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Inside Baseball at the NLRB: Chairman Gould and His Critics

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LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR. By William B. Gould IV.** Cambridge: MIT Press. 2000. 449 pp.

INTRODUCTION

"Inside baseball" is a phrase with two meanings, one literal and the other metaphorical. In this examination of Professor William B. Gould IV's tumultuous tour of duty as Chairman of the National Labor Relations Board, both meanings apply.

Professor Gould's recent account of his tenure at the Board, *Labored Relations: Law, Politics, and the NLRB—a Memoir*, is a rich source of metaphorical "inside baseball" about the agency he chaired. Gould pulls no punches in exposing the inner workings of the NLRB from August of 1993, when President Clinton nominated him for the post, until his term ended five years later. He offers candid, often critical, assessments of his colleagues' performances at the Board. And as a lightning rod for the bitter, high stakes ideological battles fought over federal labor policy, Gould's service at the NLRB has in turn been the target of heated barbs from some Board insiders,[1]

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* Vice Dean and Professor, Widener University School of Law. The author notes that he was one of many labor law professors who signed a letter to Congress in support of Professor Gould's nomination to the NLRB in 1993. He thanks his colleagues Douglas E. Ray and Erin Daly for their helpful comments on an earlier draft of this essay.

** Charles A. Beardsley Professor of Law, Emeritus, Stanford Law School.

1. *See, e.g.*, Joan Flynn, *"Expertness for What?": The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency*, 52 ADMIN. L. REV. 465 (2000). Professor Flynn should have mentioned in her article that she served as Staff Counsel for Board Member Charles I. Cohen, a proemployer Republican whom Republicans in the Senate insisted also be appointed to the Board as the price of Gould's confirmation as Chairman. Michael H. Gottesman & Michael R. Seidl, *A Tale of Two Discourses: William*

although his years at the Board have also been the subject of more balanced appraisals from other agency insiders and close observers.[2] Gould's account of the NLRB and its relations with Congress and the Executive Branch offers students of administrative law dramatic lessons in the divergence of practice from theory when it comes to "independent" federal agencies. It also provides Gould's spin on the intrigue and conflict surrounding him as he attempted to navigate Washington's rocky political shoals.[3]

Some of that intrigue and conflict arose, quite literally, inside baseball—or more specifically, inside Major League Baseball. That is the subject of Part I of this Review, which finds in Professor Gould's discussion of the baseball strike of 1994-1995 some trends and themes that run throughout his memoir. Part II examines the NLRB as an administrative agency and compares the degree of independence Professor Gould expected his agency to enjoy when he became its Chair with the reality he discovered after he arrived in Washington. The final Part of this Review responds to some of Chairman Gould's critics and places that criticism in the context of the political and ideological battles that raged during the 1990s over the direction of federal labor policy.

I. INSIDE BASEBALL

Bill Gould is one of an old-fashioned breed of red-blooded American baseball fans who can barely contain themselves waiting for Opening Day each spring.[4] It is therefore a bit ironic that he was at the center of two baseball-

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Gould's Journey from the Academy to the World of Politics, 47 STAN. L. REV. 749, 750-51 (1995). Gould describes Cohen as "a thorn in our side throughout his tenure" and reported that "staff called him 'Doctor No' because he dissented from the simplest and most self-evident propositions and opinions." Pp. 55, 260.

2. *See, e.g.*, Charles B. Craver, *The Clinton Labor Board: Continuing a Tradition of Moderation and Excellence*, 16 LAB. LAW. 123 (2000); Fred Feinstein, *The Challenge of Being General Counsel*, 16 LAB. LAW. 19 (2000); Gottesman & Seidl, *supra* note 1; David L. Gregory, Book Review, 2 EMPLOYEE RTS. Q. 74 (2001); Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton Board*, 16 LAB. LAW. 103 (2000); Wilma B. Liebman & Peter J. Hurtgen, *The Clinton Board(s)—a Partial Look from Within*, 16 LAB. LAW. 43 (2000); John C. Truesdale, *Battling Case Backlogs at the NLRB: The Continuing Problem of Delays in Decision Making and the Clinton Board's Response*, 16 LAB. LAW. 1 (2000).

3. Professor Gould would appreciate the nautical reference, since one of his personal heroes is his great-grandfather, the first William B. Gould, a runaway slave who served in the United States Navy during the Civil War. Pp. xvii, 305; WILLIAM B. GOULD, DIARY OF A CONTRABAND: THE CIVIL WAR PASSAGE OF A BLACK SAILOR (2002).

4. Gould's love of the game is evident in this passage from a speech he delivered at an academic conference commemorating the 100th anniversary of Babe Ruth's birthday:

> Like the Constitution, the Flag, and "straight ahead" jazz, baseball, to paraphrase President Clinton, is the "glue" which holds the nation together. Combining the analytical and cerebral with the country's passion for that which is romantic, it is one of life's eternal verities in which the clock stands still forever, transcending all periods of one's life—a game in which there is no buzzer or horn in the form of an arbitrary or predestined time limitation. Like life itself, it gives one the sense and hope that it could go on forever, but in reality, meanders

related disputes during his tenure as Board Chairman. The first involved one of the highest profile cases in NLRB history, leading to the injunction that brought an end to the 1994-1995 strike in Major League Baseball.[5] The second involved politically motivated personal attacks upon Gould for his attendance at too many baseball games with the "wrong" people, such as the general counsel of the Major League Baseball Players Association, or for "neglecting [his] duties by attending baseball games on government-financed trips."[6] Gould's love of the game put him in a position that for some observers created at least the appearance of impropriety because he had arbitrated baseball salary disputes before his appointment to the Board[7] and, as the chairman of that agency, would inevitably be drawn into any strikes or lockouts that might arise in professional baseball during his term.

The threatened investigations of Gould's travel budget and attendance at baseball games never amounted to anything more than irritating and insulting distractions.[8] They were reminiscent of the baseless and unsubstantiated rumors floated by Gould's opponents while his nomination as Board Chairman was pending in the Senate, that Gould had a gambling problem and accepted bribes in arbitration cases to pay off his gambling debts.[9] Charges like this illustrate the hardball nature of Washington politics, especially in closely fought Senate confirmation battles.[10]

Of greater interest is Professor Gould's account of the NLRB's role in resolving the baseball strike that began on August 12, 1994, and resulted in the cancellation of the remainder of the 1994 season, including the World Series.

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through streams and corners which defy all earthly predictions.

William B. Gould IV, Baseball and the Sultan of Swat: The Curse of the Bambino, p. 353. Gould has written numerous books and articles on baseball and sports law. *See, e.g.*, ROBERT C. BERRY, WILLIAM B. GOULD IV & PAUL D. STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS (1986); William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (with Apologies to Soccer and Bobby Thomson)*, 8 IND. J. GLOBAL LEGAL STUD. 85 (2000); William B. Gould IV & Robert C. Berry, *A Long Deep Drive to Collective Bargaining: Of Players, Duress, Brawls, and Strikes*, *in* SPORTS AND THE LAW: A MODERN ANTHOLOGY 126 (Timothy Davis, Alfred D. Methewson & Kenneth L. Shropshire eds., 1999); William B. Gould IV, *Players & Owners Mix It Up*, CAL. LAW., Aug. 1988, at 56.

5. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). As two leading media critics have pointed out, "[n]ational media seem to have an unwritten rule: If a labor-management conflict isn't disrupting big-league sports or transportation, it isn't very important." JEFF COHEN & NORMAN SOLOMON, THROUGH THE MEDIA LOOKING GLASS: DECODING BIAS AND BLATHER IN THE NEWS 128 (1995).

6. Pp. 119-20, 211, 230.

7. P. 102.

8. Pp. 230, 246.

9. Pp. 26-27; Mike Weiss, *The Prey: Cover Story: The GOP's Politics of Destruction*, MOTHER JONES, July-Aug. 1994, at 50.

10. Professor Gould is in the company of such prominent political lightening rods as Robert Bork, Lani Guinier, Jocelyn Elders, Zoe Baird, John Tower, and Douglas Ginsburg.

That account illustrates three characteristics of Gould's memoir. First, it is a serious work of scholarship. In his discussion of the baseball strike, Professor Gould provides an excellent, scholarly treatment of the history of collective bargaining in professional sports and the legal issues confronting the Board and the parties in the particular labor dispute in question.[11]

Second, the book sheds valuable light on the relationship between the Executive Branch and the so-called independent agencies, revealing that behind-the-scenes communications between the White House and the NLRB occur more frequently than might be expected. For example, several weeks before the strike began, Gould was asked by the Secretary of Labor to suggest a mediator who could be named by the White House to assist in the bargaining between the owners and the union representing the players.[12] The following spring, when the Board was considering seeking an injunction against the owners' alleged unfair labor practices, the mediator eventually selected, former Secretary of Labor William J. Usery, called Gould to ask that the Board delay its decision because he thought (mistakenly) that the players and owners were close to an agreement.[13] Before the Board agreed to do so, Gould called White House Counsel Abner Mikva to discuss the mediator's status.[14] A few days later, after Gould and Board member John Truesdale got into a shouting match over Gould's discussion of the injunction case with a *New York Times* reporter, Gould had lunch with Mikva at the White House and "asked for him to see if Truesdale could be taken to the 'woodshed.'"[15] Gould later acknowledged that he "erred in making the request and Mikva was correct in rejecting it,"[16] but these and other contacts between Gould and members of the executive branch—for example, Secretary of Labor Robert Reich's suggestion during the budget crisis of 1995-1996 that the Board delay issuing certain controversial decisions until Congress passed a budget[17]—highlight the fact that "the line

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11. Pp. 101-11. In contrast, the memoir of former Secretary of Labor Robert Reich, which covers some of the same ground as Gould's book, is a humorous, more entertaining read, but it makes no pretense of being a work of scholarship. ROBERT B. REICH, LOCKED IN THE CABINET (1997).

12. P. 108. Gould mentions in a diary entry that mediating the baseball dispute was a job he would have loved "if only I wasn't supposed to adjudicate." Indeed, NLRB member Charles Cohen actually suggested to Gould that the two of them attempt to mediate the dispute, but "the complexities of recusal" in later Board proceedings led Gould to reject that suggestion. P. 108.

13. P. 114.

14. P. 114. Usery had been the subject of some criticism from the Players Association, and Gould wanted to confirm that Usery still had White House support as the mediator of the baseball dispute.

15. Pp. 116-17. Truesdale, a career official at the NLRB who served several stints as a member of the Board and succeeded Gould as NLRB Chairman, pp. 422-23 n.1, was serving a recess appointment to the Board at this time and might for that reason have been vulnerable to pressure from the White House.

16. P. 130.

17. P. 134.

between appropriate and inappropriate contact or discussion was inherently vague." Gould's view is that these contacts are on the appropriate side of the line so long as they are "unrelated to the actual substantive merits of particular cases."[18]

The third characteristic of Professor Gould's memoir illustrated by his account of the baseball strike is the author's discussion of his interpersonal relationships with other Board personnel and his determination to settle some old scores. As one journalist has explained, "Gould did not lack for ego, and like many proud and accomplished men he was also demanding, at times prickly and thin-skinned."[19] After describing a disagreement he had with NLRB general counsel Fred Feinstein, Gould wrote in his diary:

> This incident reminds me of the fact that all the principal players [inside the Board] here are *not* friends in any sense of the word. Feinstein has been calculating . . . from the very beginning. This is to be contrasted with the relationship between [Chairman Frank] McCulloch and [Arnold] Ordman [general counsel under President Kennedy] that existed when I was on the legal staff here in the sixties. They had a good relationship and consulted with one another. Feinstein rarely consulted me, if at all, and only does so when he has already talked to many others and has a plan to promote his office. Regrettably, [Board Member Margaret] Browning is aligned to him and so is Truesdale.
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> [Members] Stephens and Cohen, of course, are completely tied into the Republicans on Capitol Hill and thus cannot be trusted at all. I continue to hear rumors from a number of sources that [Senators] Kassebaum and Hatch are planning an investigation of me and are looking at my travel records.[20]

The dispute with Feinstein alluded to in the foregoing passage related to the respective roles of the general counsel and the Board in injunction cases, particularly high profile ones like the injunction against the baseball owners. Both Gould and Feinstein took office sharing the view that justice delayed often meant justice denied when it came to applying the NLRB's already weak remedial powers.[21] If the NLRB were to be effective in enforcing the federal labor policies embodied in the National Labor Relations Act (NLRA),

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18. P. 136. Gould's position is consistent with the terms of the Administrative Procedure Act's prohibitions against ex parte communications in agency adjudications. *See* 5 U.S.C.A. § 557(d)(1) (West 2002).

19. Weiss, *supra* note 9.

20. P. 113. Gould began keeping his diary while his nomination was pending before the Senate, p. xi, and lengthy passages from the diary fill many pages of his book. They certainly lend an air of intimacy and immediacy to the book, and it is interesting to read Gould's reactions to events as they happened, but they slow down the book's narrative flow. The diary entries might have been used more selectively and would have benefited from more rigorous editing.

21. For a leading critique of the adequacy of remedies available under the National Labor Relations Act and the consequences of delay in applying those remedies, see Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

therefore, both believed that the NLRB must exercise its "infrequently used discretionary power" to seek preliminary injunctions pending the Board's final resolution of certain types of unfair labor practice cases much more often and more aggressively than it had used that power in the past.[22] Indeed, Gould described the NLRB's more frequent use of these injunctions, pursuant to section 10(j) of the Act,[23] as "the most important reform of all" during his tenure in office.[24]

Under the statutory scheme, however, 10(j) injunctions could be sought in federal district court by the NLRB's general counsel only after the Board itself approved the general counsel's request for authorization to do so. This division of responsibility between the Board and the general counsel resulted from the 1947 Taft-Hartley amendments to the Act,[25] which made the general counsel independent from the Board and thus produced, in Gould's view,

> a two-headed monster that posed serious administrative problems. . . . Feinstein and I were frequently at odds, and he had the advantage of not sharing his authority with anyone else. Quite frequently, he undercut my efforts by going to [Margaret] Browning, and later [Members Sarah] Fox and [Wilma] Liebman, to gain support against positions I had taken.[26]

In the case of the baseball injunction, Feinstein and Gould agreed that a 10(j) injunction should be pursued against the owners for unilaterally imposing a salary cap and eliminating salary arbitration before an impasse in bargaining had been reached,[27] and the players had indicated that if an injunction issued,

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22. *See* pp. 65-67; Feinstein, *supra* note 2, at 26.

