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REMARKS

LABOR LAW: LABOR INITIATIVES IN THE NEW ADMINISTRATION

2008 NATIONAL LAWYERS CONVENTION OF THE FEDERALIST SOCIETY

The following was recorded on November 21, 2008

12:00 noon - 2:00 p.m.
East Room

Labor: Labor Initiatives in the New Administration

- Holly B. Fechner, Covington & Burling LLP
- Hon. William J. Kilberg, Gibson, Dunn & Crutcher and Former Solicitor, United States Department of Labor
- James A. Paretti, United States House of Representatives Committee on Education & Labor
- William Samuel, AFL-CIO
- Moderator: Hon. Timothy M. Tymkovich, United States Court of Appeals, Tenth Circuit

JUDGE TYMKOVICH: Welcome to the Federalist Society Annual Convention. My name is Tim Tymkovich. I’m a judge on the Tenth Circuit Court of Appeals, so it’s good to escape the Rocky Mountain west for the Beltway every once in a while. I want to greet my former clerks that came to the panel today. I didn’t know so many labor and employment lawyers were there, but we’re happy to see you.

The topic today is Labor, Employment and the New Administration. I saw an aspect to our topic this year in Colorado. As you might know, Colorado has the initiative and referendum process,¹ and this year we had an interesting political debate on labor and employment issues.

1. See COLO. REV. STAT. ANN. §§ 1-40-100.3-135 (West 2009).

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One group, a citizen’s group, put on the Colorado ballot several initiatives that would likely be construed as a pro-employer or anti-union, a right to work and paycheck protection initiative.\(^2\)

In response to those initiatives, the other side, union groups, put on several initiatives that would have imposed a series of mandates on employers.\(^3\) So these four or five measures made it onto the ballot. And as somebody might have suspected, it was Labor versus Employer Armageddon. The committees geared up the political committees and millions of dollars started to flow into the state both for and against these initiatives.

In August, the proponents of all of these initiatives realized that some might pass, some might fail, but collectively there will be a lot of losers in the state if they all pass. Interestingly enough, to solve the dilemma you had the labor forces and the employer forces joining together to defeat all the measures.\(^4\)

But the advertising campaign labor and business put together was particularly interesting. There were five or six ballot initiatives.\(^5\) Some

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\(^2\) See Legislative Council, Colo. Gen. Assembly, Pub. No. 576-1, 2008 State Ballot Information Booklet and Recommendations on Retention of Judges 2, 5, 17-18 (2008) [hereinafter Information Booklet] (analyzing each proposed 2008 Colorado amendment). Among the anti-union initiatives were: Amendment 47 which would prohibit requiring employees “to join and pay union dues as a condition of employment”; Amendment 49 which calls for a prohibition on public employers’ paycheck deductions including those established through agreement with labor organizations; and Amendment 54 which calls for a limitation on campaign contributions from certain government contractors (including labor organizations). Id.


\(^5\) See Rosa, supra note 4; see also Information Booklet, supra note 2, at 2, 5, 15, 17, & 19.
LABOR INITIATIVES IN THE NEW ADMINISTRATION

were pro-labor; some were anti-labor. The commercials that were run said "vote no" but only referred to the numerical reference to the initiative, 47, 49, 52, and 53 et cetera. But the commercials never said what the issue was about, so the voters were left scratching their heads. But they knew it was the end of the Republic if any one of them passed. On Election Day they all went down in flames. We had an experience of the lambs and the lions, depending on your point of view, lying down and working together on a common goal.

Turning to our panel, with the Democrats and the new President-elect in control of both Houses of Congress and the presidency for the first time since 1994, broad changes in labor policy appear to be on the horizon. President-elect Barack Obama has both supported labor policies as well as made campaign promises to push those policies, including the President-elect’s support of major policy initiatives that the panel will discuss, including the Employee Free Choice Act, the RESPECT Act, reversal of the Lily Ledbetter decision by the Supreme Court, and expanded coverage under the Family Medical Leave Act, as well as numerous others.

During this election cycle, a couple of salient political points might be observed. First of all, union workers overwhelmingly supported President-elect Obama, according to one report voting sixty percent to thirty percent for Senator Obama over Senator McCain. Secondly, most of the major unions endorsed Senator-Elect Obama, including the AFL-CIO. In addition, unions made a significant financial contribution during this election cycle, with some reports totaling the amount of donations and expenditures reaching as much as $450 million, which is about double what labor spent or donated in the 2004 election cycle. And finally, on top of that financial contribution would be millions of phone calls to voters, outreach to voters and sponsorship of rallies and events.

With these new policies and initiatives in place and a new administration coming to Washington, we have put together a distinguished pan-

6. PROTECT COLORADO’S FUTURE, VOTE NO ON AMENDMENTS 47 49 54 (paid for by Protect Colorado’s Future), available at http://www.youtube.com/watch?v=ZY6PNS1pBBg.
9. See Greenhouse, supra note 7 (“The A.F.L.-C.I.O. and Change to Win . . . campaigned all out for Mr. Obama, with labor leaders saying that unions and their political committees spent nearly $450 million during the race.”); see also GARY CHAISON, UNIONS IN AMERICA 147 (2006) (stating that labor unions spent at least $150,000 in the 2004 elections).
el to give their observations and expectations on these topics. Our first speaker, to my right, is James Paretti. Mr. Paretti is Workforce Policy Counsel to the United States House of Representatives Committee on Education and Labor for the minority party. He is responsible for legal and policy oversight of workforce issues before the committee, including labor and employment laws, healthcare, pension and welfare policy.

Mr. Paretti has previously worked on the Hill and has practiced in the area of labor and employment for several years. He has extensive experience in labor relations, collective bargaining, negotiations and grievance arbitration. He is a graduate of Harvard College and earned his law degree from New York University.

Our second speaker this afternoon is William Samuel. Mr. Samuel is the Director of Government Affairs at the AFL-CIO, serving as the chief lobbyist for the nine-million member labor federation. Mr. Samuel also chairs the AFL-CIO’s legislative committee. He previously served in the Clinton administration as Associate Deputy Secretary of Labor, and he later served with Vice President Al Gore as his principal advisor on labor policy. Mr. Samuel also served as the chief lobbyist at the United Mine Workers of America. He is a graduate of Oberlin College and the George Washington University Law Center.

Our third speaker this afternoon is William Kilberg. Mr. Kilberg is currently senior partner in the Labor and Employment Group at Gibson Dunn & Crutcher here in Washington, DC. In the past, Mr. Kilberg served as Solicitor for the Department of Labor in 1973 and before that was a White House fellow with one of my current colleagues, Chief Judge Deanell Tacha. He serves on numerous labor and employment related organizations and is an officer of the labor and employment committee of this group, the Federalist Society. He has published books and articles in the field and is a frequent speaker on these topics. He has argued two cases before the Supreme Court and numerous cases before the courts of appeal, including, the Tenth Circuit. He is a graduate of Cornell University and attended Harvard Law School. While at Cornell, I am told, he was a Local 3 International Brotherhood of Electrical Workers Scholarship recipient. Congratulations.

Our last speaker is Holly Fechner. Ms. Fechner is a member of Covington & Burling’s government affairs practice group. She has over eighteen years of legal, legislative and public policy experience in both public and private sectors. Most recently, Ms. Fechner was Policy Director for Senator Edward Kennedy and was also the Chief Labor and Pensions Counsel for the Senate Health, Education, Labor and Pensions Committee. Ms. Fechner served as the chief negotiator on federal legislation to reform the private pension system, increase the federal mini-
mum wage, extend unemployment insurance benefits, and other important policy initiatives. Ms. Fechner is also a graduate of Oberlin College and the University of Michigan Law School.

With that, we will have some opening remarks from each of our speakers, and then we will open up the floor for a question-and-answer period. Mr. Paretti.

MR. PARETTI: Thank you, Judge. Again, it’s Jim Paretti, and I thank you for having us and bearing with us this morning as we give our views on what may or may not be coming down the pike. When first asked to present, it was sort of the labor issues emerging in the Obama administration, the next administration, I think it is important as a preliminary matter, to look and see exactly how hand-in-glove Congress and the administration are going to be able to work here.

President-elect Obama has supporting him two very strong chairmen on his labor committees—Ted Kennedy obviously, and maybe only slightly lesser-known, George Miller of California, who was an early and active supporter of the President-elect. Both are considered masterful senior negotiators known for getting what they want and getting their jobs done. So I do think President Obama will come in, in January with a strong support in the House for his initiatives and in the Senate, folks working for him. It is my strong sense that they are going to hit the ground and move quickly on a number of key issues.

When thinking about the labor and employment issues that will be presented in the next administration, you can think of what legislatively will happen, what will we see on the administrative-regulatory side, and then finally, what might we expect from agencies in terms of the National Labor Relations Board, things of that sort. I will try to focus, since I have a short period of time, on the legislative side, maybe touch on some of the agency stuff. And perhaps some of my colleagues can fill in the gaps of the regulatory side.

