



**SENATE REPUBLICAN**

**POLICY COMMITTEE**

February 27, 2007

## **Union Elections by Secret Ballot Protect Workers' Rights**

### ***Executive Summary***

- The United States has a rich tradition of Americans choosing their elected representatives by secret ballot. The secret ballot election process in deciding union representation (administered by the National Labor Relations Board (NLRB)) ensures that a worker can freely express his or her desire to join a union, without intimidation or fear.
- In the face of declining union membership, Democrats have made elimination of the secret-ballot election in union representation one of their top legislative priorities. In the House, H.R. 800, the "Employee Free Choice Act," has been reported out of committee and has over 230 cosponsors.
- Support for the secret ballot, one of the cornerstones of democracy, is strong:
  - In 2002, Congress reaffirmed these rights in the passage of the Help America Vote Act (HAVA). In setting requirements for voting and voter-registration system, HAVA required that systems must maintain voter privacy and ballot confidentiality.
  - The AFL-CIO supports secret-ballot elections when it comes to decertification of a union. It argued before the NLRB that in decertification petitions, secret-ballot elections provide the surest means of avoiding decisions that are the result of coercion.
  - Some House Democrats who support card-check authorization (the acceptance of signed cards for union representation rights in lieu of a secret-ballot election) in the U.S. support the use of the secret ballot in other countries.
  - Both the NLRB and the Supreme Court have long recognized that a Board-conducted, secret-ballot election is the most satisfactory, preferred method of ascertaining employee support for a union.
- Public support for the secret-ballot election, even among union members, is also strong. A January 2007 survey found that 87 percent of voters agree that every worker should have the right to a federally-supervised, secret-ballot election when deciding whether to join a union. A 2004 survey found that 71 percent of union members agree that the current secret-ballot election is fair.

*“The right to vote is the right upon which all other rights depend.”*  
Thomas Paine

## Introduction

The United States has a rich tradition of Americans choosing their elected representatives by secret ballot which ensures free and fair voting. In the case of labor union representation of employees in the workplace, the secret-ballot election process, long overseen by the National Labor Relations Board (NLRB), allows employees to cast their vote confidentially, without fear of peer pressure or coercion from unions or employers.

Yet, with increasing frequency, unions are turning to alternatives to the secret ballot in elections for workers to decide whether or not to join a union. Many observers speculate that this is because fewer employees are choosing unions in secret-ballot elections.<sup>1</sup> The Bureau of Labor Statistics reported that in 2006, “12.0 percent of employed wage and salary workers were union members, down from 12.5 percent a year earlier.”<sup>2</sup> Only one in 13 private-sector workers is a member of a labor union, as compared to the high of 34 percent in the 1950s.<sup>3</sup>

Democrats have made elimination of the secret-ballot election one of their top legislative priorities. Legislation, introduced in the House as H.R. 800, the “Employee Free Choice Act,” was recently reported out of the House Education and Labor Committee. The House card-check authorization bill, legislation to permit the acceptance of signed cards of union representation rights in lieu of a secret-ballot election, has garnered over 230 cosponsors. It is anticipated that Senator Kennedy will sponsor similar legislation in the Senate, as he did in the 109<sup>th</sup> Congress. Meanwhile, the Administration has stated, “Our administration rejects any attempt to short-circuit the rights of workers. We will defend their right to vote yes or no by secret ballot, and their right to fair bargaining. H.R. 800 violates these principles, and if it is sent to the President, he will veto the bill.”<sup>4</sup>

Democracy in the workplace should be maintained. The secret-ballot election process that has been administered by the NLRB for seven decades must be protected to ensure that every American can freely express his or her desire to join a union. As stated by Senator Mike Enzi (R-WY), “Americans get a private ballot when they choose their President, their Congressmen, their local councilmen, even their PTA leaders – why should they not have the same right in the workplace when they decide whether to form a union?”<sup>5</sup>

This paper will focus on how the secret ballot is essential to the protection of workers’ rights. For more information on the broader concerns of eliminating the secret ballot in union

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<sup>1</sup> *Wall Street Journal (WSJ)*, editorial, “Iowa Emigration Act,” January 30, 2007.

<sup>2</sup> Bureau of Labor Statistics, “Union Members in 2006,” January 25, 2007.

<sup>3</sup> WSJ.

