



THE DEVELOPMENT OF “FINAL OFFER SELECTION”

Laurence H. Silberman

IN FEBRUARY OF 1969, shortly after Richard Nixon was inaugurated, George Shultz, then the newly appointed Secretary of Labor, called me, asking me to come to his office for an interview. I was then arguing appellate cases in the general counsel's office of the National Labor Relations Board. At the ABA convention in October 1967 in Hawaii, Arnold Ordman and Steve Gordon, the Board's general counsel and deputy general counsel, had come to my house for dinner. After a number of drinks, they suggested I come back and argue cases for the Board. As a partner in the Hawaiian firm that handled virtually all the management labor law in Hawaii, I had argued successfully several cases against the Board in the Ninth Circuit. I was also an open, if not notorious, Republican, so Arnold and Steve thought I would add some desired “diversity.” Intrigued, I resigned my partnership at the end of 1967 and came back to Washington, expecting to stay a while at the Board. But the next year, when Nixon won the presidential election, I turned out to be a unique commodity. I was a Republican expert in a management firm who had taken a neutral rinse. A prominent Washington lawyer had sent my name to the Hotel Pierre, where senior Nixon campaign officials were screening possibilities for appointments. When Shultz called me, I thought he was

Laurence Silberman is a Senior Judge on the U.S. Court of Appeals for the D.C. Circuit.

interested in perhaps a special assistant or a deputy general counsel. After all, I was only 33. But I had the dubious advantage of looking at least five years older, and so I was offered the post of Solicitor.

From the beginning of the Administration, we were faced with the problem of strikes in the transportation sector: railroads, airlines and shipping. Shortly after I was confirmed, I accompanied the Secretary to the White House to discuss with other senior Administration officials a pending railroad strike. Shultz was anxious to break with the prior Arthur Goldberg/Willard Wirtz tradition of Labor Department intervention in private management-labor disputes. He used to say, "If you hang out your shingle, you will get all the business," meaning if the parties expected the Secretary of Labor to step into major labor disputes, they would be less inclined to settle before that event. And, of course, when speaking of the transportation industries, the national emergency dispute provisions of Taft-Hartley always loomed. If a dispute went to a strike, the government could go to federal district court for a cooling-off injunction sometimes followed by legislation; in effect, 535 arbitrators would write the contract. George Shultz thought that was a nightmare – as did most observers. He was anxious that the parties would see the government as a very reluctant intervenor.

As it happened, early in our tenure, we faced a threatened nation-wide rail strike. Warner Gardner of Shea and Gardner, an ingenious lawyer, sought to pre-empt the government's decision whether to seek an injunction by going into federal district court to seek an injunction on behalf of the railroads. We were discussing the problem in Bryce Harlow's office. He was the legendary legislative guru who had the post of Assistant to the President for Congressional Affairs – the same post he occupied in the Eisenhower Administration.

As George was describing his tactics, which were to keep the parties guessing as to whether the government would "invoke Taft-Hartley," someone came into the room to exclaim excitedly that a news wire carried a story that Warner Gardner had told the district judge in open court that he was advised that the government was about to join the railroads in seeking an injunction. George was fu-

“Final Offer Selection”

rious. John Ehrlichman, then the President’s counsel, suggested that we call the judge to tell him that Gardner’s statement was incorrect. I objected, pointing out that it would be inappropriate for a party or any other interested person to communicate with the judge *ex parte*. The general reaction was that I was being rather technical, but John, who was not a litigator, acquiesced when I suggested that nothing prevented the President’s spokesman from denying Gardner’s claim in a press briefing. The judge would certainly get the message. That was done and it had the desired impact. In his limousine on the way back from the White House, George turned to me and asked whether it was seemly for his young Solicitor of Labor to contradict the White House Counsel. Was I sure I was correct? I held my ground, but I was a bit abashed.

After that incident and some other emerging dispute threats, George commissioned Jim Hodgson, then the Under Secretary, to convene a group, including me, to consider whether we should come up with proposed amendments to Taft-Hartley. To simply gain a cooling-off injunction for ninety days was not satisfactory, nor was subsequent legislation. But we all knew that the AFL-CIO, which in those days had enormous Congressional clout, was adamantly opposed to the most obvious alternative, compulsory arbitration. Legislation was less obnoxious to the AFL-CIO, perhaps because the unions had so much political power. Moreover, George had observed – and we all recognized – that the possibility of arbitration would chill negotiations, perhaps even more so than a cooling-off injunction and, the prospect of subsequent legislation. So we faced a conundrum. After our first meeting, I went back to my office to ponder the matter. As a litigator, I was naturally inclined to consider why most cases are settled. It is, of course, because both parties perceive the downside risk of trial as too great. That led me to propose, in our next meeting, what seemed to me an obvious solution. We would craft legislation that would allow the government to create a procedure to settle the dispute substantively, but by using a technique that would avoid the disincentives created by the prospect of government-imposed arbitration. In a national emergency we would still seek an injunction, but then a panel

would be commissioned to choose between the last offer of the union and the company's. We could correctly say this was not arbitration because the panel could not do other than take the whole last offer from one side – whichever side was thought more reasonable.