23. 29 U.S.C.A. § 160(j) (West 2002).

24. P. 65.

25. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

26. P. 89; *see also* pp. 150, 297. For an overview of the statutory relationship between the Board and the general counsel in the wake of the Taft-Hartley amendments, written by a former Board member with a more favorable view of the arrangement than Professor Gould's, see John E. Higgins, Jr., *Labor Czars—Commissars—Keeping Women in the Kitchen—the Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941 (1998).

27. The Players Association had filed an unfair labor practice charge against the owners for refusing to bargain in good faith, pursuant to section 8(a)(5) of the Act, 29 U.S.C.A. § 158(a)(5) (West 2002). To nonlabor specialists, it may seem odd for the union or the NLRB to take the position, in the middle of a strike, that a bargaining "impasse" had not been reached, but the fact that a strike had begun did not necessarily mean an impasse in the technical sense had been reached. Under American labor law, "[t]he right to strike is . . . considered a key element of a labor relations system designed to encourage productive and peaceful collective bargaining. It is the presence of effective weapons held in reserve by both sides that encourages negotiation and settlement within the statutory framework." DOUGLAS E. RAY, CALVIN WILLIAM SHARPE & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW 257 (1999). Bargaining between the parties often continues during a strike—indeed, the purpose of most strikes is to produce results at the bargaining table—and until a formal impasse has been reached, employers are for the most part prohibited from unilaterally changing the terms and conditions of employment. *Id.* at 206-07.

they would return to work.[28] Nothing could happen, however, until Feinstein requested authorization from the Board to seek the injunction, and in Gould's view, as spring training for the 1995 baseball season approached, "strange things were happening," and Feinstein was "deliberately dragging his heels."[29] Gould and Feinstein were each already taking heat from Republicans in Congress for their aggressive use of 10(j) injunctions, and Gould believes Feinstein was reluctant to initiate 10(j) proceedings in the high profile baseball case until Gould agreed with Feinstein's proposal "that we disguise the fact that [the general counsel's] role is separate from ours and create the impression in the public that we were speaking with one voice and one decision."[30] In his diary at the time, Gould engaged in some unflattering speculation about the possible motivations for Feinstein's conduct.[31] Given the larger political environment in which they were operating, however, and the fact that, except for two years during the Reagan presidency, the Board has almost always granted the general counsel's requests for authorization to seek 10(j) injunctions,[32] appearing to speak with "one voice" might not have been a bad approach for the agency to take politically, and would not have entailed any significant distortion of the reality of the situation.

Professor Gould is right, however, that the general counsel's independence from the Board, along with the fact that on the Board itself, the Chairman has only one vote among five,[33] creates inevitable tension and uncertainty as to who it is that actually speaks for the agency. On matters as mundane as setting up a committee to address the technology needs of the agency, Chairman Gould, as the titular head of the agency, and general counsel Feinstein, who was responsible for the operation of all of the agency's regional offices and supervised by far the larger number of agency employees, had difficulty agreeing on the number of representatives each should have on the committee.[34] On other occasions involving more substantive matters, the Board, or at least Chairman Gould, would have welcomed cases to adjudicate that would have called for NLRB resolution of certain important issues of labor policy which could then be reviewed by the Courts of Appeals and ultimately,

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28. P. 112.

29. P. 112.

30. P. 112.

31. Pp. 112-13. Gould's disagreement with Feinstein over this approach was another topic of conversation between Gould and White House Counsel Abner Mikva during the same lunch at which Gould asked that John Truesdale be taken to the woodshed. Pp. 116-17. Gould also discussed with Mikva the question whether members of the Board should issue signed opinions revealing their individual views on authorizing the general counsel to seek injunctions in high-profile cases like the baseball strike. P. 117.

32. *See* Feinstein, *supra* note 2, at 28 fig.2.

33. During much of Professor Gould's term as Chairman, the Board operated with fewer than its full complement of members, due to delays in the appointment and confirmation process. *See* Truesdale, *supra* note 2, at 4, 7.

34. Pp. 88-89.

perhaps, by the Supreme Court. However, the statutory division of labor between the general counsel and the Board requires that the general counsel first issue a complaint to initiate the adjudication. On occasion, according to Gould, "the general counsel had usurped responsibilities for statutory interpretation that properly belonged to the Board."[35]

Within the five-member Board as well, major battles ensued, again in the context of the baseball case and on other occasions too, over the question of who speaks for the Board. As Part III of this Review will explore more fully, Chairman Gould saw the chairmanship of the Board "more like a bully pulpit than a position of authority,"[36] and he therefore believed it was his responsibility to speak out on various aspects of federal labor policy and on developments within the agency. Moreover, even if he had preferred a more reticent role, as Chairman of an agency at the center of high stakes battles over the direction of federal labor policy, both the press and Congress would have forced the role of spokesman for the agency upon him in any event. His colleagues on the Board, however, whether for personal or political reasons, begrudged him that role and actually took a formal vote to prohibit any of them from speaking to the press about the baseball case. When Gould cast his lone vote against that policy, he stated that he would not be bound by the vote, and his subsequent communications with the press are what resulted in the shouting match with John Truesdale referred to earlier.[37] No one would characterize relationships within the agency as warm and friendly.

II. THE NLRB

Professor Gould's memoir of his tenure at the NLRB does much more than offer an insider's view of the personal and political conflicts that characterized his term in office. It also provides insights into many of the controversial labor policy disputes lurking in the cases that arose before the NLRB during the

35. P. 89. In this case, Gould was referring not to Feinstein but to a prior general counsel before either Feinstein or Gould had arrived at the agency, p. 312 n.15, but this consequence of the division of labor between Board and general counsel arose on their watches as well. Pp. 229, 310 n.3. This aspect of the statutory relationship between the general counsel and the Board has troubled me for many years, since the time I represented a charging party in a successful appeal of an NLRB interpretation of section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(1)(A) (West 2002), *see* Helton v. NLRB, 656 F.2d 883 (D.C. Cir. 1981). Despite our victory in the Court of Appeals, the general counsel refused to issue a subsequent complaint involving the same issue—and even the same parties—on the grounds that the Board had never changed its interpretation of the statutory provision in question. The general counsel took that view despite the fact that the Board had not had an opportunity to reconsider its interpretation of the provision since the D.C. Circuit's decision and indeed would never have such an opportunity unless and until a general counsel would issue a complaint in a case that would present the issue to the Board for reconsideration in light of the *Helton* decision.

36. P. 52.

37. Pp. 115-16.

1990s.[38] In so doing the book also sheds valuable light on the extent of independence a so-called independent agency like the NLRB actually experiences in a Washington characterized by divided government, with one party occupying the White House and the other wielding a majority in Congress.