First and foremost, I think the elephant in the room on labor issues will be the so-called Employee Free Choice Act\(^\text{10}\)—Card Check, EFCA, however you’re going to refer to it—that has been made a front-and-center campaign issue by the President during the campaign. Business has recognized the challenge that they’re going to face and are rallying their forces. And folks are talking about this being the first big donnybrook of the administration. It remains to be seen whether President Obama will lead this, as some have counseled very strongly that he should enact this in his first hundred days. Others have suggested that

they may want to wait, start with more general economic recovery work to try to make some relationship with business before they go. I suspect it will come up sooner rather than later, and given the numbers, it’s not a hard guess. It will clear the House, and you will end up having a battle in the Senate.\textsuperscript{11}

Sitting here today, the Senate is sitting with fifty-eight Democrats, forty Republicans and two open seats, one of which at least is completely too close to call.\textsuperscript{12} In the past you’ve also had at least one Republican senator support cloture on the Employee Free Choice Act—Senator Specter of Pennsylvania. So we could be, depending on where Senator Specter is returning to the table, 58-59, within one or two striking both of attaining cloture on that bill, which was supported by every Democrat in the Senate when it was brought up back in 2007.

So we can talk more as the panel continues about some of the details of that bill, what’s contained in it, but certainly I think on the traditional labor relations side, the Employee Free Choice Act is, by everybody’s agreement, labor’s number one priority, and I expect it to be the one that the Obama administration works hardest on.

Maybe a second to that would be the so-called RESPECT Act,\textsuperscript{13} which purports to overturn the Oakwood Healthcare trilogy of cases\textsuperscript{14} in the National Labor Relations Act and would essentially change the statutory definition of who is a supervisor and excluded from the Act’s coverage. That was considered in our committee. We prepared to file a report on it, but for reasons I’m not fully sure I understand, that was not brought to the House for consideration.

On the National Labor Relations Act side also, I would expect we may see some executive order, some things repealing back, requiring project labor agreements. I expect the National Labor Relations Board, which recently had become more of a ping-pong as administrations

\textsuperscript{11} See 155 CONG. REC. S2966 (daily ed. March 10, 2009) (statement by Sen. Kennedy) (arguing that “[t]his important legislation will give American workers the real freedom to choose a union without fear of threats or intimidation”); see also 153 Cong. Rec. S8385 (daily ed. June 26, 2007) (statement of Sen. Sessions) (declaring that the bill will sink like a “lead balloon”).

\textsuperscript{12} See U.S. Senate, Party Division in the Senate, 1789-Present http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Nov. 1, 2009); see also Blanche Lincoln’s Balance, ECONOMIST, Oct. 3, 2009 (stating that to break a Republican filibuster in the Senate, the Democrats need 60 votes). “They have exactly 60 senators, if you count two independents, so every vote matters.” Id.; see also John Feehery, Commentary: Democrats Incompetence Isn’t Funny, CNN, Oct. 2, 2009, http://www.cnn.com/2009/POLITICS/10/02/feehery.democrats.losses/index.html (arguing that Democrats have a “commanding majority in the House and 60 votes in Senate” and have not yet voted on EFCA).

\textsuperscript{13} RESPECT Act, S. 969, 110th Cong. (2007).

change—we will see probably a reexamination of the Dana Metalldyne case as well as things like graduate student organizing, very possibly Weingarten rights, which is always of recent years been a 3-2 issue. So just if we were looking at the National Labor Relations Act, LMRDA, and those things, I would say that’s a very full plate. But that, I would argue, is the tip of the iceberg.

On what I will call the civil rights, EEOC side, I think the number one priority there for the next administration will be enactment of the Lily Ledbetter fair pay law. Those who followed that one, that’s a bill that purports to overturn the Supreme Court’s 5-4 ruling in the Ledbetter case. I will say to their credit, supporters of that bill have very nicely tied that bill’s substance and story to the Equal Pay Act and fair pay for women. You might have seen campaign ads run; you know, John McCain does not support equal pay for women.

I would submit that, whatever your feelings are on the Ledbetter bill and what that bill does, it’s not an Equal Pay Act bill. It’s a statute of limitations bill. But when we looked at that one last year, it went through the House we picked up six Democrats but lost two Republicans. Senate cloture on that one was 56-42, with six Republicans picked up. So given the new numbers, I suspect that bill has a far greater chance of sailing through the Senate and headed to the White House, where I suspect President Obama will sign it.

An open question remains whether they will tie the Ledbetter issue, as they have done in sort of messaging whether, as a matter of substance, Ledbetter will get tied to Equal Pay Act amendments, Fair Paycheck Act, comparable worth issues. I mean, in the past those have moved to separate vehicles, but I think as the issues have been conflated, there may be some attempt to bootstrap onto Lily Ledbetter, which presents a very compelling story and there’s very compelling presence to bootstrap additional changes there.

16. See NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1974) (holding that an employee has the right to have a union representative present at investigatory interviews. This right is referred to as the Weingarten right).
Second tier—likely looking at some return to Civil Rights Act\textsuperscript{23} stuff. Eliminating the damage caps is one that we’ve heard talked about. I think mandatory arbitration of employment disputes is going to come under increased attack, and I suggest we’ll probably see some resurrection of the ENDA, Employment Non-Discrimination Act,\textsuperscript{24} sexual orientation bill. That last year had passed on sexual orientation but got hung up on the issue of gender identity. Lower items like the workplace religious freedom, addressing some of those cases that have been out there.

Moving to the third area—I think Holly may have mentioned it—Family Medical Leave Act\textsuperscript{25} and expanded leave entitlements. I suspect we’ll see a push for paid sick leave for the workforce. I think Senator Kennedy has made that long a signature issue of his, and he’s coming back to do some good work. Sort of sub-tier, I expect we will see a proposal to expand the categories of leave for which Family Medical Leave Act leave can be taken, as well as the number of covered employees, be it reducing the size of employers, reducing or eliminating hour threshold. We’ve seen bills in this Congress that would apply the Family Medical Leave Act to all employees; part-time, flexible schedule, other.\textsuperscript{26} So I suspect we will see that there.

As a side note, I am not going to talk today about what I consider to be employee issues, such as healthcare and pension and retirement security. I think both of those, we will see active agendas. Again, my chairman, George Miller, has made very clear he intends to legislate aggressively in those areas. We could talk two hours about them, but I think our focus today is a little more narrow.

Continuing down my kick list, and if I run a little bit long, my colleagues will understand we’ve got a lot to do. I think you’ll see serious efforts at OSHA\textsuperscript{27} reform, both strengthening the agency, overhauling whistleblower protections, more targeted rulemakings. On the wage and hour side, long-standing proposals have been to increase and/or index the minimum wage. I suspect we may return to that. I would expect to see increased focus both from the agency itself and on the legislative front; on designation as independent contractors, whether the classifica-

\textsuperscript{24} H.R. 3685, 110th Cong. § 2 (2007).
\textsuperscript{25} 29 U.S.C § 2612 (2006).
\textsuperscript{26} See Family and Medical Leave Enhancement Act of 2009, H.R. 824, 111th Cong. (2009) (allowing employees to take additional leave for family medical needs and to participate in children’s and grandchildren’s educational activities); see also Working Families Flexibility Act, H.R. 1274, 111th Cong. (2009) (permitting “employees to request and to ensure employers consider requests for, flexible work terms and conditions . . . .”); see also Balancing Act of 2009, H.R. 3047, 111th Cong. (2009) (providing family and medical need assistance).
\textsuperscript{27} 29 U.S.C § 651 (2006).
tion or misclassification issue, depending on where you come to the table, raising the salaries of minimum salaries for some of the exempt categories.

And finally, I guess in the broad areas, WARN Act\textsuperscript{28} legislation and reform has always been bandied about in recent years, particularly when you get to the issues of outsourcing, economic recovery, which I expect will be immediately on the new president’s agenda. Miller and others have proposals to expand the length of time of the WARN Act, expand the coverage of it. I would be surprised if we didn’t see at least some of those peeking their heads up as we contemplate broader packages. So with that, I think my time has ticked, and I will hand it over to my able colleagues.

JUDGE TYMKOVICH: Thank you for that summary. Let’s turn now to Bill Samuel. Thank you.

MR. SAMUEL: So Jim took the easy way out. He just listed all the issues that —

MR. PARETTI: I figured I’d tee them up, and now you can —

MR. SAMUEL: And now my job is to try to sell this audience on any of them. If I convince you to support any of them, I will consider myself to be a complete success.

Let me just say one word first, though, about the union vote. I think people look at these big numbers of dollars spent, and they think somehow we were sticking dollar bills in people’s pockets or buying the election. In fact, results are actually very interesting if you go down the next level. It is true that sixty-seven percent of union members voted for Barack Obama, thirty percent for John McCain.\textsuperscript{29} But what’s interesting is the money we spend is to educate, what we consider educate our members through worksite fliers, phone calls, knocking on doors, and the money goes for. We don’t give money to the campaign to do commercials. We don’t do our own commercials. There were some 527,\textsuperscript{30} but the AFL-CIO did not contribute to those.

So, we do this very comprehensive communication to our members. The more we talk to them—we can plot this out on a graph; the pollsters do, and you can see in the first week of September we weren’t anywhere near sixty-seven percent for Barack Obama,\textsuperscript{31} and most of our members


\textsuperscript{29} Greenhouse, \textit{supra} note 7.


