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*Hot Topic
Future Worker-Management*

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STATEMENT OF

WILLIAM J. KILBERG

**PARTNER, GIBSON, DUNN & CRUTCHER
AND FORMER SOLICITOR, UNITED STATES
DEPARTMENT OF LABOR**

BEFORE THE

**COMMISSION ON THE FUTURE OF WORKER-
MANAGEMENT RELATIONS**

**U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C.**

FEBRUARY 24, 1994

STATEMENT OF WILLIAM J. KILBERG
BEFORE THE
COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS
FEBRUARY 24, 1994

It is a privilege to testify before this Commission. I am here as a member of the informal Management Lawyers Working Group, set up to provide the Commission the views of attorneys who represent management in employment law matters.¹ I am a partner with the law firm of Gibson, Dunn & Crutcher, and have had the honor of serving as Solicitor of Labor, and the special honor of serving in this capacity under the Chairman of this Commission, and under another distinguished member, W.J. Usery.

I have been asked to address a series of amendments to the National Labor Relations Act. I approach the topic with some misgiving, because I believe, along with the Commission's distinguished General Counsel, Professor Paul Weiler, "that we need a lot *less* labor law than we have now."² I intend to expand on this point at length in closing. As for the proposals at hand: they include NLRA amendments for expedited elections on the showing of a certain number of authorization cards (some have even urged that representation be granted on the showing of a certain percentage of cards); access to company facilities and media for non-employee union representatives; greater sanctions for

¹ Daniel Yager of our Group addressed you a month ago. The other members are: Vincent J. Apruzzese of Apruzzese, McDermott, Mastro & Murphy; Charles G. Bakaly, Jr. of O'Melveny & Myers; Robert S. Carabell, Senior Counsel, TRW, Inc.; William J. Curtin of Morgan, Lewis and Bockius; Charles A. Powell III of Powell, Tally & Frederick; and Ezra Singer, Assistant General Counsel - Human Resources, GTE Corporation. I thank Eugene Scalia, of Gibson, Dunn & Crutcher, for his assistance in preparing these remarks.

² Paul C. Weiler, Hard Times for Unions: Challenging Times for Scholars, 58 U. Chi. L. Rev. 1015, 1031 (1991)(emphasis in original)("Challenging Times for Scholars").

terminating employees for organizing activities, and sanctions for lawyers and consultants who "encourage" this and other NLRA violations; expedited NLRB decisions; mandatory arbitration of first contracts not agreed upon in a short period of time; and expanded coverage of the NLRA.³

It will not surprise the Commission to learn that the management bar opposes all such amendments to the NLRA. Management's particular grounds of opposition mirror those given to a similar assemblage of amendments in the Labor Law Reform Act⁴ during the Carter Administration. In brief:

- Expedited elections on authorization card showing:

The Supreme Court itself has noted⁵ that authorization cards are an unreliable representation of employee sentiment. Even if they were less doubtful, authorization cards would not warrant so sharply curtailing employers' counterpoint to the rosy accounts union organizers will previously have given of unionization's rewards.

- "Equal" time and access for unions:

Such proposals inevitably intrude on employers' property rights and their freedom of speech. Nor are these truly proposals to "equalize" time and access: just as employers currently have opportunities to communicate with employees that unions do not, so union organizers enjoy means of communication unavailable to employers.

- Penalties for law firms and consultants:

As discussed below, I believe insufficient advice has more to do with any increase in employer illegality than does mendacious advice.

³ Senator Simon has introduced a series of bills to accomplish these and related ends. S. 1528 - S. 1532; S. 1567, S. 1568.

⁴ H.R. 8410, S. 2467, 95th Cong., 1st Sess.

⁵ NLRB v. Gissel Packing Co., 395 U.S. 575, 603-04 (1969).

Generally, the legal community, and not simply management lawyers, will not abide a law directing such regular examinations into exercise of the attorney-client privilege.