For example, Gould's discussion of the circumstances under which mail ballots can be used in union certification elections demonstrates how such a seemingly mundane procedural issue can become highly controversial because of its effect on the substantive interests of the parties in a labor dispute. Traditionally, almost all NLRB-conducted votes to certify or decertify unions as the bargaining agents for appropriate units of employees take place on the employers' premises.[39] In limited circumstances, however, the NLRB's *Case Handling Manual* gives the general counsel discretion to use mail ballots, such as when employees are dispersed due to their job assignments.[40] Several times during Professor Gould's tenure as Board Chairman, the issue of mail ballots came up,[41] beginning with a preconfirmation discussion with Republican Senator John Chafee of Rhode Island, in which Chafee expressed concern that a Gould-led Board might permit the use of mail ballots more frequently.[42] Late in Gould's term, the Board issued a decision, *San Diego Gas & Electric*,[43] which clarified the circumstances in which mail ballots can be used and instructed the general counsel to revise the relevant provisions of the agency's *Case Handling Manual*.[44] The decision authorized mail ballots in slightly more expansive circumstances than before, and in a concurring opinion, Gould argued that the Board should have gone further still, to authorize mail ballots

38. Among these were contempt proceedings against the United Mine Workers union for strike violence related to the Pittston strike of 1993, pp. 90-96; "salting" (the union practice of assigning paid organizers to obtain employment at workplaces targeted for union organizing) and other union organizing tactics, pp. 182, 196, 216; bargaining rights of "contingent employees," p. 176; and limitations on union organizers' access to employers' property in the wake of *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), pp. 98-99, 257, 283. Perhaps the most controversial, and acrimonious within the Board, were the so-called *Beck* cases, involving the right of bargaining unit employees who choose not to become full-blown union members to seek refunds of a portion of the union dues they pay pursuant to collectively bargained union security clauses, in accordance with *Beck v. Communications Workers of America*, 487 U.S. 735 (1988), pp. 73-74, 128-30, 141-48, 198, 221-31, 251, 259, 376-85.

39. *See* RAY ET AL., *supra* note 27, at 83.

40. P. 64.

41. Pp. 64, 84-85, 227.

42. P. 38.

43. 325 N.L.R.B. 1143 (1998).

44. The Case Handling Manual was revised, and the relevant criteria for use of mail ballots can be found at NLRB, CASE HANDLING MANUAL, pt. 2, § 11301.2 (representation proceedings).

when necessary to conserve the Board's limited resources.[45] Nevertheless, the decision fell far short of accepting the view of leading union lawyers that

> holding the election in the workplace is of material significance as it allows the employer to have the last word in the campaign. . . . [T]he Board's decisions . . . simply fail to recognize that so long as the employer is treated as a party to the election and allowed to bar union representatives from the workplace, the workplace is not an "appropriate location" for an election.[46]

Gould's memoir indicates that he essentially accepts the AFL-CIO's position on mail ballots. While he is proud of the fact that the Board "doubled the use of mail ballots during the four-plus years of [his] term—employing them even prior to the Board's decision in *San Diego Gas & Electric*,"[47] he would have liked to go further than he did in his opinion in that case. Unfortunately, "the price of issuing this decision was to bowdlerize the language of my concurring opinion, which originally suggested that the genuine rationale for employers' rejection of mail ballots was the desire to engage in antiunion tactics."[48] As Gould explains:

> [T]he real heart of the matter was revealed by the [Republican dissenters in *San Diego Gas & Electric*]. . . . They decried the inability of employers to speak directly to workers just before elections. It must be said that the effects of captive-audience speeches (in which workers are called together to hear the company's view on company time and property twenty-four hours prior to the mailing of the ballots) may well be dissipated by mail balloting. Thus a postal election may take place over a period of weeks subsequent to management's speech, whereas a manual-ballot election conducted at the plant generally occurs twenty-four hours after the speech. The effect of this difference is dramatized by the fact that of the 3,476 elections held in fiscal 1997, a majority of votes cast were in favor of a bargaining representative in 48.2 percent of the elections. On the other hand, the number of elections won by the unions when they were conducted by mail rose to 66 percent. Thus it appears that the dispute is really about employers' loss of opportunity to influence workers' votes.[49]

The fact that unions have a better chance of prevailing in certification elections conducted by mail, of course, explains why "this issue, like so many others . . . [became] politicized."[50] Thus, the Labor Policy Association, which Gould describes as "an extreme right-wing business group" that had lobbied hard against Gould's confirmation by the Senate,[51] politicized the issue as early as August of 1994 by saying "that [he] wanted to eliminate manual ballots.

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45. *San Diego Gas & Elec.*, 325 N.L.R.B. at 1146 (Gould, Chair., concurring).
46. Hiatt & Becker, *supra* note 2, at 120.
47. P. 84
48. P. 85.
49. Pp. 84-85.
50. P. 64.
51. Pp. 18, 36.

Even by their standards, this was a rather big lie."[52] Both at the time and in his book, Gould defends his concurring opinion in *San Diego Gas & Electric*, in which he argued that mail ballots are "appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources."[53] This approach, Gould argues, was particularly valid "given the budget constraints imposed by the Hundred and Fourth and Hundred and Fifth congresses . . . . At the same time, of course, I had no illusions about the reaction of congressional opponents—they cared not one whit about cutting costs when it did not suit their ideological agenda!"[54]

The ability of Congress to rein in a so-called independent agency like the NLRB, especially in the period of divided government following the Republican victory in the 1994 congressional elections, is dramatically illustrated by the Board's unsuccessful attempt to utilize rulemaking to clarify the criteria it used in determining "appropriate bargaining units" in situations where employers operate their businesses in multiple locations. Employees seeking union representation at, for example, a restaurant chain like Denny's might have greater success winning certification elections at one location at a time, rather than attempting to unionize all the Denny's locations in a metropolitan area simultaneously. The NLRB, therefore, has long adhered to a presumption that a single location bargaining unit is appropriate.[55] Employers, however—who generally prefer multilocation units precisely because they are more difficult for unions to organize—have always had the opportunity to rebut that presumption, but as Professor Gould explains, "[t]he difficulty was that the Board had never spelled out precisely the circumstances under which the employer rebuttal would be upheld, thus leaving it to ad hoc litigation."[56]

The NLRB had long been the target of both scholarly and judicial criticism for its failure to use its rulemaking powers to clarify policy issues like this one,[57] until finally, in 1989, the Board promulgated its first significant substantive rule, involving bargaining units in the health care industry.[58]

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52. P. 75.

53. San Diego Gas & Elec., 325 N.L.R.B. 1143, 1147 (1998) (Gould, Chair., concurring).

54. P. 84; *see also* p. 227.

55. *See, e.g.*, Black & Decker Mfg. Co., 147 N.L.R.B. 825 (1964). *See generally* Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984).

56. P. 71.

57. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d Cir. 1966); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

58. 29 C.F.R. § 103.30 (1989). *See generally* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991). The regulation was upheld by the Supreme Court in *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991).

