Elimination of the Secret Ballot Union Election and Compulsory Arbitration

Under The Employee Free Choice Act -

A Violation of Fundamental Principles of International Labor Law

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Elimination of the Secret Ballot Union Election and Compulsory Arbitration Under The Employee Free Choice Act - A Violation of Fundamental Principles of International Labor Law

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I. Introduction

On March 10, 2009, Representative George Miller (D-California) and Senator Edward Kennedy (D-Massachusetts) introduced the Employee Free Choice Act of 2009 ("EFCA") as H.R. 1409 and S. 560 respectively.[2] EFCA, if enacted as introduced, will make significant changes to core aspects of American labor law that will result in a legislative scheme that violates principles of international labor law. First, EFCA will effectively supplant the secret ballot election for determining union representation with a procedure through which representation will be determined solely through the submission of authorization cards.[3] Second, EFCA will create a compulsory arbitration process that either party can unilaterally invoke to set initial terms of a labor contract.[4] Both changes defy established principles of international labor law which prefer secret ballot representation elections and eschew compulsory arbitration

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[2] H.R. 1409, 111th Cong., 1st. Sess. (2009). S. 560, 111th Cong., 1st Sess. (2009). As the two bills are identical, all subsequent citations to this bill will be to the House version.

[3] H.R. 1409, 111th Cong., 1st Sess., § 2 (2009).

[4] *Id.* § 3.

schemes in favor of voluntary collective bargaining. In its inevitable debate on reforms to the NLRA, Congress should give due consideration to these international concerns before enacting legislation that disregards them.

This article will first describe the current legal framework under the NLRA for secret ballot elections and collective bargaining. Second, it will explain how Sections 2 and 3 of EFCA propose to modify the NLRA. Third, it will show where the United States has incorporated the international principles of freedom of association into its laws, and has sought to promote them abroad. Fourth, it will describe how under the principles of international labor law, the secret ballot representation election is the preferred method to determine a union's representativeness, and how Section 2 of EFCA violates these principles. Finally, it will show how compulsory arbitration schemes to set terms of a collective bargaining agreement violate principles of international labor law, and how Section 3, which imposes such a scheme, does the same.

II. The Current Legal Framework

a. Section 7 Rights and Selection of an Exclusive Bargaining Representative

The National Labor Relations Act[5] was enacted in 1935 to establish an orderly mechanism to permit employees to organize and bargain collectively, while at the same time avoid economic disruption and industrial unrest.[6] The NLRA's coverage is limited to employees and employers in the private sector.[7] At the heart of the NLRA are Section 7 rights. Section 7 of the NLRA states:

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[5] The NLRA is codified at 29 U.S.C. §§ 151-169 (2008). The original NLRA was known as the Wagner Act and was subsequently amended by the Labor Management Relations Act of 1947 (the Taft-Hartley Act) and codified at 29 U.S.C. §§ 141-144, 167, 172-187.

[6] *See* 29 U.S.C. § 151 (2008).

[7] *Id.* § 151(2), (6)-(7). The NLRA covers most private sector enterprises where the operations of the enterprises affect commerce and are covered under the commerce clause of the United States Constitution. *NLRB v. Fainblatt,* 306 U.S. 601, 606-607 (1939). For a thorough description of the scope of enterprises within the jurisdiction of the NLRA, *see* NATIONAL LABOR RELATIONS BOARD, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES (2005)

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.[8]

Under Section 7, employees have the right to engage in union activities and an equal right to refrain from such activities.[9] Employees exercising either right are protected equally under the law.[10]

b. The Election Process and Certification under the NLRA

Under the NLRA employees can have only one bargaining representative which "shall be the *exclusive* representative of all the employees in such unit."[11] In order for employees who wish to designate a union to bargain on their behalf to compel an employer to recognize and bargain with their union,[12] the employees or the union must notify the National Labor Relations Board ("NLRB") by filing a petition.[13] If the person or union can provide evidence[14] that at least 30 percent of the employees in the bargaining unit have designated it as their representative, the NLRB will process the petition.[15] The NLRB will establish the scope of the bargaining unit and

[8] 29 U.S.C. § 157.
[9] *Id.*
[10] *Id.* § 158(a)(3), (b)(1)(A).
[11] *Id.* § 159(a)(Emphasis added).
[12] An employer may voluntarily forego an NLRB certification election and recognize a union as the exclusive representative of employees through other means of verification of the union's majority status. *See*, *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *Kroger Co.*, 219 NLRB 388 (1975)(inclusion of an after acquired stores clause in a collective bargaining agreement waives the employer's right to insist on an NLRB election); *Strucksnes Const. Co.*, 165 NLRB 1062 (1967)(allowing an employer to poll employees to determine union representation, provided certain safeguards are met).
[13] *Id.* § 159; 29 C.F.R. § 101.17 (2008).
[14] "Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file." 29 C.F.R. § 101.17 (2008).
[15] *Id.* § 101.18(a); *see also Esso Standard Oil Co*., 124 NLRB 1383 (1959).

set a secret ballot election.[16]

Where more than one union seeks to represent employees, there are procedures to enable employees to select only one union as their exclusive representative.[17] Depending on the extent of support they can demonstrate, intervening unions can participate in the election process in a complete or abbreviated way, and have their name placed on the ballot.[18]

The Board conducts the secret-ballot election in accordance with pre-established criteria designed to ensure the decision is made in the secrecy of the voting booth.[19] The Board's oversight of the secret ballot election ensures it is conducted in a fair, consistent, and orderly manner, free of unfair labor practices and coercion.[20] Consistent with Section 7 of the Act, "[t]he purpose of the secret ballot election is to provide the employees a free and uncoerced opportunity to select *or reject* a bargaining representative."[21] The NLRB has placed numerous safeguards upon the process to ensure that employees exercise this choice in a manner that is free

[16] There exists a procedure to determine the scope of the bargaining unit of employees eligible for representation if that is in dispute, as well as a procedure to set an election upon the consent of the parties. *See,* 29 U.S.C. § 159(b), 29 C.F.R. §§ 101.19 (consent agreement for an election), 101.20(procedure for formal hearing)(2008). The law governing the appropriateness of a bargaining unit is comprehensive, and election petitions often result in a stipulated agreement for the conduct of prompt election. *See* N.L.R.B. AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, OFFICE OF THE GENERAL COUNSEL (July 2005).

[17] 29 C.F.R. §§ 102.60–102.72; *see also*, NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL (PART 2) REPRESENTATION PROCEEDINGS ¶¶ 11020-11042 (2007).

[18] 29 C.F.R. §§ 102.65 (intervention), 102.70 (procedure for runoff election)(2008); NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL (PART 2) REPRESENTATION PROCEEDINGS ¶¶ 11020-11042 (2007).