\textsuperscript{31} See Jesse J. Holland, \textit{Unions working to get everyone on board for Obama}, USA TODAY, Aug. 25, 2008, http://www.usatoday.com/news/politics/2008-08-25-3926600789_x.htm (explaining that “[u]nion leaders expect their voters to support Obama on Election Day, but acknowledge that
hadn’t heard of him, and if they had, they were probably not impressed because of all the, what I would say was, misinformation about him. And there was a lot of support for John McCain. He’s a very popular figure; very compelling story. But as we began to talk, again, through the mail, flyers, union newsletters, those results began to change.

What is interesting about the union vote is, if you look at some demographics, for example gun owners—gun owners who are union members voted with a 12-point margin for Obama. If they weren’t union members, it was twelve points the other way. So the effect is we have ninety members through this communication mostly at work—we do the phone calls and the leaflets, but we like to think it’s the conversation that goes on between stewards and union activists and their fellow workers. If you were sixty-five or older, the general public was with McCain by eight points. If you were a union member, you were for Barack Obama by forty-six points. White men—McCain won them by sixteen points; Barack Obama won white union men by eighteen points. So we liked to say if you were gun-owning, church-going white male, you were still more likely to vote for Obama if you were a union member than if you were not. So that’s sort of what we’re about in elections, and I think we’ve developed a pretty good program there.

As far as agendas, as I said, Jim got it mostly right. The Employee Free Choice Act is, I suppose, the eight-hundred pound gorilla in the room. I would imagine the Federalist Society believes very strongly in democracy. It’s something that we all believe is our heritage, and that’s actually why we’re for the Employee Free Choice Act. We feel that the decision for the union—everybody’s shaking their heads already? I haven’t said anything. Could you keep that door open so I can make a bee...
line right out?

You know, people talk about the secret ballot election.\textsuperscript{37} We know the tradition obviously. The problem is in the union context, only one side gets to campaign. You all know that when workers are deciding whether or not to form a union, they’re on the employer’s payroll and property eight hours a day. The employer has complete access. The union really has none. The union is not allowed on the property. Union supporters can talk to their coworkers at lunch, on breaks, but there’s really not a right to free speech in the workplace. You know that.

There could be any number of captive audience meetings. The supervisors can pull workers aside, particularly those that he or she knows might be favorable, and have as many conversations as they want. They can have, over a 6-, 8-, 12-week period, that’s a lot of conversation all directed at dissuading the worker from supporting the union. The CEO can call all the workers together multiple times, and they do that. You all know, maybe you’re working for firms that specialize in this activity. It’s a huge business now. I’ve seen estimates as much as $3 billion are spent in these union avoidance programs that the companies sponsor.\textsuperscript{38}

So, when you’re talking about democracy, normally you think of the secret ballot, and there’s this kind of free exchange of ideas. Everybody has equal access to the voters. People get to ask questions, they get to get answers. People can raise money. There are sum equivalents of money spent on communication. No side really has any coercive powers. It’s interesting that under the federal election law, employers aren’t supposed to talk to workers about who they should vote for.\textsuperscript{39} It’s interesting that under the FEC that’s the rule. I wonder why that is. It’s because of the inherently coercive relationship an employer has with his or her workers.

That’s not all true in this other so-called election context: the union election. Employers can say anything they want practically. I understand there are things they’re not supposed to say. They’re not supposed to threaten unless they can back it up with some economic or financial proof that they might have to close or move. But basically, the rules are very different so when I talk to political leaders and they say why the heck are you doing away with the secret ballot election? Isn’t that part


of the American tradition? Well, the secret ballot election assumes that there is this environment of free choice and we believe—I'm sure we'll get in to a long debate about this—that there's no such thing. The workers are frightened. They're threatened.

If I was running against Bill here for Congress or a school board, in the civic context we each have campaign managers and fliers and lists of voters. We'd go down to the board of elections and get the voting rolls. Well, in the union context I don't get to know who the voters are until a couple weeks before the election. He could and may fire my campaign manager, my press secretary, my lead political operative. That happens in a lot of campaigns; there's a big debate about how often. We've seen numbers as high as a quarter campaigns that lead union supporters get fired. He would control the hours of my staff, the duties, the location. The employer has a lot of control. Think of yourselves as employers. Think of your employer. What is the relationship between you and your workers?

The political campaign is nothing like the campaign that a union has to go through, and there isn't a county sheriff, congressman or senator who would put up with the same rules and conditions and run for office that a union has to, prior to this so-called secret ballot election. So that's really our main argument.

Now there's a whole other argument I can make about the value of unions in our society. Maybe I should have started there, because it may be that there are people here who don't really see that. We think that in the 20th century we saw a pretty good balance between labor, business and management. Everybody grew together. When companies made money, so did workers. You can chart or graph the productivity increases that continued through the postwar period. Wages went up at the same time, almost at the exact same rate. Unions had the ability then to bargain for a piece of the profits that were earned due to that productivity, and everybody grew together.

Well, starting in the 1970s, due to globalization, due to, we think, a much more aggressive antiunion business outlook, union density began to level off and wages have been flat ever since. And that, I think, was what Barack Obama was talking about when he said union wages have flat-lined because workers have lost the ability to bargain for higher wages and benefits. So, there is, I think, a very compelling economic case to strengthen unions.

There are all kinds of other issues that we think him from stronger unions—workplace safety and health. There a lot of things that we would not be enjoying today had it not been for the labor movement. You’ve all seen the sticker, the folks that brought you the weekend, the forty hour week, safe workplaces. One could argue that social security, Medicare, unemployment insurance, employer provided healthcare, things that you all enjoy, that employers were not on their own giving to workers prior to the growth of the labor movement and an activist government. And we part ways on a lot of the stuff, but that’s how we see the world.

I’ve probably taken more than five minutes, I have more to say, but I will end right on time.

JUDGE TYMKOVICH: Mr. Kilberg.

HON. MR. KILBERG: It comes as no surprise that Bill and I don’t agree on a number of things. Let me address, first, the timing and where I think EFCA is going to go and what I think some of the dangers are.

I think the administration is going to be a little concerned about pushing EFCA too quickly on its legislative agenda because it can be a “gays in the military” problem before them, much like the Clinton administration. But perhaps a better analogy is labor law reform in the Carter administration. I say that because (a) I don’t think that the arguments in favor of it are very strong, and (b) because I think the legislation itself is overreaching.

The notion that only 7.5% of the private-sector workforce is unionized solely because of employer coercion ignores realities that we all see—very expansive government protections at the federal level, at the state level, at the local level—the movement away from an industrial to a service economy, just to name two.

The arguments in favor of it also fail the statistical test. It is not true, there is no evidence that employees are fired in twenty-five percent of all union organizing campaigns. That is a statistic that comes from a union-sponsored study of union organizers, and it was an estimate given by union organizers. So it tends to be exaggerated. If you look at data

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from the National Labor Relations Board, you find that most unfair labor practice complaints brought to the board alleging illegal campaign tactics are withdrawn or dismissed. In 2005, the National Labor Relations Board found substantial evidence of illegal firings in 2.7% of organizing elections in that year, and that is a pretty constant number.44

Similarly, you find that unions win sixty percent of elections, and that, too, is a pretty constant number.45 Data came out with regard to fiscal year 2007, and it was about sixty-three or sixty-four percent.46 In 2005, it was sixty-one percent.47 In 2004, it was fifty-seven percent.48 So it ranges about sixty percent. Similarly, median time for an election is thirty-nine days after a petition is filed.49 In ninety-four percent of cases, elections are held within eight weeks.50 So the arguments in favor of the need for some dramatic reform, I would suggest, are somewhat exaggerated.

A concern is that with the Congress constituted, as it will be on January 20, and with the President-elect’s strong support for EFCA as a co-sponsor, we may find a compromise which is not a whole lot better. Most of the potential compromises that have been articulated, at least by people on the union side, take us back to the Carter labor law reform bills of 1977-78. They provide for quickie elections. They would allow unions onto the employers worksites to campaign whenever an employer speaks to his employees, and so forth.

There has also been no suggestion of compromise on what is the most serious part of the EFCA, which is the arbitration provision in the bill. It’s not the Card Check provision. It’s the notion that the failure to get a first contract will result in an arbitrated agreement by an arbitration

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46. See 72 NLRB ANN. REP. 157 tbl. 13 (2007). The report indicates that 59.9% of unions won RC elections, which occurs when “[a] petition filed by a labor organization or an employee [alleges] that a question concerning representation has arisen and [seeks] an election for determination of a collective-bargaining representative.” Id. at 114.
47. See 70 NLRB ANN. REP. 136 tbl. 13 (2005) (stating that 61.1% of unions won RC elections).
49. Memorandum from Ronald Meisburg, General Counsel, Nat’l Labor Relations Bd., to All Employees of the Office of the General Counsel 6 (Oct. 29, 2008) (“In FY 2008, the median time to proceed to an election from the filing of a petition was 38 days, one day less than the 39 median days achieved in FY 2007, and below our target median of 42 days.”).
50. See id. (“Most critically, 95.1% of all initial representation elections were conducted within 56 days of the filing of the petition in FY 2008, compared to 93.9% in FY 2007, and above our target of 90%.”).
board or panel—it is referred to both ways in the legislation—selected by the Federal Mediation and Conciliation Service\(^5\) under rules yet to be written by the Mediation Service so that we are going to have an arbitrator draft the first agreement, and that agreement would stay in effect for two years. That undercuts everything that any of us were taught in law school about the National Labor Relations Act and its purpose to foster free collective bargaining. Not the NLRB, not an arbitrator, not the Mediation Service, but the parties decide what will be in their collective bargaining agreement.

