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May 7, 2013

An Unbiased Judge: The Cornerstone of the Rule of Law

I want to thank Henry Butler and the Searle Civil Justice Institute Board of Overseers for inviting me to speak this evening. I consider this a real honor which I very much appreciate. For the past year I have been working with a small group of companies and lawyers to explore whether the time has come to ask Congress to enact legislation which reflects the original intent of the Framers of the Constitution in creating the diversity jurisdiction of federal courts.
My assumption is that all of you would agree in principle that an unbiased judge is the cornerstone of the rule of law and an essential antidote to official corruption.

Tonight, I hope is to convince you of three things related to the status of that principle in America's civil justice system today:

First, the Founders of the United States believed that parties to civil lawsuits have a "right" to an independent and unbiased judge and that they provided explicit mechanisms to protect that right in the Constitution.

Second, the federal judiciary's systematic departure from the Founders' bias preventing formula has contributed to an unacceptable level of judicial bias in the United States civil justice system which is very costly to our society.

Finally, the impact of that bias could be dramatically reduced by returning to the first principles of our constitutional system.

The correctness of a rule requiring the impartiality of judges, which today most would agree is fundamental to the rule of law and essential to respect for judicial decisions at all levels, was not self-evident in the ancient world.

John Noonan, in his book Bribes, an encyclopedic history of improper influence on government officials, documents that "In all societies and certainly in the earliest civilizations reciprocity was the "rule of life…"

According to Noonan, "Over time, the general rule of reciprocity with regard to judging was displaced with the requirement to do justice."

Circa 1700 BC Hammurabi "[t]he most famous lawgiver of antiquity decree[d], [by order of Shamash, the great Judge of heaven and earth,] that judicial decisions for Babylon be made so that "the strong might not oppress the weak and that justice might be dealt the widow and the orphan."

This concept that a higher authority requires even-handed judging entered the Western legal tradition via the Old Testament of the Bible and is summarized in the admonition to Israel's judges that "You should not do evil either by lifting up the faces of the poor or by lifting up the faces of the rich. You shall judge your countrymen in justice."

In the Declaration of Independence, Thomas Jefferson famously references a higher authority when he declares that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights." It ultimately fell to the drafters of the Constitution and the members of the first Congress to "institute" a government which would "secure [those] rights."

There is ample evidence to conclude that the Founders considered the "right" to an impartial and independent judge to be "among" those universal rights which the new government was being created to protect.

The "Indictment" appended to the Declaration was intended to justify rebellion against King George III and included complaints that:

> *--He (King George) has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers.*
>
> *--He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries.*

The fact that an apparent "right" of a party to have its case heard in federal court under certain, enumerated circumstances was included in the original provisions of the Constitution itself is further evidence that the drafters thought that protection against bias in state courts was a "right" which was fundamental to the healthy functioning of the system of dual sovereignty the Constitution would create.

The language of Article III, Section 1 of the U.S. Constitution appears to be a direct response to the Declaration by giving the newly authorized federal judges life tenure and salary protections. In Section 2, the Framer's provided for diversity jurisdiction of federal courts to better protect a party's right to a fair tribunal.

Chuck Cooper, a clerk to Chief Justice William Rehnquist, Assistant Attorney General for Legal Counsel in the Reagan Administration and considered President Reagan's "federalism cop" in a recent *amicus brief* filed on behalf of the Partnership for America in *Standard Fire v. Knowles*, explained that "Article III was designed to establish a federal judiciary "competent to the determination of matters of national jurisdiction.

"The Framers were unwilling to rely on the state courts for this purpose, as the Antifederalists preferred, largely because "the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes…."

"Indeed, the Framers were so apprehensive of actual or perceived state court bias in favor of local interests that they considered a neutral federal tribunal necessary in some cases to the peace and harmony of the union, and they took care to extend federal jurisdiction to "cases in which the state tribunals cannot be supposed to be impartial."