[19] "The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As for the mechanics of the election, the ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth." 29 C.F.R. 101.19(c); *see also, Breman Steel Co*., 115 NLRB 247 (1956); 29 C.F.R. §§ 101.19(a)(2), 102.69(a); NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL (PART 2) REPRESENTATION PROCEEDINGS ¶ 11310 (2007).

[20] 29 U.S.C. § 159; *NLRB v. Sanitary Laundry*, 441 F.2d 1368 (10th Cir. 1971). Secret ballot elections, conducted by the NLRB are conducted under "laboratory conditions" which are "conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp,* 77 NLRB 124 (1948). Elections are to be held in an atmosphere "conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasonable choice." *Sewell Manufacturing Co*., 138 NLRB 66, 70 (1962), *supplemented*, 140 NLRB 220 (1962).

[21] JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW, 2678 (5th Ed. 2006)(emphasis added).

from coercion.[22]

If a majority of employees who vote designate a union as their representative, then, absent objectionable conduct,[23] the designated union becomes certified by the NLRB as the employees' exclusive bargaining representative.[24] Certified unions enjoy representative status for one year following certification and any petition to change the representative status during that year will be barred.[25] After the end of that year, the employees may designate a competing union as their representative, or choose to have no union represent them at all.[26]

c. The Duty to Bargain, the Right to Strike and the FMCS

Once certified, a labor union enjoys the exclusive right to represent the employees with respect to "rates of pay, wages, hours of employment, or other conditions of employment."[27] The NLRA requires a union and employer to bargain in good faith, but does not require them to

[22] The safeguards of the election procedure are numerous. Examples include the following: providing accurate and complete voter eligibility lists, *Excelsior Underwear*, 156 NLRB 1236 (1966); significantly limiting conduct by employers during the 24 hours immediately preceding the election, *Peerless Plywood Co.*, 107 NLRB 427 (1954); requiring that notices of the secret ballot election be posted for a specific number of days, (29 C.F.R. § 103.20 (2008)) and contain, among other things, a sample ballot, a designation of the date, time and location of the election, and a description of who is eligible, NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL (PART 2) REPRESENTATION PROCEEDINGS ¶¶ 11314-11315 (2007) ; regulation of conduct in and around the polls during the election, *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001)(polling times), *Yerges Van Liners*, 162 NLRB 1259 (1967)(ensuring that the election procedure give all eligible employees the right to vote); allowing the parties to designate observers to witness the election process, 29 C.F.R. § 102.69(a); regulating the behavior of the NLRB agent who conducts the election, *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967); ensuring the ballot box is protected from tamper, *S.S. Kresge Co.*, 121 NLRB 374 (1958); ensuring and preserving the secrecy of the ballot so as not to disclose the identity of the voter, *Avante At Boca Raton, Inc.*, 323 NLRB 555 (1997); and ensuring that ballots be in languages other than English where voters do not speak English, *Kraft, Inc.*, 273 NLRB 1484 (1985).

[23] 29 C.F.R. § 102.69.

[24] *Id.* § 102.69(b).

[25] *General Box Co*., 82 NLRB 878 (1949); *Chelsea Industries*, 331 NLRB 1648 (2000), *enforced,* 285 F.3d 1073 (D.C. Cir. 2002).

[26] 29 U.S.C. § 159(c)(3).

[27] *Id.* § 159(a). Once a union is certified, it becomes "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contact incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.* § 158(d).

reach agreement.[28] U.S. labor law has long tolerated use of economic pressure by unions and employers to persuade the other to reach agreement or make concessions.

> [C]ollective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth….The presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system….[T]he truth of the matter is…the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.[29]

Mandatory good-faith bargaining combined with the availability of strikes[30] and lockouts[31] are thus central to collective bargaining in the American workplace, and the government generally has no power to enjoin use of these weapons unless they represent a threat to national health or safety.[32]

To facilitate a resolution to labor disputes in bargaining, Congress created the Federal Mediation and Conciliation Service ("FMCS") to provide facilitators to help resolve labor disputes.[33] The suggestions and findings of FMCS facilitators do not have the force of law, and a party's refusal to agree with or conform its conduct to an FMCS-proposed solution is not a violation of the NLRA.[34] Even with this limited authority, however, the FMCS provides a valuable service through which it encourages parties to reach agreements on their own.

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[28] The parties must bargain collectively, but the NLRA makes it clear that the obligation to engage in collective bargaining "does not compel either party to agree to a proposal or require the making of a concession…" *Id.* "[The NLRA]…does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible…."*NLRB v. Swift Adhesives*, 110 F.2d 632, 637 (4th Cir. 1940), *see also Atlas Mills*, 3 NLRB 10 (1937) (parties must bargain with a bona fide intent to reach an agreement).
[29] *Insurance Agents v. NLRB*, 361 U.S. 477, 488-89 (1960).
[30] 29 U.S.C. §§ 152(3), 157.
[31] *See, e.g., NLRB v. Greensburg Coca-Cola Bottling Co*., 40 F.3d 669 (3d Cir. 1994).
[32] 29 U.S.C. § 178.
[33] 29 U.S.C. § 172(a).
[34] *Id.* § 173(c).

III. The Employee Free Choice Act

a. Effective Elimination of the Secret Ballot Election

The first section of EFCA relevant to this discussion is Section 2, titled "Streamlining Union Certification."[35] The section would amend Section 9(c) of the NLRA to require the NLRB to certify a union as the representative of employees upon the presentation of valid authorizations from a majority of employees in the unit designating the union as their exclusive representative. Section 2 provides:

> (a) In General – Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:
>
> '(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. 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).
>
> '(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include –
>
> '(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and
>
> '(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.'[36]

Under existing law, unless an employer has either (1) committed serious unfair labor

[35] H.R. 1409, 111th Cong., 1st Sess. § 2 (2009).
[36] *Id.*

practices, [37] or (2) voluntarily agreed to recognize a union through some private verification of majority status, it can always insist upon a secret ballot election conducted by the NLRB.[38] Section 2 of EFCA would effectively eliminate the long enjoyed ability of employees to participate in a secret ballot election.[39]

b. Compulsory First Contract Mediation and Arbitration Under Section 3 of EFCA and Limits on the Right to Strike

Section 3 of EFCA creates a procedure for binding mediation and arbitration when a newly certified labor union and an employer cannot reach agreement on a first contract.[40] The relevant language proposed under EFCA seeks to amend Section 8(d) of the NLRA[41] by adding the following section (h):

> (h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) [29 U.S.C. § 158(d), described *supra*] shall be modified as follows:
>
> (1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

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[37] Where unfair labor practices are egregious, the NLRB can choose to forego an election altogether and certify a union as the exclusive bargaining representative of employees based upon authorization cards alone through what is known as a *Gissel* bargaining order. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

[38] *Linden Lumber Division v. NLRB,* 419 U.S. 301 (1974).