Gould took office determined to follow that precedent and "to make rulemaking one of [his] priority reform initiatives."[59] That, he discovered, was easier said than done. One of the reasons that the NLRB had for so many years eschewed rulemaking was that incremental policymaking through adjudication was often low-profile policymaking, whereas notice and comment rulemaking by its very nature attracted more attention, thereby inviting congressional scrutiny and intervention.[60] That is precisely what happened with Gould's rulemaking initiative.

Gould began discussions within the Board on the possibility of promulgating a rule dealing with single versus multiple location bargaining units soon after his arrival in Washington,[61] and on June 2, 1994, the agency published in the *Federal Register* an advance notice of proposed rulemaking, inviting interested parties to comment on the wisdom of issuing a rule and on the appropriate content of such a rule.[62] Actual publication of the proposal itself was delayed until September of 1995, in part because of Republican opposition to the proposal in Congress and in part due to turnover on the Board: "Several Board members were genuinely sympathetic to rule making and to the objectives of this proposal; but they also wanted to be reappointed and so were not immune to political pressure. And there was political pressure aplenty."[63] As Gould explained, the proposed rule

> brought complaints from the Republicans' supporters. In the restaurant industry, franchise fast food outlets were alarmed by the rule designed to take the ambiguity out of the employer's rebuttal of the single-unit presumption . . . . Congressional Republicans saw the proposed rule as likely to expedite union elections, which, the National Restaurant Association convinced them, would probably result in more workers voting for unionization. Certainly the Republicans were correct in assuming that one of the by-products of rule making would be the streamlining and acceleration of the process; whether it would also induce workers to vote for unions in greater numbers has never been tested empirically.[64]

Opponents of the proposal also feared that, once incorporated into a rule, the NLRB's policy on single versus multiple location units would be more difficult to change.[65] Gould acknowledged that fact but thought it was a selling point for policymaking through rulemaking:

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59. P. 71.

60. *See* Robert L. Willmore, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J., 982, 993-98 (1980).

61. P. 71.

62. Appropriateness of Requested Single Location Bargaining Units in Representation Cases, 59 Fed. Reg. 28,501 (June 2, 1994) (to be codified at 29 C.F.R. pt. 103).

63. P. 73; *see also* pp. 87-88. The notice of proposed rulemaking appeared at 60 Fed. Reg. 50,146 (1995).

64. P. 168.

65. P. 73. In fact, the proposed rule would not have changed the composition of many bargaining units, since it did not depart significantly from the standards embodied in the

> Rule making would not only create more clarity but would also eliminate the potential for the kind of "flip flops" employers and union lawyers had often complained of in Board adjudications. . . . [T]his would also diminish the role of politics in particular cases or groups of cases, avoiding a situation in which every new president could appoint a Board to change the law through adjudication, sometimes on the basis of the skimpiest of records.[66]

This argument did not persuade the proposed rule's opponents in Congress, such as the Republican chairman of the House Subcommittee on Regulation and Paperwork: "You're saying . . . there have been flip-flops in the past. In the name of stability, under your rule from now on, it's only going to be flop. . . . There won't be any more flips."[67]

During the spring of 1996, Republicans in both houses of Congress applied significant pressure to the Board in an attempt to block the proposed rule. On March 7, a House subcommittee held a hearing on the proposal, and a few weeks later, thirty-eight Republican Senators and sixty-seven Republican House members signed separate letters stating their opposition to the proposed rule. The letters argued, among other things, that the Board should not make fundamental changes in such an important area of the law when it was operating with only four members, one of whom was serving as a recess appointee.[68] In his memoir, Gould not only denies that the proposed rule would have fundamentally changed the law, he also notes the irony that "in 1996 it was the Republicans themselves who were blocking the President's appointments and were, therefore, the source of the problem they cited."[69]

At about the same time, an aide to Republican Senator Arlen Specter contacted Gould seeking a promise that the Board would not move forward with the proposed rule "until there was a 'consensus' between labor and management." Gould recorded this response in his diary:

> I told him that, as a practical matter, it was unlikely that we would move forward with it until the fall. But I said that I couldn't promise him anything and that I was the chairman of an independent regulatory agency. [Specter's aide] said: "Perhaps you would prefer a rider on the single-unit location." I

Board's case law on the subject. In 1995, for example, 86.5% of the adjudicated cases raising the issue resulted in single-facility bargaining units. P. 172. The more significant reason for employer opposition to the proposed rule was not that it would change the law, but that it would clarify it, thereby reducing the need for time-consuming litigation that substantially delays many certification elections, p. 169, usually to the employer's advantage. *See* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 78 (Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald & Ronald L. Seeber eds., 1994).

66. P. 170.

67. P. 170 (quoting Rep. James Talent).

68. Pp. 171-72.

69. Pp. 171-72.

> said that, "I would be less uncomfortable with that" than making some kind of promise to Specter.[70]

In April, the federal budget bill was finally passed, and it included a rider prohibiting the NLRB from spending any of its funds on the proposed rule, "ensur[ing] that the issue would be nothing more than a debating point during [Gould's] term in office."[71] Interestingly, during earlier discussions with personnel from the Office of Management and Budget in the Clinton White House, Gould had been asked, "How important was rule making to the Board? Could this be used as a chip to be bargained away for other parts of our appropriations request to Congress?" Gould's response was "invariably 'yes'—and it *was* used as a chip. From [his] perspective, money or appropriations were the sine qua non of effectiveness."[72]

As an academic with little prior experience inside the Beltway,[73] Professor Gould acknowledges several times in his memoir that he was sometimes naive about the ways of Washington.[74] Certainly that is true in the case of the rulemaking proceedings described above. "What we had not foreseen," he explains, "was the fact that rule making, by its very nature, generates publicity. . . . By using rule making . . . we advertised what we were thinking of doing before we did it, thus inviting political interference from those unconcerned with the rule of law."[75] If he had it to do over again, he would have followed his agency's traditional practice of using adjudication to make policy:

> If the Board had rendered such a decision at a time when the press was not watching, or during the government shutdown of late 1995-early 1996 when most people assumed we were not issuing decisions, it might have taken weeks, or even months, for the public and industry to find out what we were

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70. P. 205.

71. P. 172. The rider remained in the following two years' budgets as well, and eventually, the Board, over Gould's dissent, formally withdrew the proposed rule. Pp. 174, 214. Even after the proposed rule was dead, Republicans in Congress continued to try to influence NLRB policy on the single versus multiple location bargaining unit question:

> A February 24, 1998, letter to me from the House Appropriations Subcommittee Republicans is a classic illustration of inappropriate congressional interference with the rule of law and the substitution of politics for law. Among other things, the Republicans requested that I communicate in writing to the regional directors about the proper criteria for determining the appropriate representation units . . . . The letter made it clear that the Republicans were not satisfied with having stopped rule making in its tracks through appropriations riders . . . and the fact that a majority of the Board, over my dissent, had voted to withdraw the rule altogether. Now, without any amendment to the NLRA, the House Republicans were presuming to instruct me to tell regional directors how to resolve the single facility unit cases.

P. 131; *see also* p. 262.

72. Pp. 126-27.

73. For two years early in his career, Gould served as an attorney on the staff of Board Chairman Frank McCulloch. P. xii; ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 2001-02, at 548-49 (2001) [hereinafter AALS DIRECTORY].

