



Competitive Enterprise Institute

1899 L Street, NW • 12th Floor • Washington, DC 20036

202.331.1010 • www.cei.org

Advancing Liberty – From the Economy to Ecology

March 24, 2009

No. 152

Card Check Double Standard Unions' Hypocrisy on the Secret Ballot

By F. Vincent Vernuccio*

The greatest controversy surrounding the so-called Employee Free Choice Act (EFCA, H.R. 1409, S. 560)—introduced on March 10, 2009, by Rep. George Miller (D-Calif.) and Sen. Tom Harkin (D-IA)—centers on its first provision, known as “card check,” which would empower unions—and unions alone—to determine the method by which to organize workers at a given company. The Act’s card check provision would effectively eliminate the secret ballot in union certification elections.

It would do so by requiring the National Labor Relations Board (NLRB) to recognize a union as the exclusive bargaining agent for all employees at a company once the union has collected signatures from a majority of the employees. Employees are asked to sign the cards out in the open, exposing them to high-pressure tactics—without time to reflect on their decision or make a private judgment.

Union leaders see the Employee Free Choice Act as an opportunity to stem decades of private sector membership decline. Thus, organized labor has made EFCA its top legislative priority. To see it enacted, unions gave heavily to Democrats during the 2008 election and now expect the politicians they have supported to support the union agenda. President Obama, his Secretary of Labor, and most congressional Democrats have supported EFCA.¹

However, many card check advocates have conveyed selective support for secret ballots in other contexts, including labor union matters other than organizing, both today in the past. Indeed, many of the nation’s top unions have secret ballot provisions in their constitutions and bylaws governing internal elections, and unions have insisted on secret ballot elections when their own

* F. Vincent Vernuccio, an attorney, is a former Special Assistant to the Assistant Secretary for Administration and Management in the Department of Labor under President George W. Bush. He is editor of *efcaupdate.com*.

employees have tried to organize. Moreover, EFCA sponsor Rep. George Miller (D- Calif.) and other supporters of the bill in Congress have even urged foreign government officials to use the secret ballot in union certification elections. Secretary of Labor Hilda Solis has fought for the secret ballot in the Congressional Hispanic Caucus, and sponsored legislation in California protecting the secret ballot for workers deciding their employers' overtime policies.

The Act itself is inconsistent. EFCA would leave in place many provisions of the National Labor Relations Act (NLRA) and Labor-Management Relations and Disclosure Act (LMRDA) that require the secret ballot in union elections other than certification, including decertification of a union and the election of local officers.

The Current Process. Under the National Labor Relations Act, a union can organize workers in two ways: by a secret ballot election or by card check. The union must turn in to the National Labor Relations Board cards signed by at least 30 percent of employees voicing their support for a union in order to request a secret ballot. It may also turn in 50 percent-plus-one to ask for immediate recognition, if the employer agrees.² In the majority of cases, the employer will demand a secret ballot election.³ The NLRB supervises the secret ballot election, usually six to seven weeks after the union requests to be recognized.⁴ During the election process the union has decisive advantages.

The first advantage for the union is speech. An employer cannot make any promise or show any detriment to its employees that either could affect, or is contingent on, whether the company unionizes or not.⁵ The employer can only make vague generalizations of what has happened to other companies that have gone the union route. The union is not bound by the same speech limitations and can make promises—and even insinuate threats—to voting employees.⁶ This is what supporters of EFCA refer to as “management controlling the information.”⁷

Another advantage the union enjoys is its ability to control the timing of when a petition will be filed and the size of the bargaining unit. For example, if a union does not think that it can unionize an entire company, it will try to organize only one department.⁸ Moreover, the union retains sole possession of the signed cards, which include the names and home addresses of all potential members. On the day of the election, both the union and the employer are allowed to monitor the election for irregularities. Company and union monitors can keep tally of which employees vote but not of *how* they vote—which is crucial for minimizing coercion and intimidation.⁹

The Process under EFCA. EFCA supporters claim that they are simply giving workers the choice of opting for card check, without taking away the right to a secret ballot.¹⁰ Labor consultant Steve Rosenthal, on the blog of the Service Employee International Union (SEIU), claims that EFCA “will not eliminate secret ballots in union representation elections (period).”¹¹ Such claims rely on a verbal sleight of hand. EFCA mandates that the NLRB will certify a union to represent a collective bargaining unit if it finds that a majority of the employees have signed cards.¹² However, it is not up to the workers whether to opt for a secret ballot election or go through a card check procedure—that decision is up to the union organizers.