[39] Government supervised designation of a labor union as the exclusive bargaining representative of employees in a bargaining unit without an NLRB election was abandoned shortly after passage of the Wagner Act. Under the original Wagner Act, the "card check," or the verification of union support through checking authorization cards against an employee list, was frequently used in lieu of a secret ballot election to determine whether a union represented a majority of the workers in a bargaining unit and from which a union could be certified by the NLRB. JOHN E. HIGGINS, JR., THE DEVELOPING LABOR LAW, 734-35 (5th ed. 2006) (emphasis added). In 1939, the card check was abandoned under the Wagner Act in favor of the secret ballot election. *Id.* at 735. The concept of recognition by card check has been controversial because it enables an employer and a union to agree to eliminate the rights of workers to a secret ballot election. Recently, the NLRB attempted to resolve this issue in the case, *Dana Corp.*, 351 NLRB No. 28 (2007). There, the NLRB created a procedure pursuant to which employees in a bargaining unit for which a labor union was voluntarily recognized by an employer were (1) informed of their rights to seek a secret ballot election and (2) given a period of time following the voluntary recognition to file for a secret ballot election in accordance with the NLRB procedure if they so desired. *Id.*

[40] H.R. 1409, 111th Cong., 1st Sess. § 3 (2009).

[41] 29 U.S.C. § 158(d).

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.[42]

This change would make such a procedure a part of private sector labor relations for first time,[43] irrespective of the industry.[44] Either party may invoke the procedure unilaterally, and there is no mechanism to permit a party to decline to participate.[45]

i. Section 3 of EFCA and limits on the right of employees to strike

Section 3 of EFCA does not expressly prohibit the right to strike by a newly certified labor union, but the compulsory mediation and arbitration provision it details effectively does so. First, it imposes the "loss of status" provision of Section 8(d) upon employees after a party gives notice to the FMCS to commence the mediation and arbitration procedure of Section 3. Under Section 8(d) of the NLRA, "any employee who engages in a strike within *any notice period*…

[42] H.R. 1409, 111th Cong., 1st Sess. § 3 (2009).
[43] Compulsory arbitration to settle the terms of a contract is not uncommon in public sector labor legislation in the United States where employees do not enjoy the right to strike. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 1348, 1371-91 (Alan Miles Rubin ed., BNA Books, 6th ed. 2003)(1952)(citing many of the pieces of public sector labor legislation that provide for interest arbitration). This type of arbitration procedure is also an available procedure under the Railway Labor Act, which is the statute that governs labor relations in the railroad and airline industries, but in order for the parties to participate in such a process, they both must agree to do so. 45 U.S.C. §§ 151 *et seq*. (2008).
[44] There is no language in EFCA to limit the industry or sector in which this compulsory provision is applicable. H.R. 1409, 111th Cong., 1st Sess. § 3 (2009).
[45] *Id.*

shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act."[46] Known as the "loss-of-status" provision,[47] this language means that a strike that violates Section 8(d) is illegal,[48] may be enjoined,[49] and any employee who participates loses all protections available under the Act.[50]

Section 8(d) contains several "notice periods" during which an employee can lose the protections of the Act. They are designed to "give mediation its intended statutory period in which to work."[51] First, under Section 8(d)(1), a party wishing to terminate or modify a collective bargaining agreement must notify the other party 60 days beforehand, and under Section 8(d)(4) cannot engage in a strike during that period.[52] Second, under Section 8(d)(3), the initiating party must also notify the FMCS within 30 days after issuance of the notice under 8(d)(1).[53] Third, for employees of a health care institution, a newly certified labor organization cannot engage in any strike, picketing or other refusal to work until at least 30 days after notice of the dispute is given to the FMCS.[54] Each notice period starts when notice is given and ends when the requisite number of days pass. Each can also be extended as the result of a failure of a party to provide notice.[55]

Section 3 of EFCA creates a new notice period under Section 8(d). It starts when one

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[46] 29 U.S.C. § 158(d)(emphasis added).
[47] *Fort Smith Chair Co.,* 143 NLRB 514, 518 (1963).
[48] *Id.* at 519 (finding a strike called by a union that had not given the proper notice to the FMCS under Section 8(d)(3) of the Act to be unlawful, rendering the employer's termination of the striking workers not violative of the Act).
[49] *Id.*
[50] The NLRB has consistently held that employers do not violate the law when they terminate employees who strike in violation of Section 8(d). *Id., see also, Boghosian Raisin Packing Co.*, 342 NLRB No. 32 (2004)(holding that an employer did not violated the Act when it terminated 42 employees for engaging in a strike where the union has erroneously failed to file the 8(d)(3) notice with the FMCS).
[51] *Fort Smith Chair Co.,*143 NLRB 514, 519 (1963).
[52] 29 U.S.C. § 158(d)(1)-(4).
[53] *Id.* § 158(d)(3).
[54] *Id.* § 158(d)(4)(B).
[55] "[T]he waiting period must be extended to include a full 30 days after the filing of such notices in order to give mediation its intended statutory period in which to work." *Fort Smith Chair Co.*, 143 NLRB 514, 519 (1963), *see also Boghosian Raisin Packing Co.,* 342 NLRB No. 32 (2004).

party unilaterally notifies the FMCS after ninety (90) days of bargaining without agreement.[56] However, unlike the other notice periods of Section 8(d), the one created by EFCA does not end after a predetermined number of days. The notice period lasts until the parties have come to terms on a first contract, or two (2) years have passed since the arbitration panel has rendered its decision to settle the dispute.[57] The ultimate duration of this notice period is unknown as it is designed to allow the compulsory mediation and arbitration provision to work on a time frame controlled by the FMCS.[58] During that entire notice period, employees who strike risk losing their jobs with no recourse to the protections of the NLRA.

Section 3 of EFCA also prevents workers from striking to change the terms of employment submitted to and decided by the arbitrator. When arbitration is invoked to settle labor disputes in the United States, federal labor policy strongly favors it,[59] and considers "arbitration… [to be] the substitute for industrial strife."[60] "[A] contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike over such disputes."[61] The availability of arbitration to settle labor disputes over terms of an initial contract carries with it an implied undertaking not to strike.[62] Because Section 3 of EFCA imposes upon the parties a *statutory* obligation to submit their labor dispute to arbitration rather than a contractual one, it presents an even more compelling mandate that workers not strike while the process is ongoing.