So, I think we are in for a rough haul. I don’t think that the EFCA will be the first thing that the administration tries to achieve, but I think clearly the Democrats and union movement have the upper hand, and we are in for a tough time.

Let me just mention a couple of other bills that Jim did not mention, which at least are pending now and may be reintroduced in the new Congress. The Patriot Employer Act,\(^5\) which the President-elect talked about a great deal during his campaign. He always talked about one provision of the act, which is to reward employers with lower taxes if they create more jobs in the United States than they do overseas.\(^5\)\(^3\) He neglected to mention another requirement in order to get that reduction in taxes, and that is that the employer adopt a union-neutral employment policy.\(^5\)\(^4\) This is another strong push to silence employers.

We talked about the Healthy Families Act,\(^5\) which would provide seven days of paid leave in the event of sickness or illness of an employee or a family member. It’s interesting to look at that bill. “Family member” is defined as anyone whose close association with the employee is the equivalent of the family relationship.\(^5\)\(^6\) It should provide for some interesting litigation down the road.

The Working Families Flexibility Act,\(^5\) which Senator Obama had

\(^{51}\) Employee Free Choice Act, H.R. 1409, 111th Cong. § 3 (2009).
\(^{53}\) See id. § 450(b)(4)(A) (stating that a Patriot employer will receive a tax credit if it “maintains or increases the number of full-time workers in the United States relative to the number of full-time workers outside of the United States”); see also Change.gov, The Office of the President-Elect, The Obama-Biden Plan, http://change.gov/agenda/economy_agenda/ (last visited Oct. 15, 2009) (explaining that the Patriot Employers Act “will provide a tax credit to companies that maintain or increase the number of full-time workers in America relative to those outside the U.S.”).
\(^{54}\) Compare S. 1945 § 450(b)(3) (stating that a Patriot employer is eligible for a tax cut only if they “operate[ ] in accordance with[ ] a policy requiring neutrality in employee organizing drives”), with Change.gov, supra note 53 (neglecting to mention the policy that the employer adopt a union-neutral employment policy).
\(^{55}\) H.R. 2460, 111th Cong. (2009); see also S. 1152, 111th Cong. (2009).
\(^{56}\) S. 1152 § 5(b)(3).
\(^{57}\) H.R. 1274, 111th Cong. (1st Sess. 2009).
cosponsored along with Senator Kennedy, would provide employees with an annual right to request changes to work hours, schedules or locations, and such other matters as the Department of Labor might, in its wisdom, provide in regulation.\(^8\) The employer would have fourteen days to meet with the employee; fourteen more days to provide a written decision explaining a rejection to an employee’s request.\(^9\) The employee has a right to a representative of his or her choosing.\(^6\) And the employee can request reconsideration and must be provided with another meeting.\(^6\) Any discrimination or retaliation against the employee is reviewable in a federal district court.\(^2\)

Jim talked about the Lilly Ledbetter Act, and we’re all familiar with that. Comparable worth, as Jim mentioned, may be tied into that. The comparable worth notion, which all of us thought of as a 1970s bill that went nowhere, is back. There is a Fair Pay Act,\(^6\) which Senator Harkin introduced in this Congress, that would provide equal pay for otherwise unequal jobs so long as they involve comparable skill, effort, responsibility and working conditions.\(^6\) That along with the Paycheck Fairness Act,\(^6\) which would limit various Equal Pay Act defenses and provide unlimited punitive and compensatory damages is another bill that, if reintroduced in the next Congress, ought to give us all some concern.

JUDGE TYMKOVICH: Thank you. Ms. Fechner.

MS. FECHNER: Judge, thank you so much, and I really appreciate the opportunity of being here today, particularly with such a distinguished group of panelists.

First off, I want to offer a disclaimer, which is that what I’m doing here is I think trying to filter what I see as President-elect Obama’s labor and employment agenda through my many years on the Hill with Senator Kennedy working on these issues. But in no way am I representing the transition or the new administration, as I am sure everybody up here would agree that that is our situation.

I think what I want to do, because a lot of the speakers have talked about some of the specific agenda items, is try to stand back and maybe characterize how I see President-elect Obama looking at labor and employment issues, and then maybe talk about some other issues that ha-

\(^8\) See id. §§ 3(a), 6(b)(1).
\(^9\) Id. § 4(b)(1)(A)-(B), (H)-(I).
\(^6\) Id. § 4(b)(1)(L).
\(^6\) Id. § 4(b)(1)(E), (H).
\(^6\) Id. § 6(b)(4).
\(^6\) S. 904, 111th Cong. (2009).
\(^6\) Id. § 3(a).
\(^6\) S. 182, 111th Cong. (2009).
ven't been mentioned yet.

As I compare the way he talked about these issues throughout the campaign with other past Democratic candidates, a few things stand out to me, and I want to share with you what I saw and how I think he is looking at these issues. I think one thing is clear, that his agenda on these issues is very robust, but it is also quite focused. He doesn't just sort of throw out the kitchen sink—you know, “I’m going to address these thousand labor and employment issues that people have been focusing on.” I think it’s very much like he does everything, so he’s taking on some of the challenging issues. He’s taking on the labor-management unionization Card Check arbitration issues. But he is picking and choosing his battles, I guess, is how I would put it.

The other thing I noticed is that his work on labor and employment seems to be very integrated with his message on the overall economy and the idea that this is not some discrete area of law sitting off over in a corner, but it is part of one of the biggest challenges that he has, which is to get this economy moving again.

The other thing that I noticed is that in a number of respects, what I think he is trying to do is modernize labor and employment law and make it much more reflective of what the current workforce is like.

So, let me talk about a number of other issues I think that we haven't really covered. First off, let’s talk about the economy. It is true, when Congress comes back, when the President comes into office in January, one of the very first things that is going to be on his plate is dealing with this very serious economic slowdown that we have, and he has already said that one of his first orders of business is going to be to go to the Hill with not just an economic stimulus plan but truly something that he is calling an economic recovery plan.66 And I think that the order of magnitude that people are talking about is immense, and he is talked about addressing taxes in this too.

I think what is relevant for this group, particularly, is that in his campaign he talked about a lot of different ways that we could create jobs in this country, and I think that first bill, the economic recovery plan, could be a means, a way to try to do some of the work that he has talked about. And what I’m suggesting are things like this idea of infrastructure: transportation, communications infrastructure. He has talked about putting a lot of remanufacturing back into this country along with the idea of freedom from dependence on foreign oil.

66. See Change.gov, supra note 53 (“I have already directed my economic team to come up with an Economic Recovery Plan that will mean 2.5 million more jobs by January of 2011—a plan big enough to meet the challenges we face that I intend to sign soon after taking office.”).
He has talked about creating a whole new workforce of green jobs. We can talk more about what that means, but certainly places like the Department of Labor and many companies and organizations are going to be involved in rethinking what these jobs might look like. How do we get people ready for the new jobs? So I think right off the bat, in terms of what he needs to do, what the Congress needs to do, we'll be talking about a lot about jobs and job creation.

Going along with that initial package—just yesterday, the Congress passed an extension of unemployment insurance, which I think unfortunately is going to be something on the plate for quite a while to come. But something that President-elect Obama has talked about in relation to unemployment insurance is the idea of modernizing it and making it more responsive to the current workforce. I think people in this room understand what a critical role unemployment insurance plays in terms of stimulating the economy because it is a countercyclical program. People are unemployed, it kicks in, people have money in their pocket, and they spend it to spur the economy.

What he has noticed is a problem with the program is because of the changing workforce over time, the program doesn't do exactly what it is intended because there are a lot of workers that it doesn't cover, particularly workers like part-time workers and low-wage workers. Because of some of the particular ways that the programs are structured, a lot of workers are left out. So he certainly has said that that is certainly one thing he wants to do.

We've touched on the minimum wage. The next increase, the final increase of the bill that was passed, will go into effect next summer. That will raise the minimum wage to $7.25 an hour. He has talked about going to $9.50 an hour in 2011 and then indexing it from there. So even though that won't be right off the bat, it certainly will be on the table.

I think one of the most creative and innovative policy areas in labor and employment law that President-elect Obama has put time into is the work-family area. And I think that it is different in the respect of what I talked about, how it is robust but focused. This work-family agenda is actually robust and has a lot of parts to it. So think that's the one exception that I would say to my own categorization—really throwing a lot of ideas about work-family.

I think he is trying to be responsive to women voters. I think he's

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trying to look like he is part of a new generation of leadership, people who really do appreciate women moving into the workforce, the paid workforce is probably the most significant demographic change that our economy has undergone during this past century. But in addition to the paid sick days, which he has supported, the various different permutations of expanding the FMLA, covering more workers, covering them more reasons to leave, he also has this idea of a fund— I think it's a $1.5 billion fund—to allow states to experiment with various different types of paid family medical leave.

As Bill talked about, he has spoken in favor of ideas like flexible work schedules. How can the government work with employers to provide more flexibility? Telecommuting is certainly something that he has talked about.

A number of other speakers have talked about his agenda on equal pay on the Ledbetter bill, but I guess one thing I would note is that, really, a lot of it does go back to the campaign, having a historic primary with the first very serious woman candidate for president. I think he put quite a bit of energy into the campaign appealing to women. Clearly, Democrats win when the gender gap is fairly significant. He knew that. He knew he needed to appeal particularly to women.