In most, cases workers do not spontaneously request to join a particular union. Rather, an outside labor organization attempts to recruit the workers. Some labor organizations, including the AFL-CIO, even hold schools to train new professional organizers.¹³ These organizations spend a great deal of money and resources on organizing campaigns because they stand to increase their membership and gain substantial sums of revenue in dues if a new local union is created.

Card check usually weighs heavily in favor of the union, so much so that unions rarely settle for a simple majority if they know that there will be a secret ballot election. Unions advise their organizers to wait until they have gotten 60 to 70 percent of the workers to sign cards before they submit them to the NLRB.¹⁴ This is because erosion of support is practically inevitable, so the union stands a better chance of winning an election if it goes into it with a substantial margin for error. Organizers know that workers may change their mind or sign cards only so organizers will leave them alone.

Most employers expect union organizers to use sales gimmicks and pressure tactics to obtain the requisite number of cards. Therefore, the employer usually demands a secret ballot election run by the NLRB to ensure a fraud and coercion free process.¹⁵ For these same reasons, unions know that their best chance at organizing is through card check, and therefore prefer to avoid holding a secret ballot election which could jeopardize their campaign.

If EFCA is passed and card check becomes the norm, workers will, in almost all cases, lose secret ballot organizing elections as an option. They will be subject to high-pressure sales techniques and possibly even coercion by union organizers. While EFCA does not explicitly outlaw the secret ballot in union recognition elections, it makes secret ballots a dead letter by allowing unions to determine the procedure for recognition. The Act states:

If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).¹⁶

Under EFCA, union organizers would decide how long to continue collecting signatures. Since they can go back to ask employees again and again, unions would have no incentive to turn in cards to the NLRB until they have gotten to the 50 percent-plus-one threshold—which they could obtain by just wearing down resisting employees—at which point the NLRB is expressly prohibited from holding an election, and must certify the union as exclusive bargaining agent.

Secret Ballot Provisions for Union Issues Left Unchanged by EFCA. The Employee Free Choice Act would not eliminate the secret ballot from all union elections. It leaves several provisions of the National Labor Relations Act unchanged. While EFCA supporters would like to all but eliminate the secret ballot in union certification elections, they have not sought to eliminate it in decertification elections. The NLRA currently requires—and will continue to require if EFCA passes—a secret ballot election in order to decertify or disband a union.¹⁷

Similarly, the Labor-Management Relations and Disclosure Act requires that secret ballots be used in the elections of—and impeachment proceedings for—local union officers.¹⁸ If the law will continue to require secret ballots to be used to decertify or dissolve a union and to elect local officers, why then is it not appropriate to certify a union as the exclusive bargaining agent for a group of employees?

Unions' use of the Secret Ballot. A majority of Americans and union members support the secret ballot.¹⁹ A January poll conducted by *McLaughlin & Associates* found that 86 percent of those surveyed supported keeping union recognition elections private, 40 percent of those surveyed were union members with 88 percent in favor of keeping the process private.²⁰ With or without the secret ballot the vast majority of Americans do not wish to join a union. A March poll by *Rasmussen Reports* found only 9 percent of non union members would join a union if they could and 81 percent would not.²¹ Under EFCA, union organizers will have complete control over whether to use the secret ballot or card check in organizing, with employers having no say in this aspect of their business

Many major unions have codified the secret ballot into their internal governing structures.²² Most of America's top unions have provisions in their constitutions and bylaws requiring the secret ballot for elections of officers and delegates and for deciding whether to go on strike.²³ The chart on the facing page highlights some of America's top unions and how they utilize the secret ballot. If the secret ballot is good enough for electing the people who run a union why then is it not good enough to determine if a union should exist at all?