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[56] H.R. 1409, 111th Cong., 1st Sess. § 3(h)(2) (2009).
[57] *Id.* § 3(h)(2)-(3).
[58] It is interesting to note that only the FMCS has the authority to engage the arbitration mechanism under Section 3 of EFCA. *Id.* § 3(h)(3). Neither party to the labor dispute can invoke the process.
[59] "Final adjustment by a method of agreed to by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d).
[60] *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).
[61] *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974)(citing *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962)).
[62] *Id., see also Goya Foods, Inc.*, 238 NLRB 1465, 1467 (1978)(holding that a no strike clause of a collective bargaining agreement extended beyond the expiration of the collective bargaining agreement where the arbitration duty was also extended).

IV. Freedom of Association – A Core Principle of International Labor Law

a. The ILO and Its Supervisory Mechanisms

Freedom of association and the right to collective bargaining is one of the most fundamental principles of international labor law. Article 20 of the United Nations' Universal Declaration of Human Rights provides that "[e]veryone has the right to freedom of peaceful assembly and association."[63] The International Labor Organization ("ILO"), the United Nations agency with jurisdiction over international labor standards, is charged with furthering this principle on the international level.[64]

Two ILO Conventions[65] address freedom of association and the right to collective bargaining.[66] Convention 87, Freedom of Association and Protection of the Right to Organise, was adopted in 1948,[67] and focuses on the rights of workers to form and join labor organizations freely.[68] Article II of Convention 87 provides that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."[69] Convention 98, Right to Organise and Collective Bargaining Convention, was adopted in 1949,[70]

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[63] U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 20 (1948).
[64] The ILO Constitution mentions the freedom of association in its preamble. In relevant part, it states: "And whereas conditions of labor exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by … recognition of the principle of freedom of association …" U.N. ILO CONST. pmbl.
[65] ILO Conventions apply only to member nations that have ratified them. Article 20 of the ILO Constitution governs the registration of Conventions by the ILO with the United Nations. The text reads, "[a]ny Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it." ILO CONST. art. XX.
[66] A Convention is an instrument of the ILO created by the ILO Convention and ratified by member nations. U.N. ILO CONST. art. XIX.
[67] U.N. ILO, Convention No. 87 (1948).
[68] *Id.*
[69] *Id.*, at art. II.
[70] U.N. ILO, Convention No. 98 (1949).

and relates to protections of workers who seek representation and the right to engage in collective bargaining.[71] Article IV of Convention 98 provides that "[m]easures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[72]

In addition to Conventions, the international commitment to freedom of association as a core principle of international labor law appears in other ILO instruments. The most important of which is the 1998 Declaration on Fundamental Principles and Rights at Work ("1998 Declaration").[73] The 1998 Declaration was adopted as a means to guide every member of the ILO in its respect for labor rights solely by virtue of membership in the ILO, irrespective of whether a nation has ratified a specific convention or not.[74] The 1998 Declaration sets forth four core principles of international labor law, the first of which "freedom of association and the effective recognition of the right to collective bargaining."[75]

Finally, because the ILO considers freedom of association so central to its mission, in 1950 it established a separate Committee on Freedom of Association ("CFA" or "Committee") "for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions."[76] Complaints may be brought against any member state by employers' or workers' organizations when they believe the

[71] *Id.*
[72] *Id.* at art. IV.
[73] U.N. ILO, Declaration on Fundamental Principles and Rights at Work (1998).
[74] *Id.*
[75] *Id.* The other three areas include the elimination of forced labor, the abolition of child labor and the elimination of discrimination in employment and occupation. *Id.*
[76] Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, Annex I, at 231.

principles of freedom of association are not being respected.[77] Such cases can be brought irrespective of whether the member nation has ratified either Convention 87 or 98.[78] During its existence, the CFA has examined thousands of cases, and has developed a substantial body of decisions upon which it relies when examining new cases.[79]

b. Commitment of the United States to the International Principle of Freedom of Association

The United States deems freedom of association a cornerstone principle of its laws. At home, it is at the heart of the U.S. Constitution and labor law.[80] Abroad, the United States promotes freedom of association through international trade legislation, and has frequently included reference to the principles of freedom of association and "relied on ILO guidance in formulating the labor rights clauses in these instruments."[81] There are also numerous pieces of legislation, and agreements to which the United States is a party, that reference promotion of freedom of association and the rights to collective bargaining.[82]

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[77] *Id.* at 235.
[78] *Id.* at 8.
[79] *Id., see also*, http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1.
[80] The freedom of speech and of assembly have been guaranteed in the United States through the Bill of Rights. U.S. CONST. amend. I. In the labor context, freedom of association has long been a core aspect of the law. It is the policy of the United States to encourage "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.
[81] *See*, Complaint of the AFL-CIO to the ILO Committee on Freedom of Association concerning employees classified as "supervisors" under the National Labor Relations Act at 11. *See also*, U.N. ILOCFA, 349th Rep., Case No. 2524, United States, ¶¶ 794-858 (2006).
[82] Examples include the following: Congressional report on legislation governing U.S. participation in international financial institutions (R. Conf. Rep. 4426, 103rd Cong. § 1621(a) (2d Sess. 1994)); Legislation governing the Generalized System of Preferences (19 U.S.C. §§ 2461 *et seq.* (2008)); Legislation forming the Overseas Private Investment Corporation (22 U.S.C. §§ 2191 *et seq.* (2008)); Legislation establishing the Caribbean Basin Initiative (19 U.S.C. §§ 2702 *et seq.* (2008)); Section 301 of the Trade Act of 1988 (*Id.* §§ 2411 *et seq.*); Appropriations for economic development grants through the Agency for International Development (22 U.S.C. §§ 2151 *et seq.* (2008)); The laws governing U.S. participation in international lending institutions (*Id.* §§ 1621 *et seq.*); Bilateral free trade agreements with numerous countries (*See, e.g.,* Israel Free Trade Agreement, September 1, 1985, 24 ILM 653); The North American Free Trade Agreement (NAFTA North American Free Trade Agreement, December 8, 11, 14, and 17, 1992, 32 ILM 289; 19 U.S.C. § 3471); and The Central American Free Trade Agreement. Dominican Republic-Central America-United States Free Trade Agreement, August 5, 2004, 43 ILM 514; 19 U.S.C. § 4001.

