to prevent these ills not only in union elections, but in *all* elections.
- The only reason to eliminate the secret ballot in union elections is to give union leaders and managers the power to manipulate individual workers to support the union and not to reflect the true choices of the employees.

This paper, in its entirety, can be found at:
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> [The object of the NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions…. [I]t was recognized from the beginning that agreement might in some case be impossible, and it was never intended that the Government would…become a party to the negotiations and impose its own views of a desirable settlement.[5]

But it is the EFCA's effective elimination of the secret ballot in union elections that is its most shocking provision, since it creates ideal conditions for individuals to be subjected to intimidation, threats, and coercion. The secret ballot was implemented to prevent these ills not only in union elections, but in *all* elections. The secret-ballot election was one of the "central pillars of the original NLRA" that was intended "to introduce a system of union democracy whereby unions could only obtain the rights of exclusive representation for firms if they could prevail in an election held by secret ballot."[6]

This paper will discuss the election change, not the serious constitutional and property rights issues arising in the mandatory arbitration provision.[7]

Development of the Secret Ballot in Political Elections

The secret ballot that most modern democracies, including the United States, take for granted today was first widely used in Australia in 1856. It was introduced by South Australian Electoral Commissioner William R. Boothby because the traditional public process of voice votes "made the voter vulnerable to both bribery and intimidation."[8] England adopted the secret ballot in 1872 after the Queen urged that the conduct of elections be examined by Parliament and "further guaranties adopted for promoting their tranquility, purity and freedom."[9]

The secret ballot began to be adopted in this country after 1888 to counter widespread instances of bribery and intimidation of voters. In fact, the 1888 presidential election is considered to have been "one of the most corrupt in American history."[10] This after the notorious election of 1884, in which New York Governor Grover Cleveland won a narrow victory over Republican James G. Blaine, polling 4.876 million votes (48.5 percent) to Blaine's 4.852 million (48.26 percent), although there was a wider margin in the electoral college: 219 votes to 182. Cleveland won despite Blaine's having generated the slogan "Ma, Ma, Where's my pa? Gone to the White House, Ha! Ha! Ha!" against Cleveland based on the accusation that Cleveland had fathered an illegitimate child.[11] The election

1. George Will, *An Assault on Corporate Speech*, WASH. POST, Feb. 27, 2007, at A15.
2. *See* TRACY CAMPBELL, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION 1742–2004 97 (2005).
3. Employee Free Choice Act of 2009, H.R. 1409/S. 560, 111th Cong. (2009). The bill was previously introduced as the Employee Free Choice Act of 2007, H.R. 800/S. 1041, 110th Cong. (2007). Although the EFCA passed the House of Representatives by a vote of 241 to 185, it was stopped in the Senate in June 2007 after cloture was not invoked in a vote of 51 to 48.
4. RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 7 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337185.
5. H.K. Porter Co. v. Nat'l Labor Relations Bd., 397 U.S. 99, 103–104 (1970).
6. EPSTEIN, *supra* note 4, at 8.
7. *See generally* James Sherk, *Employee Free Choice ACT (EFCA): The Heritage Foundation 2009 Labor Boot Camp*, Jan. 15, 2009, http://www.heritage.org/Research/Labor/wm2210.cfm.
8. National Archives of Australia, Documenting a Democracy, Constitution Act 1856, http://www.foundingdocs.gov.au/item.asp?dID=6 (last visited Mar. 9, 2009).
9. ELDON COBB EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 18 (1917).
10. CAMPBELL, *supra* note 2, at 94.

was so close that a "mere 600 votes in crucial New York would have thrown the election to Blaine."[12]

New York, of course, was the home of Tammany Hall, probably the most efficient and ruthless vote fraud machine in the history of American elections. Even after Boss William Marcy Tweed's fall from power, Tammany Hall continued to manufacture votes, "especially during the zenith of its power in the second half of the nineteenth century."[13] Since there were no secret ballots, "Tammany fixers could ensure that voters would cast ballots as promised."[14] Manufacturing 600 fraudulent votes in New York through bribery, intimidation, or outright fraud was something Tammany Hall could have done easily, given its prior record and the lack of a secret ballot.[15]