Section 2 prescribes five circumstances when a lawsuit "shall" be subject to federal jurisdiction because of fairly commonsense concerns about the impartiality of state judges:

> Controversies between two or more states;
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> Controversies between a state and citizens of another state;
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> Controversies between citizens of different states;
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> Controversies between citizens of the same state claiming lands under grants of different states, and
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> Controversies between a state, or the citizens thereof, and foreign states, citizens or subjects.

According to Cooper "Of particular concern to the Framers in establishing federal jurisdiction over disputes "between citizens of different states" was the crippling effect that judicial bias favoring instate interests, whether real or perceived, would have on interstate commerce…By ensuring that a neutral federal forum was available in such cases, the Framers were thus animated by much the same spirit that resulted in the various substantive constitutional protections against state interference with interstate and foreign commerce."

The current Supreme Court also recognizes a "right" to an impartial and independent judge. In 2009, *Caperton v Massey,* involving the question of when a judge must recuse him or herself when hearing a case involving a campaign supporter, gave all of the justices of the U. S. Supreme Court the chance to agree that litigants have a "right" to a fair and impartial judge.

Justice Kennedy, writing for himself and Justices Stevens, Souter, Ginsburg and Breyer declared that "It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process. The Murchison opinion from which Justice Kennedy was quoting went on to say that "Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

Chief Justice Roberts, writing for himself and Justices Scalia, Thomas and Alito opened his dissent in *Caperton* by saying "I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such."

Unfortunately, the Court has yet to recognize the contribution its own diversity jurisprudence is making to real and perceived judicial bias by supporting judicially created doctrines which prevent removal to federal court of many cases involving diverse parties.

The central point of the Partnership's amicus brief in *Standard Fire* is that "Despite the clear text of Article III mandating that the judicial power of the United States "shall extend" to controversies "between citizens of different States" and the important role this provision was intended to play in promoting interstate commerce and uniting the several States into a single, unified nation, the federal courts have systematically resisted exercising the diversity jurisdiction."

The Partnership's brief identifies a number of doctrines and rules created by federal judges to keep diversity cases out of their courts. As Cooper states, "The doctrine of complete diversity and other techniques used by federal courts to avoid taking jurisdiction in diversity cases are at war with one of the Founders' key purposes in establishing the federal judiciary: to facilitate national trade and commerce by providing a neutral federal tribunal for resolving disputes between interstate litigants…Indeed, the federal courts have developed an entire framework of doctrines that seem designed largely and systematically to limit or defeat the text and purposes of Article III."

Cooper informed the Court that "This textual analysis of Article III is supported by its drafting history and the debates during the Constitutional Convention and much of the specific language of Article III was developed by the Committee of Detail."

Finally, Cooper urges the Court to "instruct the federal judiciary that it may no more sanction a scheme to evade its duty to decide cases falling within the diversity jurisdiction than it may do so with respect to any other type of cases. In the famous words of Chief Justice Marshall, the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."

In other words, states do not have some residual "right" to try out-of-state defendants in their courts. On the contrary, federal courts have a Constitutional obligation to remove such cases from state courts when requested by any diverse defendant which is not a citizen of that state.

If a staunch states' rights advocate such as Cooper has reached this conclusion, it should be a relatively easy task to convince Congress to simplify codify the

commonsense diversity mandates of Article III. Unfortunately some stakeholders have a vested interest in judicial bias.

No responsible member of the American legal community would question the rightness of the first Canon of The American Bar Association's Model Rules of Judicial Conduct which provides that "A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

But despite the clarity of that prescription and its almost universal adoption by state and federal courts, certain state courts and legal systems are widely considered to be "plaintiff friendly." This is, of course, a euphemism for their being biased against business defendants, particularly defendants who are not citizens of that state.

Dickie Scruggs, once "one of the nation's foremost plaintiffs' lawyers [who since has gone to prison for bribing a Mississippi judge]," described picking the best location for trial this way at a 2002 conference: "[W]hat I call the 'magic jurisdiction' … [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected."