74. *See, e.g.*, pp. 160, 175, 206.

75. P. 173.

> doing. The Republicans would have been protesting about an adjudicated rule that was already on the books and could only be changed by a statutory amendment. Whatever might have happened in the House under these circumstances, such a bill would have had to survive both a potential filibuster by Senate Democrats and the veto sure to come from President Clinton. Compare this to the relative ease with which the Republicans thwarted the prospective rule making with an appropriations rider.[76]

Chairman Gould's difficulties in Washington, however, resulted from more than an academic's idealism and occasional naiveté. At times, they also seemed to stem from an unrealistic expectation of the actual independence the so-called independent agencies in Washington should enjoy. While Gould concedes that "the Board's perfect independence, though frequently extolled, has always been an elusive reality," and that "independence is a somewhat mythical and abstract idea,"[77] he nonetheless wrote to members of Congress at one point that "I am sure you agree that it is vital that independent agencies remain free of interference from both the legislative and executive branches of government."[78] In analyzing independent federal agencies, most administrative law commentators focus on the "security of tenure" of the agencies' commissioners or board members, or their "insulat[ion] from presidential control in one or more ways."[79] There is generally less emphasis on independence from Congress, however,[80] and the view that such agencies should be completely independent of both the legislative and executive branches has been described by one pair of commentators as "most extreme."[81]

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76. P. 174.

77. Pp. 122, 167.

78. *Letter by NLRB Chairman Gould to Republican Members of House Economic and Educational Opportunities Committee, April 19, 1995*, 1995 Daily Lab. Rep. (BNA) No. 76, at E-1 to E-2 (April 20, 1995), *quoted in* Flynn, *supra* note 1, at 512 n.193.

79. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.5, at 45 (3d ed. 1994); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.10, at 20 (3d ed. 1991). *See generally Symposium: The Independence of Independent Agencies*, 1988 DUKE L.J. 215.

80. One theory posits that independent agencies are designed not only to be insulated from executive control but to be "*more* susceptible to congressional control." RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 94 (1999) (emphasis added); *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 235-36 (1989) (describing Congress's "'awesome arsenal' of weapons . . . against agencies: legislation, appropriations, hearings, investigations, personal interventions, and 'friendly advice' that is ignored at an executive's peril" (citations omitted)). In this Review, I have focused more on appropriations than on the other "weapons" Wilson mentions, but all of them were brought to bear on the NLRB, particularly hearings and investigations, as Gould discusses throughout his memoir. Pp. 150-51, 154-55, 157-63, 170, 201-04, 232. For a catalog of the four oversight and five budget hearings concerning the NLRB that were held from 1995 through 1998, *see* Truesdale, *supra* note 2, at 10 n.29.

81. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1136 (2000).

It may be unfair to ascribe such a view to Professor Gould, but throughout his memoir he compares his role as Chairman of the NLRB with that of a federal judge, and at times he seems to believe Board members should have almost as much independence as the federal judiciary.[82] The analogy to the judiciary is an apt one,[83] but as Professor Gould learned in Washington, if he didn't already know it when he arrived, comparable independence for Board members was impossible, and not only because of the congressional control over agency budgets exemplified by the abortive rulemaking proceedings described above. Unlike federal judges, Board members do not have lifetime tenure, and although they can be removed from office only for cause, the absence of long-term job security substantially undermines their independence. According to Gould, most Board members, who are usually inside-the-Beltway types to begin with, "desperately want to be reappointed," and as a consequence, they will sometimes modify their views to curry favor with the constituencies most likely to help them achieve that result.[84] "Early in my term," Gould explains, "I was told that one member . . . up for reappointment was openly advertising to parties whose cases were before the agency how he would vote on such cases. His conduct represented one extreme on the politicization continuum. Fortunately, he was not reappointed."[85]

Professor Gould's solution to this problem would be to limit Board members to only one term, but to lengthen that term to seven or eight years.[86] Unfortunately, he has no solution for the much more serious problem that confronted him in Washington—the vicious, ideologically driven, take-no-prisoners nature of the political battles over the future of federal labor policy. As Chairman of the National Labor Relations Board, of course, he was right in the middle of the fray.

III. CHAIRMAN GOULD AND HIS CRITICS

The leading critic of Chairman Gould among other NLRB insiders—or at least the leading critic willing to commit her views to print[87]—is Professor

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82. *See* pp. 70, 132, 166, 188, 198; *cf.* p. 63.

83. *See, e.g.*, Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 261-62.

84. P. 126.

85. P. 125. For additional, though less extreme, examples of the effects on Board decisions of members' jockeying for reappointment, see pp. 55-56, 73, 75, 198, 215.

86. P. 126.

87. Some of his colleagues on the Board, however, did issue statements to the press critical of Gould, particularly during their disagreements over the handling of the baseball injunction. *See, e.g.*, Press Release, NLRB, R. 2053, *Statement of Board Member Charles I. Cohen Regarding the Baseball Case* (Mar. 27, 1995); Statement by John C. Truesdale, Member, NLRB, to Daily Labor Report, BNA (March 27, 1995), *cited in* Flynn, *supra* note 1, at 518 n.214, 519 n.215. After Gould's departure from the Board, some of his former colleagues, without mentioning Gould explicitly, emphasized the collegiality of the Board in

Joan Flynn, who served as Staff Counsel for Board Member Charles I. Cohen from 1994-96.[88] While Professor Flynn concedes that Professor Gould was "perfect on paper" as President Clinton's choice to chair the NLRB,[89] she mercilessly attacks him for his "fatal flaw—his evident lack of both internal and external political skills" which led to "the dark side of Gould's tenure: his penchant for speaking out on controversial issues and lashing out at his opponents, and the Congressional reaction engendered thereby, as well as his inability to get along with, much less lead, his colleagues at the NLRB."[90] Flynn endorses the view of some management and labor critics of Gould's performance at the Board that he was guilty of "'politicizing' the agency and thereby damaging the Board's long-term viability,"[91] speculating that Gould's behavior "'made sense' if Gould was more concerned with his reputation in the academic community—to which he was to return—than with the Board's future ability to function."[92]

Professor Flynn is not the first critic to focus on Professor Gould's "large, sensitive ego,"[93] some of which is evident in his memoir, but she is grossly unfair in laying the lion's share of the blame for the tumult surrounding his tenure in office at Gould's feet, rather than acknowledging the nearly impossible political climate in which he was operating. The best evidence of this is the bitter opposition his nomination faced from Senate Republicans on behalf of antiunion lobbies like the Labor Policy Association, the Chamber of Commerce, and the National Right to Work Committee, well before any of the "fatal flaws" Professor Flynn attributes to Gould had surfaced.[94] As Professor Charles Craver explained, somewhat facetiously, "Professor Gould . . . made the mistake of publishing a new book, *Agenda for Reform*, just before his nomination."[95] That book,[96] which Flynn concedes contained "mainstream

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the post-Gould period. *See, e.g.*, Truesdale, *supra* note 2, at 16; *Truesdale Reflects on Tenure as Chairman; Discusses Factors That Affect Case Backlog*, 1999 Daily Lab. Rep. (BNA) No. 220, at A-9 to A-10 (Nov. 16, 1999), *cited in* Flynn, *supra* note 1, at 523 n.235.