Charges of fraud also enveloped the 1888 election when Benjamin Harrison challenged incumbent Grover Cleveland. Harrison lost the popular vote by about 100,000 votes but won the electoral college by a margin of 233 to 168.[16] Harrison won his home state of Indiana by only 2,376 votes. Indiana had "a notorious reputation in the annals of electoral corruption"[17]and in fact was infamous "for the buying and selling of votes."[18] This was particularly noticed during the 1888 election when a circular from a Republican national committeeman, W. W. Dudley, "instructing Indiana party leaders to make sure that purchased voters cast GOP ballots" was publicized.[19] GOP Chairman Matt Quay said that Harrison never knew "how close a number of men were compelled to approach the gates of the penitentiary to make him President."[20]

In 1888, Louisville, Kentucky, which had experienced "a series of fraudulent city elections," became the first municipality in the nation to adopt the secret ballot after a state representative read an article on the new secret ballot being used in Australia.[21] Massachusetts became the first state to adopt it that same year.[22] The secret ballot spread quickly as other state legislatures implemented it and former President Grover Cleveland supported its passage, calling for citizens to "restore the purity of their suffrage."[23] In 1889, nine states implemented the secret ballot—including Indiana. By the time of the 1892 presidential election, "citizens in 38 states voted by secret ballot."[24]

Over the past 120 years, the secret ballot has become the bedrock of our democratic election process in the United States, as well as in those of numerous other democracies around the world. Even the U.N.'s Universal Declaration of Human Rights recognizes the importance of periodic and genuine elections "by secret vote."[25]

11. LARRY SCHWEIKART & MICHAEL ALLEN, A PATRIOT'S HISTORY OF THE UNITED STATES 447 (2004).
12. *Id.*
13. JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY 167 (2008).
14. *Id.*
15. The personal animosity that Tammany Hall boss John Kelly held towards Cleveland had been smoothed over, and he "reluctantly supported the Democratic national ticket in New York." *See* HarpWeek.com, 1884: Cleveland v. Blaine, http://elections.harpweek.com/1884/Overview-1884-4.htm (last visited Mar. 9, 2009) [hereinafter Blaine].
16. Encyclopaedia Britannica Profiles, The Election of 1888, http://www.britannica.com/presidents/article-77824 (last visited Mar. 9, 2009).
17. CAMPBELL, *supra* note 2, at 95.
18. Blaine, *supra* note 15.
19. *Id.* Dudley instructed local leaders in Indiana to "Divide the floaters [voters] into blocks of five, and put a trusted man with necessary funds in charge," being sure to "make him responsible that none get away and all vote our ticket." *See* S.J. Ackerman, *The Vote That Failed*, SMITHSONIAN MAGAZINE, Nov. 1998.
20. CAMPBELL, *supra* note 2, at 95.
21. *Id.* at 115.
22. *Id.* at 97.
23. Ackerman, *supra* note 19.
24. *Id.*

Any proposal to eliminate the secret ballot in our political elections would rightly be met with protests and outrage at the very concept of taking away such an important guarantee of an individual citizen's freedom of choice. Vote buying loses its appeal when the vote buyer cannot be sure that an individual votes the way he was paid to vote. The ability to cast a vote without fear was also one of the major reasons for adoption of the secret ballot, because "it would protect [voters]…against intimidation and coercion."[26]

Yet a return to that environment is exactly what is being proposed for union elections in the Employee Free Choice Act, a bill that represents a radical departure from democratic ideals. As the *Buffalo News* opined, "[m]ore than most people, members of Congress should be publicly devoted to the concept of the secret ballot…[the] democratic act upon which this county is predicated. Without it, everything else dies."[27]

The Secret Ballot in Union Elections

The provisions for secret ballots in union representation elections are outlined in Section 9 of the National Labor Relations Act, codified at 29 U.S.C. §159 and first passed in 1935. The original language stated that the National Labor Relations Board (NLRB) could provide for "a secret ballot of employees, or utilize any other suitable method to ascertin [*sic*] such representatives."[28]

This provision was amended by the Taft–Hartley Act of 1947 to delete the "other suitable method" language after Congress found that "the American workingman…has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act."[29] Thus, the right of employees to a secret ballot has been in existence for over 60 years.