- Increased Section 8(a)(3) remedies:

Employers already pay double for terminating union organizers -- back pay, and the replacement worker's salary. This proposal is an instance of the tort-ification of labor law discussed below.

- Expedited NLRB proceedings:

The NLRB is hardly the bottle-neck sometimes portrayed. In Fiscal Year 1992, for example, nine in ten unfair labor practice charges were resolved within a median time of 51 days of filing; more than half of those that went forward were resolved in a median time of less than half a year. The small number of cases that went to the Board were resolved in a median of 509 days; this number has dropped appreciably since 1986. As for elections, in FY 1992 nearly 90 percent of representation cases were decided without a hearing. Only about one in 12 elections is delayed beyond two months by pursuit of Board review. Review is nearly always denied, so that it was only .2% of all representation cases in 1992 that Board decisions were issued a median of 282 days after filing. Nor does this number appear to be increasing.

- Mandatory arbitration of first contracts:

Difficulty achieving first contracts is as often due to unions' excessive campaign promises and expectations as to employers' surface bargaining. After an election, union and management need to learn to negotiate; this will not happen by imposing a contract upon them. NLRA-issue, cookie-cutter contracts would betray collective bargaining.

These, are some of the management bar's chief, specific objections to the individual proposals on the table today. I give these proposals only brief *individual* attention because my principal response is to insist that these proposals be treated as the coordinated whole they are -- a frank attempt to constrain management and facilitate

unionization. To quote an observation from another context, these proposals are a wolf that come as a wolf.⁶ It is to consideration of this common purpose that I now turn.

Hard Times for Unions

The reason this particular wolf is back at the company door is, in Professor Meltzer's words, that these are hard times for unions.⁷ From 1953 to 1989, the percent of the private sector workforce belonging to unions dropped from 35 to 12 percent. Today it is scarcely above 11 percent. In a world where unions must constantly win elections just to maintain market share, fewer elections are being held and fewer are being won. In the period 1985-88, 40 percent fewer union elections were held than in 1950-54; the union win rate in the elections that were held fell from 72 percent to 48 percent. The number of working Americans grew considerably over that period, but newly-represented employees dropped from over 550,000 in 1950-54 to barely over 80,000 in 1985-88.⁸

No honest observer disputes that the causes of this decline are manifold. Traditionally-unionized sectors such as manufacturing have contracted, while traditionally non-union sectors have expanded. Competition has intensified, through deregulation, the expansion of less concentrated industrial sectors, and the growing presence of foreign businesses -- competition makes employers less able to pass costs onto customers, and therefore more concerned about the increased costs unionism is likely to entail. Another contributor to unions' decline has been that more sophisticated human resources

⁶Morrison. Independent Counsel v. Olson et al., 487 U.S. 654, 699 (1988)(Scalia, dissenting).

⁷Robert J. LaLonde and Bernard D. Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegalities, 58 U. Chi. L. Rev. 953 (1991)("Hard Times for Unions").

⁸Id at 953-59.

professionals are doing a better job of employee relations than their predecessors. From employees' perspective, federal and state legislatures, agencies, and courts have taken ever greater interest in regulating the employment relationship and working conditions, narrowing the utility of union membership.⁹ Indeed, workers' perception of unions has deteriorated markedly: a Harris poll released just weeks ago shows that 62 percent of Americans do not consider unions to be doing a good job.¹⁰ Significant to the issues on the table today, 65 percent of those polled regard unions as "more concerned with fighting change than with trying to bring about change."¹¹

A final possible factor in unions' decline -- and the ostensible reason for many of the amendments for discussion today -- is the purported rise of employer illegality under the NLRA. I now turn to this so-called "rogue employer" theory, wherein it is management who is the wolf.

A Political Parable

I would like to frame my discussion of employers' supposed conduct toward unions with an analogy suggested by Professor Weiler in an illuminating debate in the pages of the University of Chicago Law Review.¹² Professor Weiler suggested his analogy in response to a piece by Professors Meltzer and LaLonde, which had endeavored

⁹These factors are usefully catalogued and weighed in Gail McCallion, Union Membership Decline: Competing Theories and Economic Implications, Congressional Research Service (August 23, 1993).