Notwithstanding its commitment to the principles of freedom of association, the United States is one of a very small number[83] of ILO member nations that has not ratified Conventions 87 or 98.[84] Apart from the technical reasons why Conventions 87 and 98 would require a wholesale revision of the NLRA,[85] ratification would "pose a genuine constitutional dilemma in the United States."[86] In order for the United States to ratify the two Conventions, there would have to be legislative action by the federal government and the 50 states, as well as the District of Columbia.[87] The Tenth Amendment prohibits the federal government from mandating how a state organizes its affairs, and therefore ratification of Conventions 87 and 98 "would clearly amount to an unconstitutional interference into the manner in which state and local governments organize their personnel policies to deliver services to the public"[88] because both Conventions apply to public and private sectors.[89] There are also many other aspects of labor relations regulated by state law.[90]

c. The United States and the ILO Committee on Freedom of Association

Even if a country has not ratified Conventions 87 and 98, the ILO, through the Committee on Freedom of Association, still examines that nation's labor laws and practice as part of the ILO's mandate to "provide guidelines and offer… technical assistance to bring the

[83] For an up to date listing of countries that have ratified ILO Conventions 87 and 98, please see, http://www.ilo.org/ilolex/english/docs/declworld.htm.
[84] For the definitive authority on why the United States cannot ratify either convention, s*ee,* EDWARD E. POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING – THE IMPACT ON U.S. LAWS AND PRACTICES OF RATIFICATION OF ILO CONVENTIONS, NO. 87 AND NO. 98 (Washington: Labor Policy Assn.)(1984).
[85] *Id.* at pp. 5-63.
[86] *Id.* at p. 70.
[87] *Id.* at p. 65.
[88] *Id.* at p. 70.
[89] *Id.* at pp. 67-68.
[90] *Id.* at p. 66.

laws into compliance with the principles of freedom of association."[91] The United States presents no exception, and has had its laws examined by the CFA.

The complaints filed against the United States have been diverse. They range from complaints about the decision of President Ronald Reagan to terminate the federal air traffic controllers represented by the Professional Air Traffic Controllers' Organization ("PATCO") for engaging in an illegal strike,[92] to actions of the United States in the Panama Canal Zone.[93] More recently, the AFL-CIO has used the CFA as a means to challenge decisions of the National Labor Relations Board with which it did not agree.[94]

Some case examinations have resulted in conclusions and recommendations that the law or practice subject to the complaint is consistent with the principles of freedom of association.[95] Other case examinations have resulted in a criticism of U.S. law or practice.[96]

V. The Right to a Secret Ballot Election to Determine Union Representation Status as an International Labor Principle

a. Under principles of international labor law, the secret ballot election is the appropriate and desirable way to determine a union's representative status because it best serves to protect the employee's right to freedom of association without fear of reprisal

[91] Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶ 11 (2006).
[92] U.N. ILOCFA, 211th Rep., Case No. 1074, United States (1981).
[93] U.N. ILOCFA, 6th Rep., Case No. 42, United States (1953).
[94] *See*, U.N ILOCFA, 350th Rep., Case No. 2608, United States (2007)(NLRB decision on graduate teaching and research assistants); U.N ILOCFA, 349th Rep., Case No. 2524, United States (2006)(NLRB decision on the definition of supervisor); U.N. ILOCFA, 332d Rep., Case No. 2227, United States (2002)(United States Supreme Court decision regarding remedies available to undocumented workers under the National Labor Relations Act).
[95] U.N. ILOCFA, 211th Rep., Case No. 1074, United States (1981)(concluding that the U.S. government acted appropriately in terminating striking air traffic controllers and using controllers from the military); U.N. ILOCFA, 349th Rep., Case No. 2524, United States (2006)(concluding that the exclusion of certain classifications of employees under the NLRA can be done provided that exclusion is limited to workers who genuinely represent the interests of employers).
[96] U.N. ILOCFA, 350th Rep., Case No. 2608, United States (2007)(concluding that the NLRB decision excluding graduate teaching and research assistants did not comport with the principles of freedom of association); U.N. ILOCFA, 344th Rep., Case No. 2460, United States (2005)(concluding that the law in the State of North Carolina that prohibits the state or any subdivision thereof from entering into any collective bargaining agreement was contrary to the principles of freedom of association, and should be repealed).

One of the most important concepts in international labor law is that "[w]orkers… shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."[97] Consistent with the ILO's commitment to enable workers to select a union of their own choosing, the Committee, acting in its supervisory capacity, has long sought to enable workers to designate a collective bargaining representative through "objective verification."[98] The need for an objective verification of a claim of union support applies "in all cases," and is equally applicable in the public and private sectors.[99]

Through work of the Committee, the ILO has long expressed a belief that an "objective verification" is best achieved through a poll conducted by the authorities.[100] Within the context of the ILO's strong belief that "[a]nti-union discrimination is one of the most serious violations of freedom of association,"[101] such polling must occur without revelation of the identities of the

[97] U.N. ILO, Convention No. 87, at art. 2 (1949).
[98] "The Committee has emphasized the importance that it attaches to the fact that workers and employers should in practice be able to establish and join organizations of their own choosing in full freedom." Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶ 309 (2006). The Committee has stated that "collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining, the Committee has considered that *the competent authorities should, in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of workers in an undertaking, provided that such a claim appears to be plausible and that if the union concerned is found to be the majority union, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes.*" U.N. ILOCFA, 309th Rep., Case No. 1852, United Kingdom, ¶ 337 (1995)(emphasis added).
[99] The Committee has written that "competent authorities should, *in all cases, have the power to proceed to an objective verification of any claim by a union that it represents the majority of the workers* in an undertaking, provided that such a claim appears to be plausible." U.N. ILOCFA, 332nd Rep., Case No. 2250, Argentina, ¶ 281 (2003) (emphasis added).
[100] U.N. ILOCFA, 145th Rep., Case No. 776, Jamaica, ¶¶ 44-46 (1973); U.N. ILOCFA, 187th Rep., Case No. 796, Bahamas, ¶ 173 (1974); U.N. ILOCFA, 190th Rep., Case No. 882, United Kingdom, ¶ 291 (1977); U.N. ILOCFA, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).
[101] Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶¶ 769-774 (2006).

individuals involved.[102] The Committee has treated protection of data regarding union membership "a fundamental aspect of human rights,"[103] and has called the secret ballot election "an especially appropriate" and desirable way to allow workers to exercise their right to be represented by a labor union of their own choosing.[104] The Committee has encouraged use of a secret ballot election for workers to determine their bargaining representative even in situations where unions seeking to represent workers have rejected such a proposal.[105] In a case examined in 2001 involving Madagascar,[106] the Committee recommended the government amend its law "to allow the representativity of trade unions to be determined *without* making it a requirement that members' names be communicated to the authorities."[107] The Committee reasoned that its recommended amendment would allow the determination of the most representative worker organization to be achieved through objective criteria "so as to avoid any possibility of bias or

[102] In a case examined by the Committee in 1994 involving India and its public sector workers, the Committee made a very strong statement with respect to its general belief in the need for guarantees of secrecy in the process of verifying the representativeness of labor unions. U.N. ILOCFA, 302d Rep., Case No. 1817, India, ¶ 325 (1994). "The Committee believes that such a determination of ascertaining or verifying the representative character of trade unions can best be made when strong guarantees of secrecy and impartiality are offered." *Id.*

[103] U.N. ILOCFA, 320th Rep., Case No. 2040, Spain, ¶ 669 (1999).