88. AALS DIRECTORY, *supra* note 73, at 493.

89. Flynn, *supra* note 1, at 471.

> As a professor of labor law, [Gould] combined the objectivity of the [NLRB] careerist with the intellectual independence of the academic. As an arbitrator, he brought some of the added practical expertise of the union or management-side lawyer, along with a willingness, as a neutral, to actually put that expertise into effect.

Id. at 481.

90. *Id.* at 469.

91. *Id.* at 468 (quoting management lawyer and former NLRB General Counsel John S. Irving); *id.* at 468 n.16 (citing criticism from AFL-CIO sources).

92. *Id.* at 531.

93. Jonathan D. Rosenblum, *His Field of Dreams*, CAL. LAW., Sept. 1996, at 35, 83 (quoting former NLRB Chair Edward B. Miller); *see also supra* note 19 and accompanying text.

94. Gould is an African American, and his race may also have been a factor in the opposition he faced. *See* pp. 11, 27, 37, 43.

95. Craver, *supra* note 2, at 123.

96. WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT

Democratic views"[97] and which reviewers described as proposing reforms that were "truly modest,"[98] "politically moderate [and] incrementalist,"[99] and "comfortably within the mainstream of academic writing about labor law,"[100] was characterized by Gould's opponents "as 'radical' and 'extremist,' . . . as a 'manifesto' for the radical rehauling of America's labor laws, and as 'a battle cry—institutional unionism's Mein Kampf."[101] Gould's opponents were so vehement they attacked not only his ideas but the man himself, floating baseless rumors about gambling debts, bribery, and associations with South African communists.[102] And this was the political climate *before* the Republicans regained control of Congress in the 1994 elections![103]

The unfairness of Professor Flynn's attack on Gould is further evidenced by her own comparison of Gould's experience as Chairman with Fred Feinstein's as general counsel. Gould's "impolitic conduct," according to Flynn,

> stood in sharp contrast to the much savvier approach of . . . Feinstein, who had come to the Board after many years of working for Congress . . . . The contrast between the two was most striking in their respective public comments concerning the increase in the number of "10(j)" injunctions sought under the Gould/Feinstein regime. Gould, for his part, continually played up the magnitude of the increase and the Clinton Board's activism in this area—even after the issue had become a huge lightning rod with Congress. Feinstein, on the other hand, took a much more low-key approach, emphasizing the continuity between his approach . . . and that of prior General Counsels . . . . Gould the academic, in short, only further fanned the flames of contention,

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RELATIONSHIPS AND THE LAW (1993).

97. Flynn, *supra* note 1, at 493.

98. Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616, 1617 (1995).

99. Daniel J. Gifford, *Labor Law and Its Reform*, 80 IOWA L. REV. 201, 201 (1994).

100. Gottesman & Seidl, *supra* note 1, at 751.

101. Flynn, *supra* note 1, at 493-94 (quoting, respectively, Senators Kassebaum, Simpson, and Nickles, the Chamber of Commerce, and the National Right to Work Committee).

102. *See* p. 27; *supra* note 9 and accompanying text.

103. Perhaps it is an indication of Professor Gould's political naiveté when he entered this arena that he thought publication of *Agenda for Reform* would help his nomination; in fact, he feared that it might be organized labor that would oppose his nomination, or damn it through faint praise, because of his writings during the 1960s and 1970s critical of the discriminatory racial practices of many unions, particularly the building trades. Pp. 17, 23; *see, e.g.*, WILLIAM B. GOULD IV, BLACK WORKERS IN WHITE UNIONS (1977). Gould also served on the advisory board of the Association for Union Democracy, a position not likely to endear him to many entrenched union officials. According to Professor Craver:

> People who thought that Professor Gould was a knee-jerk supporter of labor unions should have reviewed his early writings, which were critical of discriminatory practices by many trade unions. During this period of his academic career, labor leaders considered Professor Gould an enemy of unions. Throughout his distinguished academic career, Professor Gould has been . . . an unequivocal supporter of *employee rights*. When individual rights have been threatened by management *or* labor practices, he has spoken out.

Craver, *supra* note 2, at 124 (emphasis added).

while Capitol Hill veteran Feinstein sought to present the Board's actions in the least controversial light.[104]

Flynn relegates to a footnote, however, what is perhaps the most telling aspect of this comparison: that despite their differences in style and approach, Gould and Feinstein experienced exactly the same reaction from the Republican Congress.[105] It was not only Gould but Feinstein as well who provoked congressional cuts of the NLRB budget, with one Congressman posing the question to Feinstein, "What percentage of a [budget] reduction would it take for you to resign?"[106] Indeed, Feinstein ultimately withdrew his name from consideration for a second term as general counsel because of doubts that the Senate would confirm his reappointment.[107]

Certainly Professor Flynn is correct that Gould had a penchant for speaking out on controversial issues, and that his outspokenness provoked hostile reactions from many in Congress. Indeed, there were times when he probably did go too far, exhibiting, in Flynn's words, "near-genius for irritating Congress."[108] For example, in a statement he submitted to the California Legislature opposing Proposition 226, which would have required unions to obtain explicit authorization from their members before spending dues monies for political purposes, Gould should have refrained from offering as a reason for his opposition the fact that the proposal would "cripple a major source of funding for the Democratic Party."[109] As Gould wrote in his diary, "a veritable firestorm" resulted from his statement, which angered Democrats in Congress almost as much as Republicans, since it provided House Republicans with support for their claims that he had "politicized" the NLRB.[110] Although Gould acknowledges that it was a mistake for him to make the reference in his statement to union support for the Democratic Party,[111] it should also be noted that this incident occurred just a few months before Gould left office, long after Republicans in Congress had made up their minds about him.

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104. Flynn, *supra* note 1, at 534-36 (citations omitted).

105. *See id.* at 536 n.299.

106. *Id.* (quoting Rep. Jay Dickey).

107. *Id.*

108. *Id.* at 533.

109. Gould's statement in opposition to Proposition 226 is reprinted in an appendix to his memoir. Pp. 386-87. Of course, that was not Gould's only, or even principal, reason for opposing Proposition 226, but it is the one that garnered the most attention. *See* pp. 268-69.

110. P. 269; Flynn, *supra* note 1, at 497 n.130. "What in the world did you think you were doing . . . ?," demanded David Obey, the ranking Democrat on the appropriations subcommittee. "Don't you realize that you have opened yourself up and the agency up to an attack by the conservative Republicans . . . ?" Gould later described the day of that confrontation as "the lowest" of his term in office. P. 271.

111. P. 271. Union financial support for Democratic candidates was a particularly sore subject for congressional Republicans because of the AFL-CIO's renewed and intensified commitment, under its new president, John Sweeney, to use its political muscle to elect more Democrats to Congress. *See id.* at 219.