A survey by the consultancy PTI Labor Research shows that since 2000, union employees—not union members employed with private companies but a union's own staff—filed 162 petitions for an election to the NLRB. Under the current process,²⁴ workers only need to file a petition to the NLRB if an employer demands a secret ballot election rather than take cards supporting a union at face value and recognize a new bargaining unit. According to the survey, unions have denied card check organizing petitions from their own staff 162 times since 2000 and instead favored the secret ballot.²⁵ If unions object to card check for unionizing their own employees, then why do they seek to impose it on everybody else through the Employee Free Choice Act?

Congressional Card Check Advocates' Secret Ballot Double Standard. Rep. George Miller (D-Calif.), who introduced the Employee Free Choice Act in the House of Representatives on March 10, had a curiously different view of secret ballot union elections a few years ago. On August 29, 2001, Rep. Miller and 15 other members of Congress wrote to the Local Conciliation and Arbitration Board (*Junta Local de Conciliación y Arbitraje*) of the Mexican state of Puebla, urging the board to adopt the secret ballot for union recognition elections.²⁶ The letter stated:

We are writing to encourage you to use the secret ballot in all union recognition elections... We understand 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.

America's Top Unions' Use of the Secret Ballot

Union	Date	Title	Strike	Officer	Dissolution	Description
American Federation of Government Employees (AFGE)	August 2000	AFGE Constitution		✓		Art VI § 8 delegates elected by secret ballot; Art VIII § 1 election of officers by secret ballot
Communication Workers of America (CWA)	January 2008	CWA Constitution	✓	✓		Art XVIII, § 6.b strike vote by secret ballot; Art XIII, § 9.k delegates elected by secret ballot; Art XV, election of officers by secret ballot
International Association of Machinists (IAM)	June 2002	IAM Constitution	✓	✓		Art. XVI § 2 strike vote by secret ballot; Art. XXII § 7 election of officers by secret ballot
International Brotherhood of Electrical Workers (IBEW)	September 2001	IBEW Constitution		✓		Art 2 § 10 delegates elected by secret ballot; Art III § 3 election of officers by secret ballot
Laborers International Union of North American (LIUNA)	September 2001	LIUNA International Constitution	✓	✓		Art V § 9 delegates elected by secret ballot; Art VII; election of officers by secret ballot; Local polices for secret ballot for strike
Service Employees International Union (SEIU)	June 2004	SEIU Constitution and Bylaws	✓		✓	Art 18 § 5 delegates elected by secret ballot; Art XXV dissolution by secret ballot; strikes left to locals see local 902 Art 19 § 1 secret ballot for strike vote;
Teamsters	June 2006	Teamsters Constitution	✓	✓		Art III § 5. delegates elected by secret ballot; Art IV § 2. election of officers by secret ballot; Art XII may use secret ballot for strike vote
United Association of Plumbers and Pipe Fitters (UA)	August 2006	UA Constitution	✓	✓	✓	§ 15 delegates elected by secret ballot; § 31 secret ballot to hold a convention; § 98 dissolution by secret ballot; § 122 election of officers by secret ballot; § 174 strike vote by secret ballot; § 213 referendum by secret ballot
United Auto Workers (UAW)	June 2006	UAW Constitution	✓			Art 8 § 4 special convention by secret ballot; Art 8 § 23 delegates elected by secret ballot; Art 50 § 1 (a) strike vote by secret ballot
United Brotherhood of Carpenters and Joiners (UBC)	August 2007	UBC Constitution		✓		§ 9 election of officers by secret ballot; § 17 delegates elected by secret ballot;
United Food and Commercial Workers (UFCW)	October 2005	UFCW Constitution			✓	Art 8 § (l) 3 delegates elected by secret ballot; Art 31 § (C) secret ballot for dissolution;

* Note: Local union officer elections are mandated to be done by secret ballot by § 401 (b) Labor-Management Reporting Disclosure Act of 1959. All references above to officers are for officers at the national or international level.