The last area I wanted to touch on, which I think will be a real change from the current administration, is his seeming interest in federal employees. He has made some statements. He has suggested that federal employees really will be partners in all that he wants to do as President. People may have noticed—the Washington Post has a story this very week about a series of letters he sent to federal employees talking about their specific agencies and what he wanted to accomplish working with them.69 I think he is a president who realizes that the federal government is not in the business of making widgets. Really, its human resources, its federal employees are one of the most effective ways that he can accomplish his agenda. So I thought it was pretty interesting that he has made a number of statements and did send that series of letters.

And I think that finally what that leads into, which we haven't talked a lot about, is the nature of increased enforcement, regulation and reregulation of areas that have been deregulated. It just astounds me to see any public official, including Democrats for many years here, actually talk about regulation and use the word regulation as if it's a good

69. See Carol D. Leonnig, Obama Wrote Federal Staffers About His Goals, WASHINGTON POST, Nov. 17, 2008, at A01 ("Barack Obama wrote a series of letters to workers that offer detailed descriptions of how he intends to add muscle to specific government programs, give new power to bureaucrats and roll back some Bush administration policies.").
thing. I think the financial crisis has opened that door in ways that it hasn’t been open for many years now. We could talk more about that, but certainly I do think that there will be a robust regulatory and enforcement agenda.

JUDGE TYMKOVICH: Thank you, Holly. I hope that appreciation for federal employees includes the federal judiciary.

With that, we can open the floor to questions from the audience. And we have a microphone set up. So if you have a question, just step up to the microphone, and I’ll recognize you.

One question before we get to you, sir. I just wondered if Bill Samuel wanted to respond at all to Bill Kilberg.

AUDIENCE PARTICIPANT: I’ll ask a question and try not to make it a loaded one. The number of back pay awards has been climbing. The National Labor Relations Board issues back pay awards if an employer violates certain parts of the National Labor Relations Act. It’s one of the only real penalties that the board can issue. The other involves posting notices on employee work bulletin boards to say they won’t commit this act again. But back pay awards obviously is more serious. And it now routinely awards $20,000 to $30,000 per year. Back in the 1960s it was $1,200 a year, $1,500 a year. I’m not saying these are all back pay awards because someone got fired for organizing; I’m not saying that. But it’s a pretty serious penalty nonetheless.

So, my question is, is there anything about the National Labor Relations Act that needs fixing, or is working just fine?

JUDGE TYMKOVICH: Bill.

HON. MR. KILBERG: I think it’s working pretty well. As you indicated, the number of back pay awards, the total number of workers given back pay during the course of a year involves all kinds of disputes, not all of them discrimination and illegal firings.

If you look at a more interesting statistic to get at the issue that you are seeking to address with the EFCA, you would look at reinstatement. That is the remedy that you think of when somebody has been illegally fired. They’re put back to work. The number of reinstatements has not gone up in recent years indicating that there has not been an increase in discriminatory firings.

MR. SAMUEL: But there’s a lot less organizing going on through the National Labor Relations Act.

HON. MR. KILBERG: You know, there is less organizing going on, but I think if you looked at that, you wouldn’t see this dramatic upward change.

Ironically,—because you are concerned about employer coercion, you want a bill that takes away the secret ballot in favor of a public Card
Check. And it seems to me there's an inherent contradiction there. If you want to protect employees from coercion, you ought to want a secret ballot. And historically, that was the union position. You don't want to use a public Card Check system. It becomes a public document, that creates more risk for individual employees than a secret ballot election.

So, I don't understand the remedy for the alleged wrong. I don't think the wrong is there. I think the Act is working reasonably well. But one can certainly look at the penalty structure. One can certainly look at the time frames. One can look at staffing for the NLRB. All of those are legitimate areas of inquiry.

JUDGE TYMKOVICH: Jim, did you have a comment?

MR. PARETTI: Yeah, I may jump in. I sort of got charged on task of setting everything out there, so I didn't get into a lot of substance.

I guess that's my one reaction to Bill Samuel. It seems to me in many ways that you're critiquing, or the issue becomes conflating critiques about how campaigns can be waged with critiques as to the final voting, the issue of the actual vote itself. I think from a lot of our members' perspectives, you look and say, okay, ultimately it's about coercion, retribution. The only thing that prohibits coercion or retribution, and presumably that you have a pure you have employer who's saying, you voted union, so I'm going to punish all of you across the board. You know that's not permitted.

But if I am the worker, you can press the everyday and say, Paretti, if you vote for that union, you're not going to have a job. You stay on the right side of the line, but you can press me. But in his back and look my boss in the face and say, no sir, did not vote for that union. I'm the only one that knows if I'm telling the truth.

So, I guess to the extent, and Bill sort of alluded to it, if there are areas in which to explore campaigning and how the NLRA works, recognizing there is a tension between the private property rights and private speech rights of employers, there is fertile ground and more credible ground to me than the argument that, well, a secret ballot is subjected to coercion. At the end of the day, it's the one thing that's not. Having sat there and had the NLRB agent walk me to the bathroom when we're all sitting at the—they do a pretty good job, an excellent job of maintaining a truly confidential ballot.

So, my two cents on that one.

JUDGE TYMKOVICH: Thank you. Let's go ahead and take a question from the audience.

AUDIENCE PARTICPANT: Hi. Good afternoon. I'm an employee benefits litigator in town, so I'm very interested to see what your thoughts are on possible initiatives that the new administration might
pursue in that area, especially considering that, according to the government's own estimate, the recent financial crisis has walked out $2 trillion in value from retirement and pension funds.

JUDGE TYMKOVICH: Holly, why don't you start with that?

MS. FECHNER: Well, think you're right, there is such a need to look hard and long at the whole situation with benefits. I think from what we've seen, the energy is for healthcare to come first. And this has been my experience and I think people's personal experience too, that the thing right before them is the health insurance. The thing way off in the future is the pension or the retirement savings, which is a huge public policy problem, because in my experience, it has been very difficult to get the Congress and administration across the board, Republican and Democrat, for decades, to really focus on the retirement security issues. I know that people are preparing for a very serious fight on healthcare reform. A lot of energy is going into that from all directions. So I think we will expect to see something in the first year.

I think President-elect Obama does have a lot of good ideas about retirement savings, and I do think that there are members on the Hill who really care about this. I mean, Jim can speak more to it, but right as we speak, Congress has been dealing with the issue of the Pension Protection Act and how to ease, potentially, some of the burdens that the financial crisis has put on pensions in terms of their funding obligations. So I think that in the short term there will be attention devoted to that issue. But I think we have a way to go in figuring out some of the bigger solutions.

Clearly, there will be some action next year, particularly from Chairman Miller, about fee disclosure. I think that is something that we can almost certainly count on that will be on the agenda.

JUDGE TYMKOVICH: Anybody else? Jim?

MR. PARETTI: Yeah. I mean, just to echo Holly's points, absolutely. With respect to Mr. Miller, he had proposed fee disclosure legislation this year and had moved it through the committee. We were expecting to see it on the floor, and I suspect it was a function of that they're not being complete consensus on their side of the aisle, as well as a little bit on the campaign. This may not be the time you want to go stick pins in the eyes of folks whose support you try to earn.

In the short term, I expect we will try to do something with respect to tweaking the Pension Protection Act, recognizing that in 2006 we tried to strike a balance between making sure companies fund, to maintain the promises, that the PBGC\textsuperscript{70} doesn't end up too far on the hook,

that all of these are able to survive and hold on. None of us in the room, members or staff, I think ever would have anticipated two years later that we would be where we are, so there is a willingness on both the Republican and Democratic side, to say, okay, that means playing with the dials and numbers a little bit; easing back on contributions, allowing some freezes on extensions. I sense a broad willingness to do that. We were very close to doing something this week, and it sort of got held hostage due to an entirely separate issue, and I'll leave it at that. But that's the short term.

I do think that longer term, plainly, fee disclosure legislation, and I do think Mr. Miller comes to the table with a sort of assessment that the 401(k) system has done everything it's supposed to do as we've moved from defined benefits to defined contribution. I don't know that they're seriously going to charge at the windmill of trying to bring back the year of the DB plan. I just don't know—that ship may have sailed. But if we are in a DB world, what we have to do to ensure that grows. That's a challenge. I don't know if anybody's put out answers.

We had a couple of hearings in the fall to sort of start laying out issues, and I would suggest that we continue it from the economy, economy, economy. It serves their purposes very well. But there is a recognition that some action is going to have to be taken.

Also, with respect to the code, you'll see probably some ability for folks who may be otherwise required to take withdrawals, to maybe juice those nest eggs back up. And ultimately, I think that everybody is still playing a little bit of pings. The market is going to come back. We just hope it gets there sooner rather than later. Enough said on that point.

JUDGE TYMKOVICH: Bill Samuel.

MR. SAMUEL: Very quickly, I would just say none of the proposals that are being seriously considered right now are commensurate with the scale of the problem. I think we're about to see a generation of Americans retire with very little to fall back on. Social security, everybody will have, but their own savings, either individually in bank ac-


counts or through their 401(k)s or IRAs, are probably not going to be enough. They are certainly not replacing the benefits that were available under the traditional defined benefit plan, which most of our parents probably retired on. And I think it's a crisis that's right around the corner.