¹⁰Public Rates Unions, Business Both Negatively in Harris Poll, 20 DLR A-2 (February, 2 1994).

¹¹Id.

¹²LaLonde and Meltzer, Hard Times for Unions, cited in note 7; Weiler, Challenging Times for Scholars, cited in note 2; and Leo Troy, Market Forces and Union Decline: A Response to Paul Weiler, 59 U. Chi. L. Rev. 681 (1992).

to show that Professor Weiler's earlier work had exaggerated the extent of employer illegality in the organizing context, and hence its contribution to unions' decline.

Professor Weiler both answered and demurred: he argued, first, that Professor Meltzer over-corrected Weiler's earlier calculations of illegality; and he replied second and chiefly, that even if Professor Meltzer's numbers were correct, they would still warrant amending the NLRA. If employees are being terminated for union activity in one in three elections, Weiler asked, what is the argument for *not* amending the NLRA?¹³

To illustrate his point, Professor Weiler offered a "political fable" set in a Central American country with a "traditional authoritarian regime[]." In the country's periodic referenda, the people had repeatedly declined to assume power from their totalitarian rulers. A careful study reveals oppression by the government at one-in-three polling places; this being the case, Professor Weiler asks, would there be any serious debate as to whether or not to reform the system?¹⁴

I am taken with Professor Weiler's idea of a political analogy, but propose some refinements. Since Professor Weiler has claimed the title "fable," I will have to call my refined version a "parable." For this parable, I propose, first, that Weiler's story be moved to North America, and second, that it suppose the existence of two political parties whose competition is supervised by objective government authorities. After disagreement in the nation's formative years over matters of political organization -- how to allocate votes among political subdivisions and the like -- an elective structure is agreed upon and Party A enjoys considerable success. Over time, however, Party A begins to falter in contests around the country; its representation in the legislature plummets. Coincidentally,

¹³Weiler, Challenging Times for Scholars at 1030-31 (cited in note 2).

¹⁴Id at 1025-26.

the population drops severely in those parts of the country where Party A's successes had been greatest; Party A becomes associated with deleterious fiscal policies; and Party B adopts a political plank far more appealing than past platforms to former partisans of Party A. Indeed, polls among Party A's own membership reveal widespread disenchantment.

Finally, it is shown that in some areas of the country Party B has engaged in election misconduct. (No inquiry is made as to increased misconduct by Party A).

On this record, Party A comes before the country's independent judiciary -- the Court of Public Opinion -- and demands that the nation's political map be redrawn so that the states where it is strongest have more representatives. It seeks access to Party B's coffers. And, it proposes extraordinary new sanctions for election misconduct, but only when committed by Party B.

How would the court respond? Let me suggest the following: It is concerned of course about the election misconduct, but is comforted considerably by evidence in the record that in every reported case of misconduct, the victim was redressed; where elections appear to have been affected, they have been held again. On balance, then, the court is surprised by Party A's request (albeit impressed with its forthrightness), and in argument addresses Party A as follows: You are asking to disrupt a difficultly-achieved political balance. You claim the balance is unfair, yet it brought you success in the past. Therefore, says the court, before granting your request we will need strong evidence that our nation's political arrangements are no longer suited to the objectives for which they were drafted. Alternatively, we would entertain arguments that those very objectives are misguided, and ought to be altered; but to prevail on that point, you will need particularly strong evidence indeed.

This, I would submit, is a political portrait more analogous to where we stand today than that offered by Professor Weiler. The differences between my parable and his fable, and those differences' implications, are largely obvious; I would, however, like to dwell on two.

