Talking the Talk to Walk the Walk

Author : Sergio J. Campos

Date : April 19, 2022

- *Justice Restored: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963 Before the Subcomm. on Antitrust, Commercial, and Administrative Law*, 117 Cong. __ (2021) (Statement of Myriam Gilles).
- Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing Before the H. Comm. on the Judiciary, 117 Cong. __ (2021) (statement of Myriam Gilles).

"Staffers, staffers, staffers." That is the number one rule of congressional testimony. To provide some context: U.S. senators and representatives are elected to represent large constituencies with diverse and often conflicting interests. To respond to constituent concerns, Congresspersons rely upon their staff to help them understand complex issues. The key in congressional testimony is not to convince the Congressperson but the staffers of the rightness of your position. It is advice that proceduralists like me appreciate.

Myriam Gilles is adept at talking to staffers, as demonstrated by two examples of her submitted congressional testimony that I like lots. The first ("*Justice Restored*") concerns the Forced Arbitration Injustice Repeal ("FAIR") Act, a house bill that would prohibit forced arbitration in a number of consumer and employment settings. The second ("*Silenced*") concerns the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which recently became law and prohibits arbitration agreements involving claims of sexual assault or sexual harassment.

Gilles is a perfect choice to provide these congressional testimonies. She writes in the field of class actions and complex litigation and expresses complex issues clearly, precisely, and with great vividness. Her titles are legendary:

- The Day Doctrine Died: Private Arbitration and the End of Law;
- Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After *AT&T Mobility Concepcion*;
- Class Dismissed: Contemporary Judicial Hostility to Class Certification

As one can tell from these titles, one focus of Gilles's scholarship has been arbitration, in particular arbitration clauses prohibiting the use of class action and similar aggregate procedures. Gilles has been writing about "class action waivers" since 2005, when she predicted that such clauses would lead to the "near-total demise of the modern class action." Beginning in 2009, the Supreme Court decided a series of cases, most notably *AT&T Mobility* v. *Concepcion*, holding not only that class action waivers were enforceable, but that class action procedures were in conflict with the policy of "bilateral arbitration" reflected in the Federal Arbitration Act ("FAA"). Gilles, much to her dismay, proved prophetic.

The Court's position has some intuitive appeal. Arbitration is a process that allows parties to opt out of formal judicial procedures and resolve disputes using a private arbitrator. Arbitration procedures often are simpler, cheaper, and faster. It is hard to square the simplicity of arbitration with the complexity of class action procedures that allow one representative to litigate on behalf of many.

Gilles's work reveals the fallacy of that position. Not only are class actions cheaper, faster, and better, but without class actions many plaintiffs would not file suit at all, either in a court or an arbitration. Class actions allow a representative party to pool resources and invest in litigation that would not make sense on a plaintiff-by-plaintiff basis. Defendants know this, which is why, to borrow Gilles's words, class waivers are "nothing more than a 'get out of jail free' card for companies." Even in settings where class action procedures are not necessary, defendants can write arbitration clauses with procedures that are so one-sided that they can "write their own accountability-avoiding rules at the expense of American workers."

Of course, Gilles cannot submit 16 years of law review articles to the committees; that would be too much to ask of any staffer. Instead, in the two examples that I like lots, Gilles condenses her work into two short, crisp, letters, each serving as "submitted testimony," that provide an overview of her work in a way that addresses the committees' concerns.

Justice Restored provides a short overview of the Supreme Court's expansive interpretation of the FAA and how it has led to the proliferation of arbitration clauses in consumer and employment contracts. Like an experienced litigator, she provides vivid evidence of the effects of these forced arbitration clauses. In 2018, out of an estimated 826 million consumer arbitration provisions in force, the two largest arbitration providers resolve approximately 6,000 arbitrations (only 6,000!). About 52% of private-sector, non-union workers (about 60.1 million workers total) are subject to arbitration of employment disputes, but an estimated 1 in 10,400 workers pursues any arbitration claim. The high use of arbitration clauses combined with the paltry numbers of actual arbitrations supports Gilles' thesis that arbitration clauses allow defendants to escape liability.

Silenced focuses on the lack of transparency in the few arbitrations that plaintiffs do pursue. The offending provisions include nondisclosure provisions that require the arbitration to be conducted "in utter secrecy." For claims involving sexual assault or sexual harassment, defendants use arbitration clauses less to divide and conquer plaintiffs than to hide the offending conduct from the public. The lack of transparency can and does lead to systematic bias against victims in arbitration awards.

In *Silenced*, Gilles further shows the necessity of federal legislation by discussing the limits of alternative avenues of challenging forced arbitration – state legislation and public pressure. State legislation runs into preemption, as the Court has interpreted the FAA so expansively that it would preempt state law attempts to curb forced arbitration. Public pressure may work for the most powerful and well-off workers, who can lobby against arbitration clauses in their own contracts. But it leaves the least-well-off workers the most vulnerable. I found these sections particularly compelling, as I could imagine a staffer feeling a renewed sense of urgency in the need for legislation.

I have written in previous jots about my love for scholarship that focuses on the how – how to change law, how to improve things on the ground. I commend Gilles for her mastery of putting her scholarship into action, to ensuring that her important contributions to legal scholarship are understood by individuals who can do something about the problems she exposes. Many legal scholars participate in this kind of work, through amicus briefs, legislative testimony, service on law-reform projects, and other efforts. These efforts should be celebrated because they prove again and again the value and importance of legal scholarship.

Sergio J. Campos, *Talking the Talk to Walk the Walk*, JOTWELL (Apr. 20, 2022) (reviewing *Justice Restored: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 963 Before the Subcomm. on Antitrust, Commercial, and Administrative Law*, 117 Cong. __ (2021) (Statement of Myriam Gilles); Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the

Shadows: Hearing Before the H. Comm. on the Judiciary, 117 Cong. __ (2021) (statement of Myriam Gilles).), https://courtslaw.jotwell.com/talking-the-talk-to-walk-the-walk/.