Professor Flynn's criticism of Gould for speaking out on other "hot button" topics, such as striker replacement legislation and the "TEAM" Act,[112] is in my view less well-founded. As Professor Gould has noted in his own defense, the chairs of other quasijudicial agencies, like the Federal Trade Commission and the Federal Communications Commission, have often spoken out on legislative proposals affecting the statutes their agencies administered, and while recent practice was for NLRB chairmen to refrain from doing so, that has not always been the case.[113] Moreover, as he discovered in the case of the TEAM Act, if he did not set forth his views on the pending legislation, "others, quoting from my earlier writings, would try to characterize them for me."[114]

Gould was well aware of the argument made by other Democrats at the NLRB, like member Sarah Fox and general counsel Fred Feinstein, that his speeches triggered budget retaliation by Congress,[115] but it cannot be forgotten that this was in the midst of Newt Gingrich's campaign to virtually repeal the entire New Deal. Would Republican hostility toward the NLRB have been any less if Gould had not been as outspoken on labor policy matters as he was? I tend to agree with Professor Gould that it would not:

> [T]he fact of the matter was that the Republican attacks on our budget were motivated by their hostility to the NLRA and the Board itself. Our use of Section 10(j) antagonized them, and our rule making and scheduling of frequent oral argument—all of which I take responsibility for—caught their attention and prompted them to move against us on particular issues before we could institute needed reforms. Moreover, the AFL-CIO's active involvement in the 1996 campaign enraged the House Republicans and made them all the more determined to move against any labor legislation thought to be favorable to organized labor. Only repeal of the National Labor Relations Act and, perhaps, its replacement with repressive legislation would have satisfied them.[116]

Professor Gould's assertion that what congressional Republicans really wanted was the repeal of the NLRA is probably an overstatement, since anti-union forces have learned to live with the Act, "not for the positive contribution it makes but rather for the brake it applies to other approaches to ordering labor relations."[117] Republicans in Congress, therefore, may not have been actively

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112. Flynn, *supra* note 1, at 495-96. The Teamwork for Employees and Managers Act, which would have modified the National Labor Relations Act's prohibition against "company unions" to permit more forms of "workplace cooperation," was eventually vetoed by President Clinton. *Id.* at 496 n.124.

113. Pp. 186-87. Even Supreme Court Justices sometimes speak out on pending legislation. P. 188.

114. Pp. 185-86, 190-92.

115. P. 193. At one point in 1995, a House committee proposed a 30% cut in the NLRB's budget, and the full House voted a 15% cut, but the Senate restored all but 2% of that cut to the final budget. Pp. 400-01.

116. P. 193.

117. Gottesman & Seidl, *supra* note 1, at 754. As Professor Gottesman and his coauthor explain,

seeking the repeal of the statute, but they were perfectly happy to see the agency that administers it crippled by budget cuts and paralyzed by interminable delays in confirming appointments to fill vacancies on the Board.[118] In all likelihood, that would have been the case even if Gould had listened to his critics and refrained from using his NLRB chairmanship as a "bully pulpit" for commenting on controversial issues of labor policy as often as he did. Professor Flynn herself points out that "the Republicans' aggressive oversight of the Gould Board marked a continuation of an age-old pattern; oversight bordering on or spilling over into harassment has been a leitmotif of NLRB history."[119] This was the case despite the fact that most Board members, apart from Chairman Gould, have refrained from commenting publicly on pending legislation.[120]

Certainly, Professor Gould could have picked his battles with Congress more carefully and done more to cultivate a collegial atmosphere within the agency he chaired, but as the day-to-day battles fade into the past, the most important legacy of his tenure at the NLRB is the case law he and his fellow Board members crafted and the well-reasoned opinions he authored. Even his harshest critic agrees that Gould's decisional record was "impressive, and the promise of his balanced and varied background largely borne out."[121] Unlike management or union-side practitioners, who when appointed to the Board feel pressure to "deliver the goods for 'their' side," and unlike NLRB careerists, who when appointed to the Board tend to lack outside experience and sometimes lack imagination as well, Chairman Gould's work at the Board "reflected a high degree of objectivity and intellectual independence, whether measured qualitatively or quantitatively."[122]

> The NLRA remains attractive to employers because it (1) preempts the states from enacting labor laws more favorable to employees; (2) bans the secondary boycott, a union tactic that would exert real pressure on employers to make concessions; (3) diffuses momentum for the legislation of minimum terms and conditions of employment by proffering a means through which employees can (however illusorily) pursue their own preferences; and (4) creates an image of nuanced balancing of employer and employee interests that stifles public sentiment for a stronger collective bargaining law.

Id.

118. The problem of turnover on the Board and delays in the confirmation of new members has changed little in the four years since Chairman Gould's term ended. *See Three Current NLRB Members Discuss Challenges Caused by Member Turnover*, 71 U.S.L.W. 2146 (2002).

119. Flynn, *supra* note 1, at 516 (citations omitted).

120. *Id.* at 504 n.159.

121. *Id.* at 483.

122. *Id.* at 476, 484. During Gould's term, for example, in cases with at least one dissent, former management lawyer Peter Hurtgen voted the "promanagement" position in 100% of the cases in which he participated, while former union lawyer Margaret Browning took the "prounion" position in 98% of the cases in which she participated. *Id.* at 484. Gould's record, on the other hand, was a more balanced 78% to 22% split in favor of the union position, including "proemployer" stances in such controversial areas as nonemployee access to company property, *e.g.*, Leslie Homes, Inc., 316 N.L.R.B. 123, 131 (1995), *rev.*

Moreover, as he promised the Senate during his confirmation hearings, Chairman Gould exhibited "extraordinary scrupulousness in following Supreme Court precedent with which he strongly disagreed."[123] He also refrained from attempting to implement reforms he had advocated in his book, *Agenda for Reform*, or in his public statements, that could not find support within the existing statutory framework. As management lawyer and former NLRB Chairman Edward B. Miller explained, "Because of what we knew about Chairman Gould's writing, we expected more of a drastic switch in board decisions than we have thus far seen. . . . He told the Senate . . . that he would interpret the law as it now is. He has by and large done that."[124]

Where not boxed in by statutory language or Supreme Court precedent, however, Chairman Gould's opinions "bore the mark of a scholar; they were invariably thoughtful and consistently evidenced a willingness to reexamine the conventional wisdom," and yet they still "reflected a high degree of practical expertise."[125] For an academic with a temperament perhaps not ideally suited for the rough-and-tumble world of Washington politics, this is a record of which Professor Gould can be justifiably proud.

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denied sub nom. Metro. Dist. Council v. NLRB, 68 F.3d 71 (3d Cir. 1995), employee participation schemes, *e.g.*, Keeler Brass Auto. Group, 317 N.L.R.B. 1110, 1119 (1995), and especially in the *Beck* cases, *e.g.*, Connecticut Limousine Serv., Inc., 324 N.L.R.B. 633, 638 (1997). Flynn, *supra* note 1, at 484, 486-88.

123. Flynn, *supra* note 1, at 489.

124. *Quoted in* Rosenblum, *supra* note 93, at 81.

125. Flynn, *supra* note 1, at 490-91. For citations to Gould opinions illustrating these points, see *id.* at 490 nn.100-01, 491 n.102.