Every signer of the letter who is currently in office in the 111th Congress has co-sponsored EFCA.²⁷ Of Course, Mexican labor law is different than American labor law, but as in the United States, in Mexico the secret ballot is an option for union recognition.²⁸ In their letter, the 16 members of Congress pointed out the “absolute necessity of the secret ballot” to avoid intimidation and urged Mexican officials to require the use of the secret ballot.²⁹ Why, then, did the 12 members who are still in office change their mind from defending the secret ballot and urging Mexican officials to require it to co-sponsoring a bill that would make it a dead letter?³⁰

Political pressure from organized labor is one possible explanation. In 2008, the Service Employees International Union, one of America’s largest unions, alone gave over \$85 million in campaign contributions, mostly to Democrats³¹ and had 2,000 members take time off to work for the Obama campaign.³² What does Big Labor want for all this? American Federation of State, County and Municipal Employees President Gerald McEntee has plainly stated: “The payback would be Employee Free Choice Act.”³³ And if the politicians they have supported do not deliver? SEIU President Andy Stern, when interviewed on EFCA by CNN, was asked if, “If elected officials should be afraid of him?” He replied that, “Everyone should be scared [of not living up to the promises they have made]”.³⁴

Labor Secretary Hilda Solis’ Support of the Secret Ballot. Throughout her career, Secretary of Labor Hilda Solis has supported the secret ballot. While still a State Senator in California, she proposed legislation mandating the secret ballot for workers deciding their employers’ overtime policies.³⁵ The bill specifically required that “only secret ballots may be cast by affected employees at any election held pursuant to [over time selection].”³⁶ After being elected to Congress, Solis became involved in a fight over the Chairmanship of the Congressional Hispanic Caucus. In 2007, she and other women on the Caucus signed a letter protesting the election as Chairman of Rep. Joe Baca, (D-Calif.) because it was not done by secret ballot. The letter called for the secret ballot, stating, “as we prepare for the 110th Congress in which the Congressional Hispanic Caucus will have the opportunity to play a more prominent role, we believe it is imperative that our Caucus’ integrity be unquestioned.”³⁷ Further, in an individual statement Solis wrote:

Votes by secret ballot were in order but never taken. We therefore believe that we need to follow proper rules of procedure and hold a vote by secret ballot...It is important that the integrity of the CHC be unquestioned and above reproach.³⁸

So does this mean that a union that is certified as an exclusive bargaining agent through card check rather than a secret ballot election would be questionable and reproachable? If Secretary Solis has found the secret ballot to be so important, why was she a cosponsor of EFCA when she was in Congress?

To date, her attempts at explanation have been as incoherent as her positions have been inconsistent. During her Senate confirmation hearing for Labor Secretary, when questioned by Sen. Johnny Isakson (R-Ga.) about her sponsorship of the California overtime legislation, she claimed that, in California, “collective bargaining is much more advanced than other parts of the country.”³⁹ As with many other questions she soon demurred, saying only that being a nominee

“doesn’t...afford me the ability to provide you with an opinion at this time,” and “I don’t believe that I am qualified to address that at this time.”⁴⁰

She was not as coy in 2001 her victory speech in El Monte, California, when she was first elected to Congress, when she stated: “I wouldn’t be here, were it not for my friends in the labor movement.”⁴¹ Indeed, labor organizations have given her \$903,550 in campaign contributions throughout her career.⁴² And 15 of her top 20 campaign donors during the 2008 election cycle were unions.⁴³⁴⁴ It would be a difficult position for someone who has been so reliant on support from organized labor in the past to oppose the union agenda. However, as Labor Secretary, her role is to function as a disinterested arbiter, not an advocate for a constituency she is supposed to oversee. Unfortunately, the Obama Administration does not seem to have made much effort to reinforce the former role.

Conclusion. No matter what organized labor and its congressional advocates claim, the Employee Free Choice Act will take away the use of the secret ballot in union recognition elections. The secret ballot as an option will be a mere legal technicality, and in practice it will become extremely rare, if not extinct. Unions will simply have no incentive to risk losing an election by allowing the workers to vote by secret ballot when card check is always an option, and they can keep going back to ask workers to sign cards time and again until they reach a majority. Make no mistake: Passage of EFCA will result in near-universal use of card check in union organizing and the high-pressure tactics and intimidation that go with it.