I don't have the answer. I think we would love to see a return, obviously, to the world as a defined benefit pensions, but that it may not be in the cards in the short term. But I don't think we've seen the worst of this yet, and it's going to be affecting a lot of people in this room I suspect.

HON. MR. KILBERG: I would just point out, by way of footnote, the law of unintended consequences. Yet again, watch what you regulate. We passed the Pension Protection Act two years ago, and that's the law that people are now seeking to amend because it puts a burden on employers and the ability of employers to fund their defined benefit plans. That is truly enormous. When you have an economic downturn like this, the assets in the plan have lost as much value as assets have lost in the last couple of years.

The problem with the defined benefit plans is not the defined benefit plan. It is the regulatory burdens that have provided incentive for employers to move away from DB plans.

MR. PARETTI: Finally, something Bill and I agree on.

JUDGE TYMKOVICH: Thank you. Let's take another question.

MR. BARTON: Michael Barton, Sugarland, Texas. When I was working trade issues on the Hill, labor issues came up a lot. And I specifically remember George Miller sending a letter in 2001 to the Government of Mexico, along with being signed by a whole bunch of other like-minded people, saying that the secret ballots for union election was absolutely essential, and Mexico should do that, and Mexico should keep it.

So, my question is why is it essential and vital for Mexican unions to have secret ballots, but it's okay for us not to have secret ballots?

MR. SAMUEL: My understanding of the situation in Mexico, obviously, it's a completely different system, but the elections there are between unions. It's not whether to have a union or not have a union. In fact, that's —

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MR. BARTON: Isn’t the principle the same though?
MR. SAMUEL: —No. Well, it's typically the case here too. In the early days, the National Labor Relations Act did not involve elections.⁷⁴ Workers for many years formed unions with cards.⁷⁵

And by the way, this notion that cards are public, and you stand up on a platform inside and everybody sees, the only way now you can get started now is by signing cards. You all know how you begin an organizing drive; you have to sign at least thirty percent of the members up on cards to get the election.⁷⁶ The Employer Free Choice Act does not eliminate secret ballot elections in any case. It's still an option for workers if that’s what they want.

But no, it’s not the same thing. If you’re choosing between unions, I’m not sure how you would do it with a card, but the election is as good a way as a way to do it.

But our criticism is not the election. Our criticism is the campaign. I mean, I really have to emphasize that. The Soviet Union had elections, Zimbabwe had elections, secret ballot elections. But nobody thought they were fair. Nobody thought there was any free choice associated with it. That’s what is running across.

JUDGE TYMKOVICH: Go ahead. Yes sir?

AUDIENCE PARTICIPANT: Yeah, I had a couple issues I’d be interested in a comment on. One is, often the beginning of an administration is preoccupied with addressing issues that were important to the prior administration, so I’m curious whether, for example, Bill and Holly see things that have been done in this administration that it’s important from their perspective for an Obama administration to take another look at and perhaps roll back.

And secondly, assuming there is time and interest, I’m curious to the extent to which the recent and ever more dramatic economic downturn causes any of you to reconsider what might have seemed a very

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⁷⁴. See The Facts: Union Representation and the NLRA (2008), http://www.apwu.org/issues-efca/flyers/efcareport_1208.pdf (discussing that in the early days, “representation was determined almost exclusively through a demonstration of majority support that did not involve balloting”).

⁷⁵. See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 133-34 (1950) (discussing that evidence of a majority in the early days of the NLRA often took the form of signed membership cards, and that even after the National Labor Relations Board decided that elections would be the best way to certify a union, signed cards were still used in many cases).

⁷⁶. See Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 159(c)(1)(A) (2006) (requiring that a “substantial number of employees” demonstrate that they desire representation in collective bargaining before the Board will allow a hearing to determine if an election needs to be held); see also NLRB Statements of Procedure, 29 C.F.R. § 101.18(a) (2009) (stating that thirty percent of the employees must demonstrate their desire for the union to be their representative in order for an election to be held).
wise priority, say, six months ago but now seems to be perhaps a disruption or cost that can’t be dealt with.

If I followed the story correctly, for example, the President has now come to support an extension of unemployment benefits, which I think he was initially opposing. I could see maybe increased unpaid leave as a way of spreading jobs around in a way that overtime pay might have been used during the New Deal. On the other hand, an increase in the minimum wage seems even more extravagant when you are in a deflationary cycle. I’ll stop there.

JUDGE TYMKOVICH: Holly, why don’t you start on that?

MS. FECHNER: Well, in terms of the first part of your question, one thing that I just read about in my Daily Labor Report this morning that I think fits into that category, which is a policy regulatory issue that the current administration and the future administration disagree about, I think—although the extent which they disagree, we’ll see—has to do with these regulations on the Family Medical Leave Act that the Bush administration just put out.

So, I know among the interest groups that they have been contentious. I have no idea what the approach will be, but I think that sort of falls into the category of a difference of opinion which is highly (technical error) as it’s coming so close to the end of his administration.

JUDGE TYMKOVICH: Bill Samuels.

MR. SAMUELS: I mean, there are probably some executive orders (technical error). I guess I would relate it back to the Employee Free Choice Act. Can we afford it now? A lot of people are saying this is the wrong time to burden business with, you know, more union organizing and potentially higher payroll costs.

I guess the way I look at it is if we’re going to have a consumer-led recovery—two-thirds of our economy as consumers—we got the money back in people’s pockets. We’ve had this long-running dispute with Wal-Mart, which I think everybody would agree, pays fairly low wages. That’s how they can sell inexpensive products. Imagine—we’re all going to be talking probably too much of a tax cut for middle income workers. A year ago it was rebates. We had everybody back $300 or $600 so they could go out and buy something.

Well, imagine if Wal-Mart, instead of paying $6.15 hour, was paying $8.50 hour. If we’re going to get back to a consumer-led economy and consumer-led recovery, we’ve got to give workers the ability to keep up with inflation and the cost of living. And right now, I’ll get back to this notion that wages are flat-lining and have been since the 1970s.77

77. See Ahmed A. White, The Concept of “Less Eligibility” and the Social Function of Pris-
That’s a fact. Our average weekly earnings have not gone up in a long time.

People can disagree with whatever the solution is, but I think the issue you raise is going to be very much in the news. Unions didn’t put Circuit City out of business, and they certainly didn’t bring down Lehman Brothers. So you know, maybe you can say they brought down the Big Three. I don’t know. I think they made lousy decisions about the kinds of cars they were still making.

If it’s true that Toyota pays about the same and provides health insurance, then why are they surviving when Detroit is not? Is it the work rules? I think it’s the fact that they made crummy decisions in the board room, not at Solidarity House, where UAW is headquartered.

JUDGE TYMKOVICH: Thank you.

I have a question for Bill Kilberg, and I’m curious about the role that business is going to play with the new Congress and the new President. In a recent column in the Wall Street Journal by Thomas Frank, he quotes the chairman of Home Depot as expressing the view that the business class might rediscover its ancestral zeal for combat. Frank sums up his article by saying, “Liberals should take heed. If they thought the Harry and Louise campaign that sank Hillary Clinton’s health care reform was dirty, they should they ain’t seen nothing yet.”

What do you see business, Chamber of Commerce, what role are they going to play in the next six months, twelve months?

HON. MR. KILBERG: I have not seen the business community as organized and as revved up as they are now with the Employee Free Choice Act since the Carter administration’s labor law reform proposal. And I have to tell you, that amazed me because I was in government during the 1970 and during those years you just couldn’t get businesses to cooperate on public policy. The Carter proposals animated the business community. Since then, it’s gone back to being a very divided world with a large variety of interests and rare that you can pull companies together. Until now.

EFCA has produced this change. I started my comments out by saying that I am impressed with the Obama administration transition to date. I was impressed with their campaign, obviously, seeing it from the other side. We thought they ran a heck of a good campaign. I think they’re
running a very, very good transition. They’re showing themselves to be very sophisticated, very smart, putting into place, people who are experienced, who can hit the ground running. And therefore, my guess is they’re going to want to buy some time and not have an issue which is so controversial and so divisive for their opening battle.

That doesn’t mean that I’m predicting that the President-elect is going to give up on the issue, but I think it’ll probably come a little later than we now think. That’s just my guess.

MR. PARETTI: Yeah. And on this one, Bill, I think I’ll disagree. A very brief aside—to establish my credibility on this issue, back in 2007, I was over in Tokyo addressing a roomful of Japanese parliamentarians and staff, and I stated that with absolute and complete certainty my conviction in the 2008 election Hillary Clinton would narrowly edge out Mitt Romney to become the next president of the United States.

So, given my great prognosticator’s skills, I do think that it will come up sooner rather than later. I think as much as people would say, we want to be strategic, we don’t take on—you know, there’s a lot of juice moving for them on this right now, and I expect Bill and his colleagues will push hard on that.

There’s also the practical matter for some of these members, particularly Southern Democrats, if you think it’s a vote you’re going to enjoy living with, rip the Band-Aid off sooner rather than later. Why let the drum beat build. It amazes me still, particularly in the House, that it seems you’re six months into that calendar year, and already folks are thinking about the election that’s eighteen months ahead. So we’ll see how that one goes. I think there are arguments on both sides.

MR. SAMUEL: You make good points Jim. You know, how does labor try to bridge some of these differences and try to work together.

