Statement of Dr. Gordon Lafer
Before the U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Hearing on *Strengthening America's Middle Class*
Through the Employee Free Choice Act
Washington, DC
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Chairman Andrews, Ranking Member Kline, and Members of the Committee, thank you for the opportunity to participate in this hearing. My name is Gordon Lafer. I hold a PhD in Political Science from Yale University and am currently a professor at the University of Oregon's Labor Education and Research Center. I am also the national co-chair of the American Political Science Association's Labor Project.

Over the past two years, I have conducted extensive research measuring the extent to which National Labor Relations Board elections match up to American standards – developed from the Founding Fathers to the present -- for defining "free and fair" elections. Unfortunately, I must report that NLRB elections look more like the discredited practices of rogue regimes abroad than like anything we would call American.

I have attached a report that summarizes this research.

Today I want to focus on just a few highlights.

The role of secret ballots

Before going into the substance of my findings, I want to say a word about secret ballots, since so much of the debate around labor law reform has focused on the role of secret ballots. To some, it may seem that as long as an election ends in a secret ballot, it must be fair. In the workplace, one might imagine that even in the worst case, if a worker is intimidated by his or her employer, one could lie to one's supervisor and pretend to be opposing the union; as long as, at the end of the day, you cast your ballot in the privacy of a voting booth, you are free to exercise your conscience.

It is critical to note that the American democratic tradition – from the Founders to the present – fundamentally rejects this view. In elections to public office, while the secret ballot is a necessary ingredient, there are a whole set of standards that must be met in the leadup to election day – such as equal access to the media and voters, free speech, etc. – which are equally crucial elements of defining a "free and fair" process. Indeed, our government has often condemned elections abroad when there was no question

that they ended in a secret ballot, because they failed to meet these other, equally important standards.

Unfortunately, with the exception of the secret ballot – which NLRB procedures protect in some ways and undermine in others –every other aspect of NLRB elections fails to meet American standards defining "free and fair" elections.

Today I would like to focus on just three dimensions of democratic elections: access to voters; free speech; and protection of voters from economic coercion.

Access to voter lists

The first step in any American election campaign is getting a list of eligible voters, and it is law that both parties must have equal access to the voter rolls.

In NLRB elections, however, management has a complete list of employee contact information, and can use this for campaigning against unionization at any time – while employees have no equal right to such lists. Employers use legal maneuvers to delay union elections for months. Only after all delays have been settled does the union have a right to the list of eligible voters. A federal commission found that on average, unions received the voter list less than 20 days before the election.[1] Even then, the NLRB requires employers to provide workers' names and addresses – but no apartment numbers, zip codes, or telephone numbers.

If we imagine this system being applied to Congressional elections – where one candidate had the voter rolls two years before election day, while his or her opponent was restricted to a partial list and only got it a month before the vote – none of us would call this a "free and fair" election.

Economic coercion of voters

When the founders of our country created the world's first democracy and gave the vote to the common people, they were particularly concerned that employers might use their economic power over workers to influence their political choices. In general, Alexander Hamilton warned, "power over a man's purse is power over his will."

For this reason, there are a wide range of federal and state laws that make sure employees can make political choices free from economic coercion.

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[1] Dunlop Commission, Final Report, p. 47.

In elections to Congress, it is illegal for a private corporation to tell its employees how they should vote, or to suggest that if one party wins business will suffer and workers will be laid off.[2] Supervisor or managers can't say *anything* to those they oversee that amounts to endorsing one side or the other. It is noteworthy that federal law doesn't require that employers spell out a *quid pro quo* threat stating, for instance, that anyone caught wearing a button supporting the "wrong" candidate will never get a promotion. It is understood that employees naturally are extremely sensitive to the need to make a good impression on their boss, and don't need a threat to be spelled out for it to influence their behavior. Thus, federal law protects the ability of workers to make a political choice based on personal conscience rather than economic coercion.

But in NLRB elections, this kind of intimidation is completely legal. Standard employer behavior involves having mass meetings where upper management attacks the idea of unionization, and then having supervisors tell each of their subordinates personally that they should vote against the union. In this way, NLRB elections maximize exactly the kind of behavior that is banned in federal elections.