In essence, unions first obtain authorization cards signed by employees indicating their approval for union representation (thus the term "card check"). Once the union files a petition with the NLRB indicating that it has the support of a "substantial number of employees" who "wish to be represented for collective bargaining," the Board is charged with investigating the petition.[30] If the Board determines that a question of union representation exists, "it shall direct an election by secret ballot and shall certify the results thereof." Such an election can be requested only once every 12 months.[31] In essence, the NLRB will conduct a secret-ballot election if at least 30 percent of employees indicate support for a union.[32]

The median time for conducting elections in 2007 was only 39 days from the filing of the petition—little more than one month.[33] The NLRB conducted 1,905 "conclusive representation elections" in cases closed in fiscal 2007, and unions won 55.7 percent of those elections.[34]

25. Universal Declaration of Human Rights art. 21, Dec. 10, 1948, *available at* http://www.un.org/Overview/rights.html.
26. EVANS, *supra* note 9, at 22.
27. Editorial, *Pay-Back Time in Congress*, BUFF. NEWS, Mar. 2, 2007.
28. Wagner Act, Pub. L. No. 74-198 § 9(c) (1935).
29. H.R. Rep, No. 80-245, at 4 (1947).
30. 29 U.S.C. § 159(c)(1)(A) (2009). The employer can file a similar request.
31. 29 U.S.C. § 159(e)(2) (2009).
32. *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp., Lab. and Pensions of the H. Comm. on Ed. & Lab.*, 110th Cong. (Feb. 8, 2007) (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockius LLP) [hereinafter Cohen Statement]. Mr. Cohen served on the NLRB from March 1994 to August 1996.
33. Nat'l Labor Relations Bd., Off. of Gen. Couns., Summary of Operations (Fiscal Year 2007), Memorandum GC 08-01 (Dec. 5, 2007), *available at* http://www.nlrb.gov/shared_files/GCMemo/2008/GC08-01Summary ofOperationsFY07.pdf. Ninety-three percent of all initial elections were conducted within 56 days of the filing of the petition requesting an election.
34. NAT'L LABOR RELATIONS BD., SEVENTY SECOND ANNUAL REPORT FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2007 11 (2008), *available at* http://www.nlrb.gov/nlrb/shared_files/brochres/Annual%20Reports/Entire2007Annual.pdf.

If an employer does not contest the union's assertion of representation through card checks, the union can be instituted in the workplace without an election. But an employer can refuse to recognize a union based solely on card checks and can insist on a secret-ballot election.[35] However, the *decertification* of union representation at the request of employees can be accomplished *only* through a secret ballot.[36] When faced with decertification, unions have taken the position that "elections are the preferred means of establishing whether a union has the support of a majority of the employees."[37]

Through these provisions, as a former member of the NLRB has said, the National Labor Relations Act "establishes a system of industrial democracy that is similar in many respects to our system of political democracy. At the heart of the Act is the secret ballot election process administered by the National Labor Relations Board."[38] The basic premise is that workers express their true wishes based on information from all sides of the issue. When an election is conducted, the NLRB brings in "portable voting booths, ballots, and a ballot box."[39] No supervisors or managers from the employer and no campaigning are allowed in the voting area, although designated employee observers may be present.

Under 29 U.S.C. §160, the NLRB can prosecute any employer who is engaging in an unfair labor practice—and that includes interfering with the election process. In fact, the Supreme Court has confirmed that the NLRB can recognize a union based solely on union authorization cards if an employer has committed unfair labor practices "that tend to undermine the union's majority and make a fair election an unlikely possibility."[40] However, "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[41]

Disenfranchising Workers to Facilitate Union Membership

Section 2 of the EFCA eliminates the right to a secret ballot provided in 29 U.S.C. §159(c). It amends part (c) by providing that if a union presents a petition to the NLRB "alleging that a majority of employees" want to be represented by the union, "the Board shall not direct an election but shall certify the individual or labor organization as the representative." In other words, if 50 percent of the workforce plus one employee sign union authorization cards, the NLRB must certify the union without any actual election.[42]

However, if a group of employees become unhappy with their union representation and want to get rid of the union, they cannot simply collect authorization cards. Decertification of the union at the request of employees can still be accomplished *only* through an election held by secret ballot.

The coercion and intimidation that an employee can face from a union and its supporters for refusing to sign an authorization card was recognized by the Supreme Court in *National Labor Relations Board v. Savair Manufacturing Company*:

> If we respect, as we must, the statutory right of employees to resist efforts to unionize a plant, we cannot assume that unions exercising powers are wholly benign towards their antagonists whether they be nonunion protagonists or the employer. The failure to sign a recognition slip may well seem ominous to nonunionists who fear that if they do not sign they will face a wrathful union regime, should the union

35. Linden Lumber v. Nat'l Labor Relations Bd., 419 U.S. 301, 309–310 (1974).

36. 29 U.S.C. § 159(e)(1) (2009). Decertification is triggered when at least 30 percent of the employees file a petition requesting decertification.