First, I place my story in North America rather than Central America because I prefer not to think of myself as advisor to General Somosa -- or Daniel Ortega. The statistical debate on employer illegality will take place this afternoon; I will state, however, that the accounts of spiraling employer illegality do not accord with my own experience or with the experience of the management lawyers I consulted in preparing this testimony. Rather, one of the most common exchanges in which I and other management lawyers engage runs as follows: A client calls for advice on whether to terminate an employee for misconduct. Among the first questions asked are whether the employee is disabled, a minority, a woman, someone who has reported alleged company misconduct to the government, or whether the employee has been active for a union. If the worker meets any of these descriptions, then the advice is that the employer practice *greater* restraint in terminating the employee than would be practiced for an employee not meeting one of these descriptions. That is, my advice to clients, and the advice of the lawyers I know, is that union activity is if anything a reason to *keep* a misbehaving employee; it certainly is never grounds to fire an employee who is *not* misbehaving.

This discrepancy between my own experience and the reported rise in employer illegality leads me to believe that if employer illegality is increasing, then the problem is not among companies who have informed counsel, but among those who do not. This suspicion is confirmed, not disproved, by the fact that unions are meeting the most success in smaller units. Part of the reason that I, and the colleagues I consulted, give the advice just described is that in our experience a termination during organizing will

more often galvanize employees than discourage them. Particularly in this era of intense direct federal regulation of job conditions, one of a union's chief pitches is job security; a termination during an organizing campaign becomes an exemplification of the very caprice and abuse of power that the organizers will be insisting unionization is so necessary to contain.

For this reason, I would recommend as a field of further research what employers are responsible for any such increase in terminations; if the answer is small, ill-advised employers, then the solution is not more law on the subject, but more guidance.

A second and related difference between the parable and the fable is that the fable suggests a national policy favoring unionism. (Few of us root for authoritarianism.) This is the view of many, perhaps most of the advocates of the proposals for discussion today. In advocating these and other amendments, Lane Kirkland has described unions as necessary as "the only institutions through which workers have sufficient power and independence to deal with their employers on an equal footing."¹⁵ Mr. Kirkland and the Communications Workers of America have both told this Commission that the NLRA's objective is to "encourage collective bargaining."¹⁶

My analogy, by contrast, presupposes a national policy of ensuring voters' freedom to vote yea or nay on the proposition before them -- whether to have a union or not. Just as the framers constituted our government to balance political interests, so the NLRA was forged to balance the interests of unions and employers; neither was to have a

¹⁵Statement of Lane Kirkland, President, American Federation of Labor and Congress of Industrial Organizations, before the Commission on the Future of Worker-Management Relations at 1. (November 8, 1993).

¹⁶Id; Labor Law Reform, prepared by Communications Workers of America, 1993, at 3.

favorable position. This is how I perceive the NLRA, and how I believe the majority of Americans perceive the matter: most of us do not see it as the government's business to favor or disfavor unionization, but rather to ensure employees' freedom to resolve the matter for themselves. As it has been said, "The purpose of the Board is to protect the bargaining rights of employees, not the bargaining rights of union[s]."¹⁷

Such balance has not always been the case, of course; it resulted from decades of debate and often violent strife leading to the Wagner Act, and from experience under that Act which led a supra-majority of Congress to pass Taft-Hartley to correct what it perceived as the Wagner Act's harmful bias towards unions. The balance should not be lightly altered. And it is for this reason that I stand with Professor Meltzer and others in insisting that before amending the Act to constrain management and favor unions, there should be strong evidence that this political arrangement which once satisfactorily reflected workers' decision *for* unionization is not now simply accurately reflecting their decision *against* unionization.