Free speech and equal access to media

Free speech is the cornerstone of American democracy.

In election to public office, it is a bedrock principle that there is no such thing as a neighborhood, park or shopping mall that is accessible to one candidate but off-limits to the other. Radio and television stations are required to sell ad time on the same terms to competing candidates. Even private corporations are prohibited from inviting one candidate to address employees without giving equal opportunity to the opposition. From the founders to the present, it has been understood that democracy requires free speech, equal access to the media, and robust debate.

Yet this most basic standard of freedom is ignored by the NLRB.

Management is allowed to plaster the workplace with anti-union leaflets, posters, and banners – while maintaining a ban on pro-union employees doing likewise.

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[2] Under FECA, corporations are free to campaign to their "restricted class" of managerial and supervisory employees, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party. 2 USC 441(b)(2)(A); 11 CRF 114.3, 114.4. According to the FEC, "express advocacy" can be either an explicit message to vote for or against a given candidate, or a message that doesn't use such explicit language but that "can only be interpreted by a 'reasonable person' as advocating the election or defeat of one or more clearly identified candidates." Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations*, Washington, DC, June, 2001, p. 31.

In addition, anti-union managers are free to campaign against unionization all day long, anyplace in the workplace, while pro-union workers are banned from talking about unionization except on break times. As a result, research shows that in a typical campaign, most employees never even have a single conversation with a union representative.

The most extreme restriction on free speech is employers' forcing workers to attend mass anti-union meetings. Not only is the union given no equal time, but pro-union employees can be forced to attend with the condition that they don't open their mouths. If they ask a question, they can be fired on the spot.

If, during the 2004 presidential election, the Bush campaign could have forced every voter in America to watch the *Swiftboat Veterans' for Truth* movie, with no opportunity for response from the other side – or if the Democrats could have forced everyone to watch *Fahrenheit 9/11* – they might well have seized the opportunity. But none of us would call this democracy.

Higher Standards Abroad than At Home

The truth is that we uphold higher standards for voters abroad than for American workers.

In 2002, the State Department condemned elections in Ukraine for failing to "ensure a level playing field," because

- employees of state-owned enterprises were pressured to support the ruling party;
- faculty and students were instructed by their university to vote for specific candidates;
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- and the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television.

Every one of these practices is completely legal under the NLRB.

The sad fact is that right now, our government demands higher standards of democracy for voters in Ukraine than it does for Americans in workplaces across the country.

Illegal activity in NLRB system, compared with FEC

The things I've described so far are legal. However, NLRB elections are also characterized by an extraordinary level of illegal activity.

Labor law is the only area of American employment law in which it is statutorily impossible to impose fines, prison, or any other punitive damage.

As a result, it is not just "rogue" employers who break the law. Any rational employer might decide it's worth it to fire a few workers in order to scare hundreds more into abandoning their support for unionization.

In my research, I have measured the impact of illegal retaliation against union supporters by making the most conservative possible calculations. Nevertheless, the results are extremely troubling. One out of every 17 eligible voters in NLRB elections is fired, suspended, demoted or otherwise economically punished for supporting unionization.

If federal elections were run by NLRB standards, we would have seen 7.5 million Americans economically penalized for backing the "wrong" candidate in the last election cycle.

Imagine what this would mean. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Most citizens would quickly become too scared to participate in any public show of support for opposition candidates. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent the popular will, but would simply reflect the fear that governed the country.

What I'm describing may sound like a bad science fiction movie. But it is the reality that workers face when they try to organize.

If we compare illegal activity per voter under the NLRB with that under the FEC, the data suggests that NLRB elections are 3,500 times dirtier than federal elections.

This number may sound incredible; but it's true. But suppose my numbers are off by as much as an entire order of magnitude. Then the NLRB system would be only 350 times dirtier than federal elections.

Anyway you count it, the system is profoundly broken, profoundly undemocratic, and, I would say, profoundly un-American.

Conclusion

If we're serious about having a truly democratic process for American workers, we must begin by fixing these problems.

Thank you again for the opportunity to be here today.

I would be happy to answer any questions you may have.

Attachment:

G. Lafer, *Free and Fair? How Labor Law Fails U.S. Democratic Election Standards*, American Rights at Work, Washington, DC, June 2005.