37. Levitz Furniture Co. of the Pac., Inc., 333 N.L.R.B. 717, 719 (2001) (citations omitted).

38. Cohen Statement, *supra* note 32.

39. *Id.*

40. Nat'l Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575, 579 (1969).

41. *Id.* at 602.

42. The existing procedure remains in place if fewer than fifty percent of employees support union representation.

> win. That influence may well have had a decisive impact in this case where a change of one vote would have changed the result.[43]

As the Court of Appeals for the District of Columbia has said, such "'cards are not the functional equivalent of a certification election' and elections have a 'preferred status' as a means of determining representation."[44] The court also pointed out that the NLRB has concluded that card checks give a "greater opportunity for coercion of employees by union organizers, as compared with a secret ballot"; that "[a]rguably, employees may misunderstand the import of signing an authorization card, because of misreading, failure to read, or union misrepresentation"; and that "[w]hen cards are used, the employer has no opportunity to speak to his employees concerning their determination to have union representation."[45]

The Court of Appeals for the Fourth Circuit concluded that it would "be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands."[46] The Second Circuit Court of Appeals said that "it is beyond dispute that [a] secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[47] When a union obtains a majority of authorization cards, that by itself "has little significance" because "[w]orkers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing."[48]

A former union organizer for UNITE HERE, a union that represents employees in the textile, lodging, food-service, and manufacturing industries, testified in 2007 about the "disgraceful practices" that unions use to obtain card checks from employees.[49] Those manipulative tactics included:

- A "blitz" in which "teams of two or more organizers" go to the homes of employees, most of whom have no idea there is a union campaign underway, and "use the element of surprise to get 'into the door.'" Usually, when someone signed a card, "it had nothing to do with whether a worker was satisfied with the job or felt they were treated fairly by his or her boss…. [M]ost often it was the skill of the organizer to create issues from information the organizer had extracted from the worker during the 'probe' state of the house call."
- Avoiding showing employees the union contract or talking about "topics such as dues increases, strike histories, etc."
- Manipulating the size of the group of workers they were supposedly organizing "after the drive was finished" if required to reduce the number of cards needed to obtain a majority "regardless of [the employees'] level of union support."[50]

The former organizer admitted that he knew "many workers who later, upon reflection, knew that they had been manipulated and asked for their card to be returned to them." But the union's strategy was "never to return or destroy such cards, but to include them in the official count towards the majority." That is why he concluded that "the number of cards that were signed had less to do with

43. 414 U.S. 270, 280–281 (1973). In fact, while 36 individuals signed the union authorization cards in this case, only 22 voted in favor of the union during the election.
44. Truck Drivers Union Loc. No. 413 v. Nat'l Labor Relations Bd., 487 F.2d 1099, 1107 (D.C. Cir. 1973) (citations omitted).
45. *Id*. at 1107 (citations omitted).
46. Nat'l Labor Relations Bd. v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967).
47. Nat'l Labor Relations Bd. v. Flomatic Corp., 347 F.2d 74, 78 (2nd Cir. 1965).
48. Nat'l Labor Relations Bd. v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983).
49. *Strengthening America's Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp., Lab. and Pensions of the H. Comm. on Ed. & Lab.*, 110th Cong. (Feb. 8, 2007) (testimony of Jen Jason, former UNITE HERE organizer).
50. *Id*.

support for the union" and more to do with the tactics of the organizers. This was consistent with the actual results from "secret ballot elections that are conducted in which workers are able to vote and make their final decision free from manipulation, intimidation or pressure tactics."[51]

Another former union organizer for the United Food and Commercial Workers local in Indianapolis confirms that testimony. His experience obtaining card checks was that you ended up with "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."[52]

The same individual also points out that the current NLRB election process weeds out the "bad union organizers" who are willing to lie, intimidate, or threaten employees to get their signatures on card checks because cards obtained through such means will not "stick" when you have a secret-ballot election where the employee knows he can vote his conscience without the union organizer knowing what he did. But the card check system will encourage the "organizer that wants to lie to [employees] and tell them blatant falsehoods, gets the card signed and gets out the door. Understand, there is no right of rescission on that card…. [Y]ou can't get that card back."[53] The organizers who bring in the most cards, no matter how they do it, will be the ones who get promoted within the union leadership, and that will not be good "for the labor movement" because the decision-makers will end up "being the most unethical" members of the union.[54]