Mending Fences, Tearing Down Walls

My aim thus far has been frankly to confront the undeniable *differences* between unions and management over legislation such as on the table today. I would like to turn, however, to consider some common ground. A point of entry is the observation of Dr. Arnold Weber, a distinguished scholar of labor-management relations and President of Northwestern University, that while changes such as those just discussed would

¹⁷ NLRB v. Ben Duthler, Inc., 395 U.S. 28, 34 (6th Cir. 1968).

undoubtedly make unions stronger, they would fail to address many other and more significant causes of unions' decline.¹⁸

I am in agreement with Mr. Weiler, Mr. Kirkland, the Communications Workers, and others on this important point: the tension in the employment relationship *has* increased in the last 25 years. I suggest, however, that workplace tensions are the product of far more forces than the employer/union relationship. We all agree that tensions in the workplace should be reduced; it is this very aspiration that occasions some of my greatest misgivings about the proposals on the table today.

When I attended Cornell University's School of Industrial & Labor Relations -- on a scholarship from Local 3 of the IBEW -- I was taught that the genius of American labor law was that it constrained naturally adverse interests and limited the harm that either party could do the other. Disputes were to be resolved quickly and neither party was to pay too high a price, both in recognition that the relationship was long term. It made sense to me at the time that disagreements between management and worker -- who have an on-going, symbiotic relationship -- be handled differently than disputes between two people whose only relation arises from driving at cross-purposes on a highway.

When I left law school, I witnessed this cooperative spirit of labor law first hand, as I had the privilege of working in one capacity or another under five different Secretaries of Labor. And this uniqueness of the employment relationship became all the more apparent to me when I entered private practice, and witnessed the furious, take-no-prisoners spirit of so much dispute resolution outside this relationship.

¹⁸May 20, 1992 Address, National Association of Manufacturers and Bill Usery Associates.

We often claim today to still aspire to this conciliatory approach to labor relations. The Civil Rights Act of 1991, for instance, provided that various forms of mediation and conciliation are "encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."¹⁹ But the reality of that Act, with its provisions for jury trials and punitive damages, is otherwise. Indeed, as I sit here today I am struck by the irony that at the very moment many in the organized bar are striving to make their practices more conciliatory, less consumed with punitive litigation in the federal courts, certain employment lawyers are busy giving the employment relationship a more vicious aspect. This is true of state statutory and common law developments such as the boom in wrongful termination litigation. It is true of amendments now pending in Congress to ERISA, Title VII, and the OSH Act. And it is certainly true of many of the proposals under consideration today. Labor lawyers are from a tradition qualifying them to be at the forefront of the movement to restore a more civil legal discourse; surely they should not be scrambling to take the lead in our national transformation to an "in-your-face" society. But that is where we now stand. We hear complaints of rising belligerence, but the requested solution is rearmament.

With these thoughts in mind, I would like to offer three proposals for this Commission to improve worker-management relations. First, I hope it is more than mere prejudice as a former General Counsel of the Federal Mediation and Conciliation Service that makes me believe that agency could be used far more often to smooth relations when they grow rough; small employers particularly, whom I believe account disproportionately for any rise in employer illegality, might benefit from the FMCS's guidance. The FMCS can be given a broader role both in education and in the mediation of first contracts.

¹⁹P.L. 102-166, 105 Stat. 1071, § 118, codified at 42 U.S.C. § 1981 Note.

Second, in the past few months we have witnessed the latest instance of the new rancor over appointments to the NLRB, of the chairman particularly. When I worked at the Labor Department, appointments to the NLRB were a model of respectful interaction between management and unions. Today, they are more often a power struggle. As a step toward cooler tempers, I recommend that the chairmanship of the Board be rotated, perhaps every year, so that no single nomination becomes the flash-point for disagreements between the union and management camps.

Third, much larger, and my principal point this morning, I propose a broader vision for this Commission. Through hearings such as these, this Commission's very existence is conducive to improved union-management relations. But the Commission could do more. Particularly, it could consider a greater slice of the employment relationship than it has to date. What first occurs to union leaders on the mention of worker/management relations, and what first occurs to more senior labor lawyers, is the NLRA. Perceived from this initial vantage, the history of employment law over the past 40 years cannot help but appear in large part the history of the decline of unionism. Hence all the attention to the subject today. Indeed, hence all the attention to the NLRA throughout this Commission's hearings. (Though unions' political significance is no doubt also a contributing factor.)