Hodgson was a bit apprehensive that this notion could result in a draconian outcome, but I contended that was its virtue: the high risk both parties faced would reduce the likelihood it would ever actually be used. Unlike the prospect of arbitration, which tended to discourage the parties from coming to the middle – because arbitrators typically would split the difference – this option would have the opposite effect. The more both parties wished to be seen as making the more reasonable final offer, the more they would inexorably move towards the other's position. George Shultz, a first rate labor economist, saw the virtue of the proposal immediately, but both he and Jim worried that it would appear too radical. George was concerned that professional arbitrators would hate being put in such an analytical box and Jim insisted that I come up with other options in the proposed legislation so that this concept would not look so stark. I argued that other options would dilute the impact of our proposed legislation; it was important that the parties face the abyss if we wished settlement. But I, of course, acquiesced and the proposed legislation included two other options: authority for the President to extend the cooling-off period for thirty days and a rather "Rube Goldberg" device, whereby a three-member panel appointed by the President could direct a "partial operation" of an affected industry, provided it would not discourage negotiations or place a greater economic burden on one of the two parties (surely an impossible criterion). At one point, Jim asked me what we should call my favorite scheme. Off the top of my head I responded, without much originality, "Final Offer Selection," and so it became.

John Ehrlichman had recently been promoted from White House Counsel to Assistant to the President for Domestic Affairs. George Shultz explained the outlines of our proposed legislation to him and Ehrlichman was intrigued. He thought it presented an opportunity for an interagency working group to vet the proposal under the auspices of his Domestic Council. So he set up such a group to include

“Final Offer Selection”



Clockwise from left: Richard Nixon, George MacKinnon, John Ehrlichman, Mike Moscow, Tenley Johnson, Laurence Silberman, Ed Morgan, Jim Lynn, William Gifford (legislative assistant to George Shultz), Richard Cook (White House legislative aide), and Ken Cole.

me, my counterparts at Commerce and Transportation, Jim Lynn and Tenley Johnson, as well as some legislative experts from the White House and some of Ehrlichman's staff. Also included was Mike Moskow, the labor economist on the Council of Economic Advisors, Shultz's position in the Eisenhower Administration. (The next year, after I became the Under Secretary, I recruited Mike as my Deputy.)

The group approved our proposal and Ehrlichman arranged a meeting with the President. That session in early 1970, according to one of the participants, was one of a very few meetings, perhaps the only one, the President had with an interdepartmental working group to discuss a domestic policy issue. As the accompanying picture shows, I am presenting the proposal to the President with the rest of the working group, as well as Ehrlichman and his deputy, Ken Cole, sitting around the table in the Cabinet Room. You will note that sitting next to the President is a white-haired older gentleman. It was apparent from the discussions that he was an ex-Congressman who had served with Nixon in the House when Taft-Hartley was passed in 1947. The President, after rather careful probing, enthusiastically endorsed the initiative. As I was walking out of the room, I asked Ed Morgan, one of Ehrlichman's assistants, "Who was the white-haired gentleman sitting on the President's side of the table?" Morgan replied, "George MacKinnon." I was taken aback: "You don't mean Judge MacKinnon." Morgan said, "Yes," at which point I pointed out that it was quite inappropriate to have a federal judge sitting in on a White House policy discussion. Morgan asked why, and I explained the judicial canon. I reminded him of what Abe Fortas had done during the prior administration and the ensuing brouhaha when he was nominated as Chief Justice. Late that day or the next, Morgan called me to say that it would never happen again, but he sent me the picture.

After the President approved, we announced the legislative proposal with appropriate fanfare. I persuaded a young new Senator from Oregon, Bob Packwood, who had been a management labor lawyer, to introduce the bill, and thereafter whenever an emergency dispute loomed, we pointed to our solution to deflect criticism.