MR. PARETTI: Timing. I’m not tipping my hand on that.

SPEAKER: Early and often.

JUDGE TYMKOVICH: Question from the audience.

AUDIENCE PARTICIPANT: Well, you mentioned controversial. You mentioned a law initiative that reminded me of Duran Duran in the 1980s, Comparable Worth.80 How serious are the powers that be in doing something with comparable worth?

MS. FECHNER: I haven’t talked to anybody like me, so I don’t know if I can really answer that question. You know, there are basically three different proposals on the table I think that had to do with equal

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80. See generally BLACK’S LAW DICTIONARY 299 (8th ed. 2004) (defining comparable worth as “[t]he idea that employees who perform identical work should receive identical pay, regardless of their sex”).
pay issues. I think only one really could be fairly put in the category of comparable worth. But this is a bill that Senator Harkin\(^8^1\) is the lead sponsor of, and I think Holmes-Norton\(^8^2\) is the lead sponsor in that one.

MR. PARETTI: On the House side.

MS. FECHNER: Is that right, Jim?

MR. PARETTI: Yes.

MS. FECHNER: But there’s a range. They’re fixing Ledbetter, which I think people have alluded to. I think the votes are probably there for that as we speak. And then there is an intermediate version, which is the Paycheck Fairness Act, which is something Senator Clinton had been a lead sponsor of.\(^8^3\) And Jim, who is the lead in the House?

MR. PARETTI: That’s Rosa DeLauro,\(^8^4\) on the Equal Pay Act stuff. And if I can, I think we can indirectly—we can’t look at each other.

MS. FECHNER: We can’t see—

MR. PARETTI: You said there were three pay equity proposals; only one could be comparable worth.

I would also sort of counter by saying I don’t think the Ledbetter bill is really an equal pay bill. As I said, the messaging on that was done very, very well. It was tied hand-in-glove to the point that we even marked up with move that the DeLauro-Clinton fairness bill so as to tie the issues together. But at the end of the day—and we can argue about whether that was always the rule and the Supreme Court changed it—it really is much more a statute of limitations question.

And my fear—and the question was put to us, if this has been the rule in many circuits, has this really been such a big problem? My concern is that by sort of focusing on the issue and expanding it, you have—and people try to step away from it. But under Ledbetter, which I agree with you, I think the votes are there. If you have an employment action that takes place in 2010, you work for another thirty years, and you look back and say, gee, I’ve been getting percentage increases all these years that would’ve been higher if I hadn’t faced an allegation of discrimination in 2010. You’ve got a thirty year look-back. Go another twenty

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82. See generally Congresswoman Eleanor Holmes Norton, http://www.norton.house.gov/ (follow “About Eleanor” hyperlink) (last visited Oct. 8, 2009) (stating that Eleanor Holmes Norton was “[n]amed by President Jimmy Carter as the first woman to chair the Equal Employment Opportunity Commission” and continues to be a champion of civil rights).


years, retire out of the system, and whether it’s a defined contribution match or a DB, the ones are still around, hey, my pension would have been higher but for that act of discrimination fifty years back, which I allege has a tangible impact on my salary.

I am concerned that it opens the door very, very broadly. I recognize Ms. Ledbetter, who was a very articulate advocate in a very sympathetic case, and I understand she brought an Equal Pay Act claim in a lower court, but the Ledbetter case was not an Equal Pay Act case. At its heart, Ledbetter was a sexual harassment case and a Title VII case. But I will give it to the supporters, they’ve done a great job of tying those two together. But I feel very strongly about Ledbetter, that it has sort of been mischaracterized.

JUDGE TYMKOVICH: Do you see any momentum on the comparable worth issue?

MR. PARETTI: I think they’ll try. I think when we start talking about what can be done and where you start peeling off, if there’s three tiers—Ledbetter, Equal Pay Act, comparable worth—will we get the, oh, we’ll be big people and take comparable worth off the table so now you can support Ledbetter and equal pay. What a deal that is, maybe.

JUDGE TYMKOVICH: Yes sir?

MR. SHERK: James Sherk, with the Heritage Foundation. The secret ballot has obviously attracted most of the attention on EFCA, and when I talk to business leaders it’s the binding arbitration provision that terrifies them.

My question is if you’ve got the government writing the labor contract for the first two years and specifying you will hire X number of workers at X rates for this amount of time, it starts to look an awful lot like a temporary nationalization of the company, and you could get into issues of a takings without compensation.

I’m an economist, not a lawyer, so my question for the lawyers is how strong a constitutional challenge is there, do you think, to the other binding arbitration side bill?

MR. SAMUEL: I’m not a constitutional lawyer. I mean, the only thing I would say about that provision—again, this is a problem that we
think is a serious one that needs to be addressed. In a third of successful organizing campaigns, a first contract is never agreed to. There are very weak incentives for employers to agree to a first contract. Basically, what happens if they drag their feet or they bargain hard is they get an order eventually to go back to the table and keep bargaining, and that can go on for a long time, and workers get dispirited, and maybe after a year there's an effort to decertify the union. So there’s not much in the law that really pushes either side to get an agreement, but the incentive I think really is lacking for businesses.

In Canada, in provinces where they have binding arbitration, it’s very rarely used. It really acts as an encouragement, pressure on both sides to agree. Nobody wants to leave it up to a third party to negotiate the terms of an agreement—not the employer, and not the union. Most of these situations are choosing terms that one or the other has recommended, which tends to push them towards the center in the first place, because you know which terms they’re are going to choose. On wages, people think, well, the union’s going put these extravagant provisions out. What if the arbitrator chooses that? It’s going to put the company out of business.

Well, these are personal people, these arbitrators. They are not going to choose the extravagant one. They’re going to look for the one that’s sort of in the middle. So it forces both sides if they’re going to get arbitration to put contract terms out that are close because they’re going to run the risk they’re going to lose out in arbitration.

But the main point I want to leave is it’s very rarely utilized. But I can’t give you the answer to whether it’s constitutional or not.

JUDGE TYMKOVICH: Bill, how would you assess that?

HON. MR. KILBERG: There are a number of constitutional challenges that can be made. It’s hard to assess how strongly the arguments will be ultimately, but some of us have been looking at the mandatory arbitration provision. You know, this is an undefined arbitration procedure. It’s left to the Federal Mediation and Conciliation Service. It’s not clear whether these arbitrators are private arbitrators, public arbitrators, whether we’re talking about a board or a panel.

My experience is that, short of baseball arbitration—which is a very special kind of arbitration where the arbitrator can choose one contract,

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one set of proposals or the other—the effect of knowing that arbitration
is at the end of the road is to encourage bargaining but rather to cause
the parties to posture for purposes of the eventual arbitration. I think
common wisdom, at least in the United States, has been that having
these kinds of provisions undercuts rather than encourages the collective
bargaining process.

JUDGE TYMKOVICH: Yes ma’am.

MS. NORMANDY: As long as you all are prognosticating, what do
you see on the horizon for immigrant and non-immigrant legal and illegal
workers that are in the country or coming to the country?

JUDGE TYMKOVICH: Who wants to take that? Jim?

MS. NORMANDY: I recognize it’s a small question. It should only
take a couple minutes to answer.

HON. MR. KILBERG: I assume there’s going to be another run at
an immigration bill.

MR. PARETTI: Yeah, I can’t give terribly much more. I wasn’t
expecting the question, so I hadn’t given it much thought before getting
here.

I would be curious. There was the highlighted Obama-McCain
meeting earlier this week, and there’s been the discussion about whether
there’s an issue on which Barack Obama can reach out to John McCain
and put him back in his dealmaker hat. We’re trying to navigate the
shoals. Would it be that issue? I don’t know.

It seems like the issue itself has ebbed a little bit. I’m curious if the
economy continues down, if is going to sort of reassert itself. But for a
while it was front and center, and then other issues got eclipsed. I think
they’ll pay to run at it. I don’t know if you’ll see piecemeal—again, it
might be in an effort to get that work comprehensive.

But it is a fractious issue because both on the Republican and Dem-
ocratic side, rather than down party lines, it splits across regions, it splits
across economics. So I don’t know that anyone is in a rush to take it up.
And at the same time, there’s enough else going on that folks can plausi-
ably say, hey, that can’t be getting the economy right in restoring the
market, name off your five things, come at a higher level of priority.

So, I guess if I were prognosticating, I would say I did not see this
being a front and center issue, at least in the near to midterm of the next
Congress. That’s my best guess.

JUDGE TYMKOVICH: Holly, would you agree from your years
on the Hill?

MS. FECHNER: That really does feel to me like a fair assessment
of it. There are so many people who really do care and want to get this
issue right. And we’ve seen very serious policy and political develop-
ment of it, people coming together, members; my old boss, Senator Kennedy, working very closely with Senator McCain, Lindsey Graham, you know, a nice array of members. But I do feel the time is not right, and it may take a while to put it back together again.

JUDGE TYMKOVICH: Other questions?

One topic that we moved through fairly quickly was the RESPECT Act, which would make changes regarding the classification of supervisors and employee. I wonder if the panel could assess the merits of that and where it might be on the to-do list for the next Congress.

MR. SAMUEL: We still think it’s something that needs to be addressed. Obviously, the law was unclear, and the Supreme Court wanted the Board to go back and try to bring some clarity to the problem. We think they went overboard, giving companies too much latitude to re-classify workers as supervisors, particularly in the healthcare field.