<sup>4</sup> Vice President Dick Cheney in speech before the National Association of Manufacturers, February 14, 2007. See: <http://www.whitehouse.gov/news/releases/2007/02/20070214-1.html>.

<sup>5</sup> Press release from U.S. Senator Mike Enzi, “Enzi Says Card Check Bill Would Deny Workers Fundamental Voting Rights on the Job,” February 8, 2007.

representation elections, please refer to the RPC paper, “Labor Unions Seek to End Secret-Ballot Elections, the Cornerstone of Democracy,” issued on February 27, 2006.

## **Current Law Assures Democracy for Employees in the Workplace**

Every American should have a right to join a labor union, and an equal opportunity not to join. Such a system is in place to permit employees to freely express their desire to join a union or not, free from coercion from employers and unions. The National Labor Relations Act (NLRA) gives private-sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions. Unions exist to permit workers to present a united front to their employers and to protect the economic interests of the workers they represent. For these reasons, the NLRA insists that a union demonstrate that it has the support of a majority of workers in any bargaining unit before it may be acknowledged as the representative of those workers.

Historically, under the NLRA, the decision as to whether a union will serve as the bargaining representative of a group of employees is made through a secret ballot. The National Labor Relations Board (NLRB) is the independent, federal agency charged with the administration and enforcement of the NLRA. Under the NLRB procedures dating back to the 1940s, a union representation election typically takes place after a union has demonstrated to the NLRB that at least 30 percent of those whom it is seeking to represent wish to have an election.<sup>6</sup> This interest is generally demonstrated by employees signing union authorization cards that indicate a desire by the employee to be represented by the union or to have an election to determine the issue.<sup>7</sup> When an election is held, it is supervised by the NLRB. The NLRB ensures that employees may cast their ballots in a confidential manner, free of coercion from either management or the union.<sup>8</sup>

The law currently allows for an exception to the standard process described above in cases in which it is clear to the employer that the union enjoys the support of a majority of the employees.<sup>9</sup> Under this exception, when the employer is presented with union authorization cards by more than 50 percent of the employees of a bargaining unit, the employer may voluntarily recognize the union. This has been tolerated under the law, despite the absence of the numerous safeguards that are provided by the secret-ballot election supervised by the NLRB.

## **Support for Secret Ballot**

As a democratic principle, support for the secret-ballot elections process is widespread and bipartisan:

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<sup>6</sup> HR Policy Association (HRPA), “Mistitled ‘Employee Free Choice’ Would Strip Workers of Secret Ballot in Union Representation Decisions,” January 29, 2004.

<sup>7</sup> Note: The wording on authorization cards varies amongst union campaigns.

<sup>8</sup> Daniel V. Yager, Vice President and General Counsel of the Labor Policy Association, in testimony before the House Subcommittee on Workforce Protections of the Committee on Education and the Workforce, July 23, 2002.

<sup>9</sup> Yager.

- In 2002, Congress reaffirmed these rights in the passage of the Help America Vote Act (HAVA), requiring that the voting systems for the American electorate “must also maintain voter privacy and ballot confidentiality.”<sup>10</sup> During consideration of that bill, Senator Harkin (D-IA) stated that “one of the most fundamental of all rights that make us uniquely American [is] the right of the secret ballot.”<sup>11</sup> Senator Dodd (D-CT) echoed this sentiment, noting that “the sanctity of a private ballot is so fundamental to our system of elections.”<sup>12</sup>
- The AFL-CIO, which has made passage of card check legislation its number one legislative priority this Congress, supports secret-ballot elections when it comes to union *decertification*. In a joint brief, the AFL-CIO argued before the NLRB that in decertification petitions (the process by which it is determined a union no longer represents a majority of employees), secret-ballot elections “provide the surest means of avoiding decisions which are the result of group pressures and not individual choices.”<sup>13</sup>
- Some House Democrats who support card-check authorization in the United States support the use of the secret ballot in other countries. A letter sent by Rep. Miller and 15 other members of Congress to Mexican government officials stated, “We understand that the secret ballot is allowed for, but not required, by Mexican labor law. However, we feel that 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.”<sup>14</sup> The letter followed a labor dispute at a facility in Mexico, following efforts by workers to affiliate with an independent union rather than the traditional union.<sup>15</sup>

Courts, in examining cases involving union elections, support the secret ballot as the fairest election method:

- In a landmark 1969 case involving a union dispute at a packing company, the Supreme Court affirmed that cards are “admittedly inferior to the election process.”<sup>16</sup>

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<sup>10</sup> Congressional Research Service, “Election Reform: Overview and Issues,” CRS Report to Congress RS 20898, January 18, 2007.