The National Institute for Labor Relations Research has collected thousands of reports of union violence involving both property damage and personal injury, only 3 percent of which have led to arrest and conviction. Unfortunately, federal law enforcement has been limited in trying to stop such incidents because of a prior Supreme Court decision holding that unions can engage in violence, intimidation, and coercion as long as "the use of force [is] to achieve legitimate collective-bargaining demands."[55]

In fiscal 2007, 5,992 charges were filed with the NLRB against unions, and 84.4 percent alleged illegal restraint and coercion of employees. The overwhelming majority of the complaints (82.8 percent) were filed by individuals, while other unions filed at least 90 such charges.[56]

All of these reports show that union organizers have engaged in coercion, deception, and other forms of manipulation. Under current law, these tactics can get them an election, but they are not tactics that can be used effectively *during* the election when employees can cast a secret ballot in an independent process. Because unions could establish union representation through a system that allows them to know exactly how every employee is voting and therefore take steps against workers who refuse to agree to authorize the union, the changes in the National Labor Relations Act made by the EFCA would provide greater opportunities for union organizers to engage in intimidation, coercion, and manipulation.

It would also encourage the outright forgery of signatures on card checks. Employers cannot interrogate the employees even if they suspect forgery (or intimidation), or they will be committing an unfair labor practice. The NLRB will not investigate a complaint without evidence that the employer is foreclosed from obtaining. All the NLRB does when it receives cards with signatures from a union is to

51. *Id*. Jason added that the "promises made by organizers at a worker's house had little to do with how the union actually functions." Organizers also trained workers to provoke unfair labor practices in order to coerce an agreement from the employer to accept card checks and not insist on a secret ballot election.

52. Rian Wathen, Consequences of the Employee Free Choice Act: Union and Management Perspectives, Speech at the Heritage Foundation (Feb. 23, 2009).

53. *Id.*

54. *Id.*

55. U.S. v. Enmons, 410 U.S. 396, 408 (1973).

56. NAT'L LABOR RELATIONS BD., ANNUAL REPORT, *supra* note 34, at 6.

"compare the names on the cards with the names on the [employee] list, and there's no process for evaluating the authenticity of the signature." Therefore, it is unlikely that such fraud would ever be discovered.[57]

Unlike the current process where a neutral third party (the NLRB) conducts an independent election, the new system under the EFCA would put the candidate in charge of conducting the election, including collecting all of the "ballots." There would also be no observers present to watch the behavior of union representatives. Every state guarantees the right of candidates and political parties to have observers in polling places because it is a fundamental assumption that transparency is the best guarantee of a fair and secure election. The EFCA would destroy such transparency.

The tactics used by union organizers described above are strikingly similar to illegal conduct engaged in by some political campaigns to obtain absentee ballots from voters.[58] They send campaign workers to residences to pressure voters into applying for absentee ballots, even when the voters do not need or want one. They come back when the absentee ballots arrive in the mail, making sure the voters vote the "right" way on the ballots, sometimes marking the ballots for them, and then taking the ballots for delivery to election officials.

The EFCA would legalize, in the union context, conduct that is illegal in political elections, including allowing the union to campaign for the vote as the voter is "voting" and then taking charge of the "ballot." Every state prohibits electioneering inside and close to polling locations precisely to avoid manipulation and intimidation of voters when they are casting their ballots; yet that is exactly what the EFCA would legalize.

Imagine also a situation in which "the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge"[59] and obtain votes while the incumbent does not even know there is an election going on. The EFCA creates that situation for employers: An election for union representation could be over before the employer (or employees known to be hostile to a union) even knows it is happening. As an opinion article in *The Wall Street Journal* said, "[t]here is simply no legitimate government interest in promoting unionization that justifies a clandestine organizing campaign which denies all speech rights to the unions' adversaries."[60]

The basic unfairness of this is so obvious that this type of EFCA system, if proposed for our political elections, would certainly raise serious constitutional questions about the fundamental rights to free speech and a fair election process. Even if the constitutional requirements are not the same here, it is no less outrageous for union representation elections.

EFCA supporters are not always against secret ballots, however. One of the most outrageous hypocrisies of the push for passage of the EFCA is a letter sent by a number of its original sponsors to the Mexican Junta Board of Conciliation and Arbitration in 2001. Representative George Miller (CA–7), the EFCA's chief sponsor in the House, as well as other cosponsors, urged the use of "the secret ballot in all union recognition elections" in Mexico. This is because "the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." In fact, it is the use of the secret ballot in such elections that "will help bring real democracy to the Mexican workplace."[61] Regrettably, the sponsors of this bill do not seem to want the same protection for American workers that they have acknowledged is "absolutely necessary" to ensure that workers in other countries are not intimidated.