[104] U.N. ILOCFA, 333rd Rep., Case No. 2153, Algeria, ¶ 207 (2001). "[T]he determination of the most representative trade union by secret ballot is not only an acceptable but a desirable way to ensure that workers exercise their right to choose the organization which shall represent them in collective bargaining." U.N. ILOCFA, 348th Rep., Case No. 2512, India, ¶ 904 (2006). The Committee's commitment to the secret ballot election also appears in the context of internal union elections where the ILO has long held that legislative requirements that such elections be conducted by secret ballot are consistent with the principles of freedom of association, even though the ILO believes that trade unions should generally be left to establish their own internal structures. U.N. ILOCFA, 256th Rep., Case No. 1414, Israel, ¶ 126 (1987). Outside of the context of labor, the United Nations has included the secret ballot election as one of the fundamental rights of prisoners of war in the selection of their representatives. "In all places where there are prisoners of war, except in those where there are officers, the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners' representatives entrusted with representing them before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them." U.N. GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR part III, sec. 6, chap. 1, art. 78 (1950).

[105] U.N. ILOCFA, 270th Rep., Case No. 1513, Malta, ¶ 434, 438 (1989).

[106] In the case of Madagascar, the process of determining representativity of labor unions created by the decree in question and which the Committee sought to have the government amend applied to both the public and private sectors. U.N. ILOCFA, 327th Rep., Case No. 2132, Madagascar, ¶ 653 (2001)(citing Section 1(3) of Decree No. 2000-291 of 31 May 2000).

[107] U.N. ILOCFA, 327th Rep., Case No. 2132, Madagascar, ¶ 663 (2001) (emphasis added).

abuse."[108]

The Committee has also strongly expressed a preference for secret ballot representation elections as a means of protecting the rights of workers to select their own labor unions in a case involving Algeria.[109] There, the Committee found the requirement that a union submit to the government a list of members and a copy of their membership card as part of the process of determining whether a union represents workers for purposes of collective bargaining ran contrary to the principles of freedom of association.[110] The Committee found the procedure to pose a problem because of the "risk of reprisals and anti-union discrimination inherent in this type of requirement."[111] The Committee requested the government "take the necessary steps to ensure that decisions enabling the determination of the representativeness of organizations *are taken without the identities of their members being revealed,*"[112] and strongly advocated use of secret ballot elections as a means of ensuring true freedom of association. It wrote "both the Committee and the Committee of Experts on the Application of Conventions and Recommendations have found that a secret ballot is an especially appropriate method for this

[108] *Id.* ¶ 661.
[109] U.N. ILOCFA, 336th Rep., Case No. 2153, Algeria, ¶¶ 145-178 (2001). The case of Algeria was one examined by the Committee over several years. In the complaint, the complainant raised concerns about the procedure used to determine the representativeness of the labor union with respect to the employer. U.N. ILOCFA, 333rd Rep., Case No. 2153, Algeria, ¶ 207 (2001). The Committee wrote that "[t]he Committee therefore requests the Government to take legislative or other steps so as to allow the determination of the representativeness of organizations on the basis of objective and pre-established criteria without revealing the identity of their members, for instance, by organizing ballots." *Id.* ¶ 207, 215.
[110] *Id.* ¶ 166.
[111] *Id.*
[112] *Id.* (Emphasis added).

purpose."[113]

b. Where only one union may be certified by law as the exclusive representative of a group of workers, the ILO requires that exclusive representative be chosen by a majority vote to safeguard the principle of freedom of association

The Committee has also examined legal frameworks, such as that created by the NLRA,[114] where only one labor union may be certified as a representative of a particular group of workers, and has consistently recommended the process of selecting a labor union include a vote to safeguard of the principles of freedom of association.[115] A law that does not authorize the establishment of more than one union in an enterprise does not comply with ILO Convention 87.[116] Notwithstanding, the Committee has written that

> in many countries the legislation confers the exclusive right to bargain for a specific category of workers upon the organisation which represents a certain proportion or a relative or absolute majority of the workers, and whose representativity is generally determined either on the basis of the number of members (checking membership lists), or by secret ballot (checking number of votes)… [W]here systems provide for the most representative trade union to have preferential or exclusive bargaining rights, it is important that the determination of the trade union in question should be based on objective and pre-established criteria, so as to avoid any opportunity for partiality or abuse.[117]

Although the Committee will not criticize a national system of designating representativeness

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[113] *Id.* Although the case of Algeria involved public sector workers, the Committee's strong statement in favor of the secret ballot for determining the representativeness of a labor union evidences the value the ILO places on the preservation and protection of the secret nature of an individual worker's decision to support a labor union or not, since revelation of that decision creates the very real risk of anti-union reprisals and discrimination against union supporters. The general application of this concept is further evidenced by the Committee's inclusion of the principle in its Digest without distinction as to its application to the public or private sector. Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶ 351 (2006). There the Committee has written "[t]he determination to ascertain or verify the representative character of trade unions can best be ensured when strong guarantees of secrecy and impartiality are offered." *Id.*

[114] 29 U.S.C. § 159(a). Moreover, it is illegal under the National Labor Relations Act for an employer to recognize and bargain with a labor organization that does not represent a majority of the workers in the bargaining unit. 29 U.S.C. § 158(a)(2).

[115] U.N. ILOCFA, 265th Rep., Case No. 1386, Peru, ¶ 277 (1986); U.N. ILOCFA, 259th Rep., Case No. 1385, New Zealand, ¶ 541 (1986); U.N. ILOCFA, 248th Rep., Case No. 1380, Malaysia, ¶ 377 (1986); U.N. ILOCFA, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).

[116] U.N. ILO, Convention No. 87, art. 2 (1949); *see also*, U.N. ILOCFA, 337th Rep., Case No. 2327, Bangladesh, ¶ 198 (2004).