I’ve heard a lot from our unionized nurses that hospital chains and healthcare providers are using this to exclude them from the potential bargaining unit that there is an organizing drive going on. And it seems like some pretty flimsy pretext if they help with scheduling, one day a week. I can’t remember what threshold is in terms of how much time they have to work on scheduling before they’re considered a supervisor, but they really don’t have what you would normally think of as supervisory duties. They can hire, fire, evaluate, or reassign, that sort of thing.

They may, in a rotating way, work on scheduling. I think under the Oakwood decisions, and this is now a couple years old, that by itself might be enough to categorize them as a supervisor. We think it was a pretty clear attempt to deny union rights to a lot of people, and so we do think it ought to be reversed. It’s high up on our list for this term.

MR. PARETTI: From our perspective—I don’t want to say the jury’s still out, because in the RESPECT Act, our members certainly had significant concerns with some of the bill’s provisions, which, given that it’s about six lines, doesn’t take much. But in particular, I would highlight each of the three.

I mean, you’re talking about the designation of a supervisor and removing for the list of tasks “assign” and “direct,” and at the same time, the requirement of a majority of the time, to me, fundamentally threatens the concept of the working supervisor in any context. I would say it’s reminiscent to me of the overtime debate back in 2003 and 2004. “If these regulations become final, eight million people are going to lose overtime overnight.” It’s been four years, and I haven’t met one of

them. I'm sure you'll be happy to find me one. You don't have to to-
day.

But I do think also we get to see if this standard has had the sort of
chilling effect that I think supporters of the RESPECT Act said it would.
"Overnight we're going to see millions of workers changed from being
rank-and-file to supervisors." In three cases at issue, it was 12 out of
181, 0 out of 55 and 0 out of 30.90 There were responses to that, but in
the short term, no one has come to us and shown credible numbers and
said, boy, this has gone too far the other way. That's my thought.

JUDGE TYMKOVICH: Next question from the audience:

MR. TOUPEY: My name is Brad Toupey. I come from Pittsburgh,
a city that has sustained a tremendous amount of damage from unionism.
Our football team is named after an industry that doesn't exist anymore,
and my dad was a member of that union.

Mr. Samuel, if the problem with union organizing in the workplace
is an unfair balance of communication between the employer on the one
hand and the union on the other, then I would think your remedy would
have to do with allowing for more union communication with the em-
ployees. Card Check doesn't do that. Card Check means that a guy big-
ger than me brings the card to me to sign, and when I say no, he brings it
to me again with his buddy. And when I say no again, it means that my
car gets vandalized. And when I say no again, my children at school are
threatened. That's what it means. So, the remedy does a massive prob-
lem. (Applause.)

JUDGE TYMKOVICH: Bill?

MR. SAMUEL: Well, you know, it's a nice fairy tale you tell. I
don't have as much experience since 1935 you have, or the Board has, or
any employer has with that type of situation. Most of these organizing
drives are among coworkers. It's not a union organizer who is—a union
organizer rarely has access to the workers themselves. These are co-
workers who have very little control or any leverage, or certainly no
coevasive power.

Since 1935, I think there have been something like forty-two cases
where the Union has been guilty of doing exactly what you say, and
that's compared to the 15,000 or 20,000 a year or less, depending on
how you define it. I think there is a lot of debate about statistics. But

90. See Oakwood, 348 N.L.R.B. at 699-700; see generally Craft Metals, 348 N.L.R.B. at 726
(holding that the Employer failed to demonstrate that any of the lead persons were statutory supervi-
sors); Golden Crest, 348 N.L.R.B. at 732 (finding that "the Employer's charge nurses do not poss-
sess authority to 'assign' or 'responsibly direct' employees . . . and, therefore, are not statutory su-
pervisors").
there isn’t a lot of empirical evidence that the situation you’ve described, and the business community likes to use in commercials with the *Sopranos*, actually happens because we get the death penalty if we do it. The election is thrown out. If there’s any evidence that there were threats, physical or otherwise, by a union organizer, and that comes to light and the Board finds it, the election is over and you lose.

It’s not the same thing for the employer, by the way, because they’ve already won. So the only penalty for them is they might have to rerun the election, like Smithfield has run it I don’t know how many times in North Carolina. So, again, you paint a very grim picture. I don’t know what kind of empirical evidence you have or if you know anybody that has happened to. And to say that the Labor Movement killed the steel industry is bizarre. I mean, Japanese imports, and competition and globalization kill the steel industry—and by the way, it’s roaring back with a lot of unionized workers. It’s doing quite well now, and if you talk to the steelworkers, they worked with the steel industry to rebuild it, to reconstitute it, to become a very competitive industry.

HON. MR. KILBERG: I’ll take it from the rear. Yes. We produce more steel, actually, in the United States today than we did thirty years ago, and we do it with seventy-five percent fewer workers. We are more productive. We got there involuntarily, and there is blame to go around. The continuous caster was an American invention that was rejected by the American steel industry, but the Japanese appreciated its value and began to eat our lunch competitively, making better steel cheaper. That was the failure of management.

But at the same time, we had work rules in the steel industry, as in the auto industry, and others, that helped to make these industries non-competitive. And if we’re going to tell the story, we have to tell it right, and we have to put the blame where it belongs, on both management and labor, especially if we’re going to do it right the next time around.

On the limited number of forty-two cases of union abuse that you cite, you know, the problem with that is, you get any group of management labor attorneys together, and we all have stories. Sometimes they’re hard to prove. Sometimes they’re resolved at the ALJ level so
they don’t get up to the Board, but we all have those stories. They are part of human nature too. Just as I would not believe the union side of you said that in a situation where people cross a picket line, you had line crossers, that there would be no retribution, no threats of violence or any instances of violence, I’ve got to tell you, in a Card Check situation, it’s hard for me to believe that there would not be, union-instigated coercion. It would all belie what we’ve all seen of human nature to believe otherwise.

MR. SAMUEL: Well, you know, since 2000, about 500,000 workers have organized a Card Check. You all know that it is illegal to—employers can recognize cards now, and they’ve been able to since the original passage of the Act, so voluntary recognition exists in practice. Unfortunately, it’s now up to the employer whether to accept it. That’s the other point I didn’t make initially. Why should the employer get to decide how workers organize, secret ballot record check or majority sign-up?

So, it happens now every day. Most organizing is through voluntary recognition. Workers have given up on the Board. Unions have pretty much given up. Much more organizing goes on through voluntary recognition. Again, I’m not aware of a lot of examples of where among those 500,000 workers at AT&T wireless, Harley-Davidson, Freightliner, Kaiser Permanente—they all use Card Check—that people were threatened or coerced or bullied into signing cards. And by the way, you can always decertify them, so people are really unhappy, and if it goes on as often as you think, that union is not going to last very long.

In fact, most organizers are told, you’ve got to be liked by these people. You’ve got to go in and be liked, trusted, because they’re putting their lives in your hands, or at least their job, because it’s so risky to vote for a union. So I think this notion that there are scary people out there threatening workers is—it may happen, but I don’t know much.

HON. MR. KILBERG: Bill, it’s also just plain peer pressure too. And it’s not the same as having the opportunity to have a secret ballot, where you go in and you vote however your conscience directs you.

MR. SAMUEL: People join all kinds of organizations today without secret ballots, and maybe there’s peer pressure involved. I think

94. See generally Mark Schoeff, Key Firms Mum on Union Bill, WORKFORCE MGMT., July 20, 2009 (discussing that more than 500,000 workers from firms, including AT&T, Verizon, Kaiser Permanente, and Harley-Davidson, have voluntarily joined unions through the use of Card Check).
most adults are able to deal that. People knock on your door trying to sell you things, trying to get you to sign-up to things. We haven’t made that illegal. People don’t take that threat seriously.

MR. PARETTI: I had one—I’m sorry. Go ahead.

HON. MR. KILBERG: Oh, go ahead.

MR. PARETTI: The only bright spot in which was an otherwise lousy week for me, as Luis Slaughter95 said, thank the Lord for a secret ballot.96

JUDGE TYMKOVICH: Bill.

HON. MR. KILBERG: Voluntary Card Check situations often have been the result of corporate campaigns conducted by unions—corporate campaigns that themselves are coercive.

We ought to be able to have a system where employees have the right to decide for themselves whether to join or not to join a union. And we ought not to assume that the decision not to join is automatically the result of coercion.

JUDGE TYMKOVICH: We have enough time for one last quick question.

AUDIENCE PARTICIPANT: Yes, I’d like to know if any proposals are being considered regarding teacher unions. Mr. Paretti, maybe you might know something about that.

MR. PARETTI: I’m not aware of any proposals specifically regarding teacher unions. I think on the education side, the issue I would most expect to see action on under Mr. Miller’s watch would be potentially organizing graduate students in graduate education or whether the Board will revisit those decisions. I’m certainly not aware of any legislation directed at teachers unions.

MR. SAMUEL: And they’re not covered —

MR. PARETTI: I was going to say—exactly. It’s on a state basis. So we’ve had a couple high-profile examinations of teacher unions scandals and such in DC. I know that’s aroused a lot of folks, but I’m not aware of any federal legislation that would be aiming towards that way.

JUDGE TYMKOVICH: Well, thank you, panel. It was very intriguing and interesting conversation.


96. Id.