57. Homer Deakens of Ogletree Deakins, Consequences of the Employee Free Choice Act: Union and Management Perspectives, Speech at the Heritage Foundation (Feb. 23, 2009).

58. *See generally*, Hans A. von Spakovsky, *Absentee Ballot Fraud: A Stolen Election in Greene County, Alabama*, Sept. 5, 2008, http://www.heritage.org/research/LegalIssues/lm31.cfm.

59. Cohen Statement, *supra* note 32.

60. Richard A. Epstein, *The Employee Free Choice Act Is Unconstitutional*, WALL ST. J., Dec. 19, 2008.

Similarly, former Congresswoman Hilda Solis, President Obama's new Secretary of Labor, who was also a sponsor of the EFCA, wrote a letter several years ago to Representative Joe Baca objecting to his election as head of the Congressional Hispanic Caucus because it had not been held by secret ballot.[62] Jim Hoffa, president of the International Brotherhood of Teamsters, in praising the sponsors of the EFCA, called elections "divisive" and said that the secret ballot is *not* "a basic tenet of democracy."[63]

Of course, the Teamsters do not quite have that attitude toward their own internal elections. Their constitution *requires* that all elections for officers "shall be conducted by secret ballot."[64] Delegates to conventions where officers are elected must also "be chosen by secret ballot"—the rules governing the delegate elections must "be designed to ensure a fair, free, and democratic election."[65] In other words, Hoffa does not support the basic procedural protections to assure that union representation elections are "fair, free, and democratic," just his own elections to lead his union.

Conclusion

As the *New York Herald* said in 1888 when the secret-ballot reform movement was sweeping the nation, the only people against using a secret ballot were "the leaders and managers, whose power depends upon their successes in manipulating the ballot so that the suffrage will express, not the will of the people, but the success of their schemes."[66] What the *New York Herald* said 121 years ago about the opponents of the secret ballot holds true today for supporters of the EFCA.

The only reason to eliminate the secret ballot in union elections is to give union leaders and managers the power to manipulate individual workers to guarantee the success of the union and not to reflect the true choices of the employees. The fact that the requirement for a secret ballot for decertification of a union remains unchanged by the EFCA shows the bad faith of the supporters of this legislation. In fact, AFL–CIO President John Sweeney's claims that card check is needed "to restore working people's freedom to make their own choice to join a union" is nonsensical: It would do the exact opposite by permitting that freedom to be coerced away.[67]

The Employee Free Choice Act represents a betrayal of the hard work, personal sacrifices, and progress that has been made over the past 120 years to secure the voting rights of Americans, from the implementation of the secret ballot beginning in 1888 to the passage of the National Labor Relations Act in 1935 to the ballot protections in the Taft–Hartley Act of 1947. It is as if, instead of having their current election process that protects the independence and privacy of every voter, New Yorkers decided to reinstitute the Tammany Hall machine with all of its accompanying intimidation, coercion, fraud, and manipulation. The last thing American workers need is a 21st century Tammany Hall in the shops, factories, and offices where they work.

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61. Letter from Rep. George Miller et al. to Junta Local de Conciliacion y Arbitraje del Estado de Puebla, Lic. Armando Poxqui Quintero (Aug. 29, 2001). This letter was also signed by other sponsors of the EFCA in 2007 such as Joe Back (CA–43), Bob Filner (CA–51), Barney Frank (MA–4), Lloyd Doggett (TX–25), Dennis Kucinich (OH–10), Marcy Kaptur (OH–9), Zoe Lofgren (CA–16), James McGovern (MA–3), and Fortney Pete Stark (CA–13).
62. Editorial, *Secrets of Solis: The Labor Nominee's Ballot a History*, WALL ST. J., Jan. 9, 2009.
63. Press Release, Int'l Brotherhood of Teamsters, Hoffa Commends Sponsors of Employee Free Choice (March 10, 2009).
64. INT'L BROTHERHOOD OF TEAMSTERS, CONSTITUTION, Art. IV, §§ 2, 3, *available at* http://www.teamster.org/sites/teamsters.prometheuslabor.com/files/constitution_June2006.pdf.
65. *Id.* at Art. III, § 5(a)(1)–(3).
66. EVANS, *supra* note 9, at 20.
67. Steven Greenhouse, *Senate Republicans Block Bill on Unionizing*, N.Y. TIMES, June 27, 2007.