<sup>11</sup> Senator Tom Harkin, *Congressional Record*, February 26, 2002.

<sup>12</sup> Senator Christopher Dodd, *Congressional Record*, April 11, 2002.

<sup>13</sup> U.S. Chamber of Commerce, “The Secret Ballot Protection Act: Reduce Coercion in Union Organizing; Protect Employee Privacy,” 2005. See:

<http://www.secretballotprotection.com/NR/rdonlyres/enio7vmjn6soib43gcm7pm7mk2p2q3rfy3atv7l6hep24w3zzmb4dhzclsglpjz6frb5oc72mzqqb7m7lwvpoa26wyc/SecretBallotProtectionActPolicyPaperPDF.pdf>.

<sup>14</sup> George Miller, Marcy Kaptur, Bernard Sanders, William Coyne, Lane Evans, Bob Filner, Martin Olav Sabo, Barney Frank, Joe Baca, Zoe Lofgren, Dennis Kucinich, Calvin Dooley, Fortney Pete Stark, Barbara Lee, James McGovern and Lloyd Doggett, Members of Congress, Letter to Junta Local de Conciliacion y Arbitraje del Estado de Puebla, August 29, 2001.

<sup>15</sup> Bureau of National Affairs; Daily Labor Report, “Congressional Representatives Push Mexico to Require Secret Ballots in Union Elections,” August 31, 2001.

<sup>16</sup> Charles I. Cohen, Senior Partner, Morgan, Lewis and Bockius LLP (and former member of the NLRB), in testimony before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, April 22, 2004. [*Gissel Packing*, 395 U.S. at 602].

- The Second Circuit Court held: “It is beyond dispute that secret election is a more accurate reflection of the employees’ true desires than a check of authorization cards collected at the behest of a union organizer.”<sup>17</sup>
- The Fourth Circuit Court held: “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. The one is no more reliable than the other...”<sup>18</sup>

Public support for the secret ballot for union representation elections is also strong. McLaughlin & Associates conducted a survey for the Coalition for a Democratic Workplace. The January 2007 survey found that 87 percent of general-election voters agree “that every worker should continue to have the right to a federally-supervised, secret-ballot election when deciding whether to organize a union.”<sup>19</sup> Furthermore, 89 percent of those surveyed indicated that a workers’ vote to organize a union should remain private.<sup>20</sup>

Union members also support the secret ballot. In 2004, Zogby International for the Mackinac Center for Public Policy surveyed union members nationwide. The survey found that the majority of union members (53 percent) state the fairest way to decide on a union is for “the government [to] hold a secret-ballot election and keep the workers’ decisions private.”<sup>21</sup> In the same survey, 71 percent of union members agreed that the current secret-ballot process is fair. The survey also found that 84 percent of union workers stated that workers should have the right to vote on whether or not they wish to belong to a union, 63 percent agreed that stronger laws are needed to protect the existing secret-ballot process, and 78 percent said Congress should keep the existing secret-ballot election process for union membership and not replace it with another process.

## Conclusion

The secret-ballot election is the fairest way to guarantee the rights of employees to freely choose whether or not to be represented by a union. It allows for a private, confidential vote by employees, based on the principles of the American system of democracy. The law should not be changed to take away these basic rights.

RPC Staff Contact: Dana Barbieri, Labor and Education Policy Analyst, 224-2946

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<sup>17</sup> Cohen. *NLRB v. Flomatic Corp.*, 347 F.2<sup>nd</sup> 74, 78 (2d Cir. 1965).

<sup>18</sup> Cohen. *NLRB v S.S. Logan Packing Co.*, 386 F.2<sup>nd</sup> 562 (4<sup>th</sup> Cir. 1967).

<sup>19</sup> Coalition for a Democratic Workplace, February 14, 2007. See:  
<http://www.myprivateballot.com/UploadedFiles/CDW%20Polling%20Memo%20National.pdf>.

<sup>20</sup> Coalition for a Democratic Workplace.

<sup>21</sup> Mackinac Center for Public Policy, “Checking the Premises of ‘Card Check’: A Nationwide Survey of Union Members and Their Views on Labor Unions,” July 20, 2004.