But of course, this Commission's mandate is broader. It is not *union/management* relations but *worker/management* relations. And this Commission must bear in mind that workers' and management's interaction is far broader. In relation to partners of my law firm a generation before, I spend far less time on matters arising under the NLRA. But I am spending time they never did on Title VII, state law claims, ERISA, the ADA, and with OSHA and the OFCCP. And so while to some in this room the distinguishing trait of the last 40 years has been the decline in unionism, and the supposed

consequential liberation of management, to me, to management, and to the management lawyers I represent, the note of the period has been continually tightening, increasingly duplicative, and ever-more aggressive regulation of the employment relationship.²⁰

How does this bear on what we are talking about today? Let me suggest three ways. First, there are many statutes, but there is one employment relationship; mounting aggressiveness under a whole host of other employment laws cannot help but increase tensions under the NLRA. Second, a point I made earlier and with which the Commission is familiar, when laws are passed giving workers something unions once gave, then unions will become correspondingly less attractive. But from this follows a third, less noticed point: There is in a sense a market in employment laws. Since passage of the NLRA, some other laws with aggressive, fast new features have come on the market.²¹ The unions' solution, and the solution urged on us today, is to revamp the NLRA, to soup it up by mimicking the powerful features of the new competition -- borrow this punitive gadget from tort law, and copy that punitive gadget from the criminal law.²² This might make sense -- if we regarded those features as beneficial contributions to the employment relationship. But to those who believe as we do, that the employment relationship has become strained, is this the solution we want? To those who believe, as

²⁰ Obviously to the very large portion of the American public that repeatedly tells pollsters it is not interested in unionization, these NLRA-restricted discussions are of limited relevance as well.

²¹ A nice illustration is Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988). Plaintiff Lingle's union could only offer her reinstatement and back pay. *Id.* at 402. But state tort law? In that window were to be found such sweets as the tort of retaliatory discharge, *id.*, and possibly, termination in violation of public policy, topped with punitive damages.

²² I am thinking here of Senator Simon's proposal to debar from federal contracts employers that violate the NLRA. S. 1530.

Professor Weiler, at least, and I do, that we need less law, not more, is this the road to take? I cannot see how.

Any new tension in the employment relationship today is not due to the NLRA; as written, that Act worked well for unions, employees, and management. The tension is due to the mounting aggressiveness of other labor laws, which is working well for no one. The union has been supplanted by the plaintiff's lawyer as employees' chief representative; this is not an individual greatly concerned for a long and fruitful relationship.

In closing, the Working Group and I recommend the following to the Commission: Bear in mind the whole employment relationship, and the whole of federal and state regulation of employment. Yes, unions have declined over the past 40 years. But forgive my colleagues and me for becoming exasperated at the invariable inference that these have been 40 years of increasing liberty and license for American business. Both unions' and management's complaints are at least in part related; should not the solution be as well?

It is a timely question, one the Commission should carefully consider. Previously, in the Gilmer decision,²³ the Supreme Court expressly sanctioned an employer and employee contracting to approach at least certain of these new laws in a manner different than that set forth in the law itself. Yet in a case being briefed in the Supreme Court at this very moment, the Solicitor General is urging that 42 U.S.C. § 1983 dictates the opposite result, at least where the NLRA and state laws are concerned.²⁴ If it wishes

²³ Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991).

²⁴ Livadas v. Aubrey, 987 F.2d 552 (9th Cir. 1991), cert. granted 127 L.Ed.2d 97 (1994).

to give a shot in the arm to unions, stroke business, and reduce adversariness, the Commission must consider relief from myriad state and federal rules for employers whose workers are represented by truly independent parties. Because I do not think anyone in this room will disagree that those independent parties are better suited in seeking and discerning employees' interests than the denizens, past and present, of this sometimes drafty building in Washington.

Thank you.