“Final Offer Selection”

Unfortunately, the AFL-CIO strongly opposed the concept. It was irrelevant to the unions that it might avoid the disincentives caused by arbitration. From their point of view, the evil was any government compulsion that would prejudice a strike – except the prospect of legislation. Not surprisingly, professional arbitrators also loudly condemned the proposal. However, the most important labor journalist in the country, Abe Raskin of the *New York Times*, was intrigued. He called George Shultz to discuss the proposal and asked whether it had any precedent – where had the idea come from. Although George had given me credit when first discussing it with Ehrlichman, he did not want to tell Raskin that his 33-year-old Solicitor had suggested it, so he urged me to see if I could find any precedent. One of my associate solicitors, Bob Guttman, was a refugee from Nazi Germany. Perhaps because of his origin, he found, or claimed to have found, that during the Weimar Republic someone had floated this idea in a legislative proposal. Elated – and without checking it carefully – I rushed to George’s office to tell him he could call Raskin back with the news. Raskin’s column gave credit to the Weimar Republic and the proposal appeared less novel.

Later I authored a law review article for the *Georgia Law Review* entitled “National Emergency Disputes – The Considerations Behind a Legislative Proposal.” To be sure, the article was largely written by my special assistant, Lawrence Holden, and with plenty of time he discovered that our idea had first been mentioned by an economist, Carl Stevens, in a 1966 article in an economics journal asserting that various types of arbitration were consistent with collective bargaining. Ironically, Holden also determined that Bob Guttman was wrong about the Weimar Republic’s consideration of our device and so, therefore, was Raskin’s article. But by that time the idea had caught on; there was a good deal of political steam behind it. Bob Packwood was working hard to develop Senate support. The Republicans were virtually all on board, as well as some southern Democrats. Later in 1970, I was promoted to the Under Secretary post and I continued to push my favorite legislative proposal.

As we neared the Presidential election of 1972, the Labor Department and the White House were reaching out to union leaders to gain support against the Democratic nominee. (Those efforts became more fruitful after George McGovern became the likely nominee.) As will be recalled, the Teamsters Union had been ostracized by both the AFL-CIO and many Democrats (as it turned out for good reason). In either late 1971 or early 1972, George Shultz, then OMB Director, called me to deliver bad news. In return for Teamster support in the upcoming election, the President had agreed to drop our legislative proposal. Moreover, as George made clear, it was I who was required to call our Senate champion Bob Packwood and deliver the message. That was not a pleasant conversation, but Bob, a skilled politician (albeit with some subsequently discovered personal faults), became resigned and we remained friends. Both because we dropped Administration support and because strikes causing national emergencies became more rare, our Taft-Hartley amendments were forgotten. But the idea was picked up by municipalities and by baseball – indeed, it is now often referred to as baseball arbitration.

But if I didn't get the legislation, I still have the picture. Years later, after I became a Circuit Judge, the picture was placed on the wall directly behind my desk. In 1987, I wrote the rather widely noted opinion, called *Morrison v. Olson* in the Supreme Court but *In re Sealed Case* before us, holding the Ethics in Government Act unconstitutional. (As you know, the Supreme Court reversed 7 to 1 – Justice Kennedy was recused.) My opinion was quite critical of the “Special Division” of our court that selected so-called Independent Counsel for the Division's continued “supervision” of those independent counsel. Indeed, Chief Justice Rehnquist's opinion also was somewhat critical of the Special Division. The presiding judge of that “court” was none other than George MacKinnon, who became a senior judge shortly before I was appointed. George and I often ate lunch together, with the circuit and district judges, and his wife and my late wife, both Smith graduates, were friends. George, as some of you may remember, was a large man, an ex-University of Minnesota football player, as well as a former U.S. Attorney and Con-

“Final Offer Selection”

gressman. He was a man of very strong opinions, openly expressed. After he read either my opinion or its echo in the Chief Justice’s opinion, he came storming into my chambers with smoke figuratively coming out of his ears to complain about my criticism. I was prepared to remind him that under the statute the Special Division was supposed to be quite independent of the rest of the circuit, but he stopped dead in front of my desk as if he had been struck by a club. He saw the picture, turned pale, mumbled, “I would have recused,” and quickly left my office.

As I thought about it afterwards, I realized there was a connection between the picture and my opinion. George MacKinnon was a good man and a good judge, but the truth was he cherished his time as an ex-U.S. Attorney and probably regretted that he never was appointed Attorney General or Deputy Attorney General. Perhaps his willingness to come to the White House to sit in that discussion with the President and his inclination to take on and to stretch the responsibility of the Special Division were prompted by the same urge.

GB