Doing away with the secret ballot in labor organizing only is not only opportunistic, but hypocritical. Many of EFCA’s most ardent supporters—from members of Congress to the Secretary of Labor to unions themselves—have supported the secret ballot in the past and continue to do so in contexts other than union organizing elections. Laws such as the Labor-Management Relations and Disclosure Act and National Labor Relations Act would still require the secret ballot in other contexts, but not in the most important decision workers make vis-à-vis labor unions: whether to join in the first place.

Notes

¹ At this writing, the Employee Free Choice Act (H.R. 1409, S. 560) has 222 cosponsors in the House of Representatives and 39 in the Senate.

² 29 USC § 159 et seq.

³ Between 1998 and 2005, 13 percent of new members of AFL-CIO unions joined without a secret ballot election. James Sherk, “Employee Free Choice Act Effectively Eliminates Secret Ballot Organizing Election,” *Backgrounder*, The Heritage Foundation, August 27, 2008, <http://www.heritage.org/Research/Labor/bg2175.cfm>.

⁴ 29 USC § 153.

⁵ 29 USC § 158.

⁶ Richard Epstein, “The Case against the Employee Free Choice Act,” John M. Olin Law & Economics Working Paper No. 452 (2nd Series.), January 2009, <https://www.law.uchicago.edu/files/452.pdf>.

⁷ “Why Majority Sign-Up,” AFL-CIO website, <http://www.aflcio.org/joinaunion/voicework/efca/majoritysignup.cfm>

⁸ Charles Cohen, Statement before the House Subcommittee on Health, Employment, Labor, and Pensions, February 8, 2007, <http://edworkforce.house.gov/testimony/020807ChuckCohentestimony.pdf>.

⁹ Ibid.

¹⁰ See AFL-CIO “Employee Free Choice Act; Get the Facts,”

<http://www.aflcio.org/joinaunion/voicetowork/efca/10keyfacts.cfm>;

¹¹ Steve Rosenthal, “Employee Free Choice Act Gives Workers a Fair and Democratic Chance to Form Unions,” SEIU Blog, <http://www.seiu.org/2009/02/employee-free-choice-act-gives-workers-a-fair-and-democratic-chance-to-form-unions.php>.

¹² Employee Free Choice Act, H.R. 1409, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1409ih.txt.pdf.

¹³ AFL-CIO Organizing Institute website, “About Us,” <http://www.aflcio.org/aboutus/oi/main.cfm>

¹⁴ Sherk, David L. Cingranelli, “International Election Standards and the NLRB: Representative Elections,” Parts 1–3 in Richard N. Block, et al., eds., *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States* (Kalamazoo, Michigan: W.E. Upjohn Institute, 2006), p. 42.

¹⁵ “Our Economy does not Need Creative Coercion,” The Heritage Foundation, February 25, 2009 <http://blog.heritage.org/2009/02/25/our-economy-does-not-need-creative-coercion/>.

¹⁶ H.R. 1409.

¹⁷ 29 USC § 159 (e), (c)(1)(A)(ii).

¹⁸ 29 USC § 481 (b) (h).

¹⁹ “New Poll: Union Members Oppose Big Labor’s Card Check,” PR Newswire, January 26, 2009, <http://sev.prnewswire.com/workforce-management/20090126/DC6262026012009-1.html>.

²⁰ Ibid.

²¹ “Just 9% of Non-Union Workers Want to Join a Union,” *Rasmussen Reports*, March 16, 2009, http://www.rasmussenreports.com/public_content/business/jobs_employment/just_9_of_non_union_workers_want_to_join_union.

²² See chart

²³ Officers for intermediate, national, and international positions, or positions for any part of the union which does not carry out the most basic union functions, are not required by the LMRA to use the secret ballot. There is debate over the definition of what is considered a local union, but courts have defined it as a union that may settle grievances; collect dues and establish wages, benefits and working conditions by contract negotiations with the employer; and discipline its members and officers.” *Schultz v. Employees' Fed'n of the Humble Oil & Refining Co.*, 74 L.R.R.M (B.N.A.) 2140, 1970 U.S. Dist. LEXIS 12288 (S.D. Tex. Mar. 31, 1970).