[117] U.N. ILOCFA, 265th Rep., Case No. 1386, Peru, ¶ 276 (1986) (citations omitted).

where only one labor union is certified as the exclusive bargaining agent of a group of employees,[118] where such a system exists, it must include certain safeguards to conform it to principles of international labor law.[119] Central to these safeguards is a system where the representative organization must "be chosen by a majority *vote* of the employees in the unit concerned."[120] Where "the authorities have the power to hold polls for determining the majority union which is to represent the workers for the purposes of collective bargaining…, [s]uch polls should always be held where there are doubts as to which union the workers wish to represent them."[121] As has been amply described *supra*, polling by secret ballot is the ILO's preferred method of determining a union's representative status.

c. The United States has promoted use of the secret ballot election abroad as being consistent with principles of international labor law

In 2001, several members of the United States Congress wrote a letter to the government of the State of Puebla, Mexico in which they equated the conduct of secret ballot elections in all union representation elections to compliance with international labor standards.[122] The text of the letter read as follows,

> As members of the Congress of the United States who are deeply concerned with international labor standards and the role of labor rights in international trade agreements, we are writing to encourage you to use the secret ballot in all union recognition elections.

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[118] U.N. ILOCFA, 259th Rep., Case No. 1385, New Zealand, ¶ 541 (1986).
[119] The four safeguards include the following: "a) the certification be made by an independent body; b) the representative organization be chosen by a majority vote of the employees in the unit concerned; c) the right of an organisation which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period; [and] d) the right of any organisation other than the certified organisation to demand a new election after a reasonable period has elapsed." U.N. ILOCFA, 256th Rep., Case No. 1386, Peru, ¶ 277 (1986). *See also*, U.N. ILOCFA, 259th Rep., Case No. 1385 New Zealand, ¶ 541 (1986); U.N. ILOCFA, 248th Rep., Case No. 1380, Malaysia, ¶ 377 (1986); U.N. ILOCFA, 241st Rep., Case No. 1330, Guyana, ¶ 844 (1985).
[120] U.N. ILOCFA, 256th Rep., Case No. 1386, Peru, ¶ 277 (1986)(emphasis added).
[121] U.N. ILOCFA, 329th Rep., Case No. 2175, Morocco, ¶ 696 (2002)(emphasis added); *see also*, U.N. ILOCFA, 187th Rep., Case No. 796, Bahamas, ¶ 173 (1974).
[122] H.R. REP. 110-23, 110th Cong. § 55 (1st Sess. 2007). The signers of this letter included Rep. George Miller, and the following co-sponsors of the EFCA bill introduced in the House and Senate on March 10, 2009: Rep. Marcy Kaptur, Sen. Bernard Sanders, Rep. Bob Filner, Rep. Barney Frank, Rep. Joe Baca, Rep. Zoe Lofgren, Rep. Dennis J. Kucinich, Rep Fortney Peter Stark, rep. Barbara Lee, Rep. James P. McGovern, and Rep. Lloyd Doggett.

> 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.
>
> We respect Mexico as an important neighbor and trading partner, and we feel that the increased use of the secret ballot in union recognition elections will help bring real democracy to the Mexican workplace.[123]

While not annotated, the letter's contents accurately reflected principles outlined by the ILO with respect to the international labor standard that guarantees workers the right to freedom of association. Of particular note was the authors' conclusion that the secret ballot election ensured that workers could exercise their right to select a labor union of their own choosing without intimidation.[124]

VI. Section 2 of EFCA Violates the Principle of Freedom of Association by Eliminating the Secret Ballot Election

By replacing the secret ballot election with a mandatory card check procedure, Section 2 of EFCA will deprive workers of their right to a secret ballot election and will violate the principles of international labor law. Nothing is more central to the principle of freedom of association than the right of workers to be free of the *risk* of reprisals for engaging in union activities. A mechanism that ensures the secrecy of their decision eliminates that risk and is not only an international labor right, but, as the ILO has stated, a human right.[125]

Additionally, under a system such as that prescribed by the NLRA, where only one labor union may be certified by the government as having exclusive representation rights for a group of workers, the system must include the safeguard of a vote to determine which union the workers wish to have. This is particularly the case where the government administering the

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[123] *Id.*
[124] *Id.*
[125] U.N. ILOCFA, 320th Rep., Case No. 2040, Spain, ¶ 669 (1999).

system is capable of conducting such votes which is certainly the case here in the United States, where the NLRB has been conducting secret ballot union elections for over half a century.

The card check process of Section 2 of EFCA removes the safeguards established by the NLRB to ensure employees make their decision on representation in secret and private way without the *risk* of reprisal. EFCA contains nothing to ensure such safeguards are preserved because with authorization cards, the decision by the employee is made only in the presence of the union or its supporters. Within such a setting, the employees' identities and sentiments are necessarily disclosed, and therefore subject the individual employee to the risk of coercion and reprisal that the principles of international labor law eschew. A change in the law of the United States that creates and encourages such an environment not only does not enhance the international principles of freedom of association, but will infringe upon them.

VII. The Imposition of a Compulsory Arbitration Mechanism to Resolve a Labor Dispute Violates Principles of International Labor Law Because it Limits Voluntary Collective Bargaining, and the Right to Strike

a. The ILO's view on compulsory mediation and arbitration to settle labor disputes

The right of workers to strike is viewed by the ILO as an essential means of workers and labor unions to defend their social and economic interests, and is "an intrinsic corollary to the right to organize."[126] Compulsory mediation and arbitration laws to settle labor disputes undermine the right of workers to strike, and fail to promote voluntary collective bargaining.[127] In the mind of the ILO, the only place where "compulsory arbitration to end a collective labor dispute and a strike is acceptable… [is where] it is at the request of both parties involved in a

[126] Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the governing Body of the ILO, 2006 DIGEST ¶¶ 520-523.

[127] The Committee has written that "it is difficult to reconcile arbitration imposed by the authorities at their own initiative with the right to strike and the principle of the voluntary nature of negotiation." U.N. ILOCFA, 349th Rep., Case No. 2545, Norway, ¶ 1156 (2007). *See also* U.N. ILOCFA, 333d Rep., Case No. 2281, Mauritius, ¶ 631 (2003); Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST ¶ 566, at 117.

dispute, or if the strike in question may be restricted, even banned, *i.e.*, in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population."[128] The Committee has examined numerous cases and concluded that restrictions on the right to strike in the public service are permissible.[129] Similarly, the Committee has defined what constitutes essential services for purposes of limitations on the right to strike.[130]

The right of either party to a labor dispute to unilaterally disengage from the bargaining table and initiate compulsory arbitration does not further the international principles of freedom of association. Such a provision "does not promote voluntary collective bargaining, since one of the parties may undermine collective bargaining by unilaterally entrusting the settlement of the dispute to the labour authority, thereby suspending the right to strike."[131] The belief espoused by the ILO that compulsory arbitration limits voluntary collective bargaining is not a new concept.

[128] U.N. ILOCFA, 333d Rep., Case No. 2281, Mauritius, ¶ 631 (2003); *See also*, U.N. ILOCFA, 307th Rep., Case No. 1890, India, ¶ 372 (1996)
[129] Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶¶ 572-580 (2006).
[130] Essential services range from workers in the hospital sector, to members of the police and armed forces, to water supply workers. *See,* Freedom of Association – Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 2006 DIGEST, ¶¶ 581-594 (2006).
[131] U.N. ILOCFA, 265th Rep., Case Nos. 1478 and 1484, Peru, ¶ 547 (1989). *See also,* U.N. ILOCFA, 295th Rep., Case No. 1718, Philippines, ¶ 296 (1993).

Many commentators have criticized the process for the same reason.[132]

The Committee has only examined one case in the United States involving a procedure for compulsory arbitration.[133] It concluded that the actions complained of did not violate the principles of freedom of association because the compulsory arbitration mechanism covered workers in the public service.[134] More important, however, was the Committee's special note of the *voluntary* nature of the arbitration process under the law it examined.[135]

In cases where the Committee has determined that a compulsory mediation and arbitration mechanism limited the right to strike and did not meet the criteria necessary for an applicable exception, it has consistently concluded that a nation's laws requiring the compulsory arbitration procedure do not conform to the international principles of freedom of association and should be changed.[136] Indeed, even in situations where such legislation is contemplated but not yet in place, the Committee has recommended the government avoid enacting it.[137] Finally, the

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[132] "It is generally believed that the best labor-management contracts are those that are negotiated through collective bargaining without outside assistance." ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 1348 (Alan Miles Rubin ed., BNA Books, 6th ed. 2003)(1952). Commentators frequently criticize such compulsory arbitration, commonly referred to as "interest arbitration", as not promoting the voluntary nature of collective bargaining, because it enables a party to readily disengage from the bargaining table and have someone else decide the terms of their contract. Interest arbitration damages the collective bargaining process because it creates what is known as the "narcotic effect." It is called the narcotic effect because the availability of such a process creates a dependence by either or both parties to a collective bargaining relationship on an arbitrator to resolve disputes that the parties truly should work out themselves through meaningful negotiations. Gary E. Bolton & Elena Katok, *Reinterpreting Arbitration's Narcotic Effect: An Experimental Study of Learning in Repeated Bargaining*, 25 GAMES AND ECON. BEHAV. 1, 2 (1996). Evidence suggests that when the parties have the ability to resort to interest arbitration to resolve disputes that cannot be fully negotiated, there is a lessened likelihood that the parties will reach a settlement on their own. *Id.* (citing Currie, J. and McConnell, S., *Collective Bargaining in the Public Sector: The Effect of Legal Structure on Dispute Costs and Wages*, 81 AMER. ECON. REV. 693-718 (1991) and R.A. LESTER, LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT, Princeton University, Industrial Relations Section (1984)). As such, there is a belief that when available, interest arbitration is overused. *Id.*

[133] The case involved the brief incarceration of a union leader for engaging in a strike against a public sector employer in violation of New Jersey State law that prohibited public sector strikes and provided for compulsory arbitration. U.N. ILOCFA, 127th Rep., Case No. 627, United States, ¶ 56 (1970).

[134] *Id.* ¶ 51.

[135] The Committee's special note of the issue demonstrates the ILO's commitment to the belief that the principles of freedom of association are best served where legislation allows the parties to insist on voluntary collective bargaining to resolve a dispute over compulsory submission of the dispute for resolution by arbitration. *Id.* ¶ 57.

[136] U.N. ILOCFA, 333d Rep., Case No. 2281, Mauritius, ¶¶ 639-641 (2003); U.N. ILOCFA, 295th Rep., Case No. 1718, Philippines, ¶ 296 (1993).

[137] U.N. ILOCFA, 349th Rep., Case No. 2545, Norway, ¶ 1156 (2007).

Committee's concern for the protection of voluntary collective bargaining and the right to strike is so strong that even in the situation where there is ambiguity in the law regarding whether parties can invoke the compulsory arbitration mechanism to settle a labor dispute, if that ambiguity is susceptible to an interpretation inconsistent with the exceptions, the Committee has sought clarification in the law in order to conform it to acceptable notions.[138]

VIII. Section 3 of EFCA Violates Principles of International Labor Law Because it Allows for a Unilaterally Invoked Compulsory Arbitration Mechanism that Limits the Voluntary Nature of Collective Bargaining and Eliminates the Right to Strike In First Contract Situations

The compulsory arbitration scheme proposed under Section 3 of EFCA interferes with voluntary collective bargaining in first contracts by replacing the right to strike with a compulsory arbitration scheme pursuant to which the government will initiate, control and determine the resolution of labor disputes. Not only will the notice period created by Section 3 of EFCA remove the benefits and protections available to employees under the NLRA if they choose to strike, but policy implications associated with the statutory arbitration scheme will enable the parties to successfully eliminate the threat of the work stoppage as a means to leverage a position at the bargaining table.

EFCA also limits the voluntary nature of collective bargaining in accordance with international labor standards because the compulsory arbitration procedures of Section 3 may be invoked unilaterally. To give either party the power to unilaterally disengage from the bargaining table and force the other to submit to a resolution of their labor dispute by arbitration, creates an incentive not to reach agreement. Worse, parties who do not wish to participate in what can often be difficult collective bargaining negotiations, can simply recuse themselves from the process and let the FMCS arbitration panel resolve the dispute. Such a result does not further

[138] U.N. ILOCFA, 302d Rep., Case Nos. 1845, Peru, ¶ 513, 518 (1995).

voluntary collective bargaining in accordance with principles of international labor law or common sense.

Finally, because the compulsory arbitration scheme of Section 3 applies to all employers within the jurisdiction of the NLRA, it also violates the principles of international labor law. The ILO is very specific with respect to the private sector industries in which a compulsory arbitration scheme may apply to supplant voluntary collective bargaining and the right to strike. Section 3 of EFCA contains no such limitation, and does not limit the restriction on strikes to only those employers in the public sector or that perform essential services.

IX. Conclusion

If enacted as introduced, with card check and compulsory arbitration for first contracts, EFCA will violate well established principles of international labor law that give workers the right to engage in free association and voluntary collective bargaining. While proponents of EFCA may seek to amend the law with a genuine belief that it will enhance an employee's Section 7 rights to form, join and assist labor unions, the addition of these two provisions to the NLRA will in fact limit those rights. Indeed, international scrutiny of Sections 2 and 3 of EFCA may well result in a recommendation that the United States modify its laws to make them conform to established international labor law principles. The United States has been a strong proponent of such principles at home and in its own dealings with other nations. Accordingly, the United States Congress should take care to avoid changes to the NLRA that so clearly contradict fundamental principles of international labor law.