²⁴ 29 USC § 159 et seq

²⁵ Dan Block, PTI Labor Research study

²⁶ See letter from Rep. George Miller, Rep Marcy Kaptur, Bernard Sanders (then Representative now Senator,) William Coyne, Lane Evans, Bob Filer, Martin Olav Sabo, Barney Frank, Joe Baca, Zoe Lofgren, Dennis Kucinich, Calvin Dooley, Fortney Pete Stark, Barbara Lee, James McGovern, and Lloyd Doggett to *Junta Local de Conciliación y Arbitraje* of the state of Puebla, August 29 2001, http://www.employeefreedom.org/downloads/mexico_letter.pdf.

²⁷ H.R. 1049, S. 560.

²⁸ Gerald Morales and Octavio Novaro, “The Legal Status of Union in Mexico and the United States,” U.S. Department of Labor 1996, http://www.dol.gov/ilab/media/reports/nao/unions.htm#N_10.

²⁹ See Mexico Letter

³⁰ Congressional Republicans have not been oblivious to their Democratic colleagues’ inconsistency on the secret ballot. Republican House Leader John Boehner (R-OH) wrote in *U.S. News and World Report*: “The irony [of supporting EFCA] should not be lost on anyone, of course, that President Obama resides in the White House because of a secret-ballot election—just as all 535 members of the United States Congress hold their offices thanks to the secret ballot.” He also cited the 2001 Mexican letter, a 2001 brief by the AFL-CIO defending the use of the secret ballot, and Rep. Louise Slaughter’s (D-N.Y.) praise for the secret ballot. She exclaimed, “It’s a secret ballot thank the Lord!” in reference to her not having to name for whom she voted in a 2008 internal Democratic contest to elect the chair of the Economic and Commerce Committee. See John Boehner, “Boehner: Card check Is About Union Lobbying Interests, Not Workers’ Rights,” *U.S. News and World Report*, February 9, 2009, http://www.usnews.com/articles/opinion/2009/02/09/boehner-card-check-is-about-union-lobbying-interests-not-workers-rights_print.htm.

³¹ Drew Griffin and Kathleen Johnston, “Union, Businesses Battle over Secret-Ballot Alternative,” CNN Politics, February 4, 2009, <http://www.cnn.com/2009/POLITICS/02/04/unions.card.check/>

³² Ibid.

³³ Stephen Diana, "Blagojevich link stings even rival union," *The Washington Times*, December 18, 2008 <http://www.washingtontimes.com/news/2008/dec/18/blagojevich-link-stings-even-rival-union/>.

³⁴ Griffin and Johnston.

³⁵ California Bill Number SB 680, passed by the Senate August 28, 1997, http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0651-0700/sb_680_bill_19970828_enrolled.html.

³⁶ Ibid.

³⁷ Dena Bunis, "Sanchez's Ears Burning," *The Orange County Register*, February 2, 2007. "Republican National Committee: Will Rep. Hilda Solis Face Questions About Her Own Support for Secret Ballots for Congress but Not for Workers?" Reuters, January 9, 2009, <http://www.reuters.com/article/pressRelease/idUS131913+09-Jan-2009+PRN20090109>.

³⁸ "Obama Appointment That Hhas rules for Herself Then Rules for Everyone Else," *The Wall Street Journal*, December 22, 2008, http://obama.wsj.com/article/06A86A9cgr2XS?q=Hilda+Solis?mod=rss_topics_obama.

³⁹ Hilda Solis Labor Dept. Confirmation Hearing, C-SPAN, January 9, 2009, <http://www.c-span.org/Watch/watch.aspx?MediaId=HP-A-14106>.

⁴⁰ Ruth Marcus, "Confirmation Hearings Lack Candidness," Real Clear Politics, January 14, 2009, http://www.realclearpolitics.com/articles/2009/01/confirmation_hearings_lack_can.html.

⁴¹ Philip Kline, "Big Labor's Girl," *Human Events*, February 24, 2009, <http://www.humanevents.com/article.php?print=yes&id=30819>.

⁴² Hilda Solis, Top Contributors, Opensecrets.org, Center for Responsive Politics, <http://www.opensecrets.org/politicians/contrib.php?cycle=2008&cid=N00009586>

⁴³ Kline.

⁴⁴ Center for Responsive Politics.