State judges have a number of incentives to attract and retain complex, high-stakes cases. Those incentives range from the relatively benign desire to handle interesting, consequential cases to realizing that managing such a docket gives the stake-holders on both sides of those cases an incentive to invest in his or her re-election.

However, it is worth remembering, the only kind of bias that attracts cases, is bias in favor of plaintiffs, because in the American system, plaintiff attorneys are given great latitude in where to file a lawsuit.

The skillful use of that leverage led to the historic Master Settlement Agreement in 1998 which transferred $206 billion to the states which remains the most egregious example of plaintiff lawyers using the bias of state legal systems against out-of-state defendants.

On May 23, 1994, armed with a new legal theory which would strip the defendants of their common law defenses, Dickie Scruggs and Ron Motley sued 13 out-of-state tobacco companies in Pascagoula chancery court on behalf of Attorney General Moore and the state of Mississippi. If ever there were a case which belonged in a federal court, outside of the reach of Scruggs' personal "magic jurisdiction," this was it.

The rise of activist state attorneys general has profoundly altered our legal system. According to former Alabama Attorney General Bill Pryor, "[t]he aim of [state sponsored] litigation is to shift the awesome powers of legislative bodies—powers

to control commercial regulation, taxation, and appropriation—to the judicial branch of government."

Equally menacing is the practice of state attorneys general granting contingency fee lawyers the power to sue on behalf of the state and these private lawyers having the right to act as though they were attorneys general. These lawyers are sometimes awarded that right in recognition of their political contributions to the state attorney general.

As some of us make the case for a return to the Constitutional standard for diversity jurisdiction, we should not expect help from most legal academics. As I noted in a 2004 monograph published by the Washington Legal Foundation "By the 1960s… the foundational norms of the old order began to give way and were soon replaced by a new philosophical superstructure.

"The chief architects of this paradigm shift included William Prosser, Guido Calabresi, and Richard Posner. For Prosser, the law of torts more than any other branch of law "…is a battleground of social theory… the interests of society in general may be involved in disputes in which the parties are private litigants…. "

As these ideas spread, if a socially minded public interest lawyer or a profit-driven contingency fee lawyer wanted to shop for state courts which had adopted these new theories, the complete diversity rule often would allow the forum shopping lawyer to trap out-of-state defendants in a "progressive" state court system.

And, based on current choice of law rules, even if these cases were removed to federal court, diversity cases still would be governed by the state laws where the case was originally filed.

Michael Greve, captures this irony in a blog commenting on the Partnership's brief in *Standard Fire*: "I do not understand why "diversity" cases of this sort … are decided even in federal court under *state* law, meaning to all intents the law of a state that was handpicked by roving plaintiffs' lawyers. Or rather I understand that all too well: it's the holding and the result of *Erie Railroad* (1938)—the baseline of all modern Civil Procedure… but arguably the Supreme Court's worst case ever."

"In its wisdom, the Congress that enacted CAFA explicitly left the *Erie* framework in place: it permits (some) diverse class action defendants to escape the bias of the local (hellhole) *forum*, but the parochial bias of state *law* will still accompany the defendants into federal court."

Our minimal diversity project will examine whether systemic bias exists in state substantive law as a result of the federal courts' refusal to implement the Constitutional standards for removal.

It is an old joke among legal reformers that the most important legal reform to a corporate general counsel is the one that would have allowed him or her to win the company's last big case. And, certainly there are a number of anecdotes which provide ample evidence of bias against out-of-state companies. But in the last ten years the evidence of bias has gone well beyond anecdotal.

In 2002, two years after the U.S. Chamber entered the state judicial election fray, the Institute for Legal Reform published its first State Liability Ranking Study designed by our friend Judy Pendell "to explore how fair and reasonable the states' tort liability systems are perceived to be by U.S. businesses."

Tiger Joyce, ATRA's president explains that "The generally unwelcome attention that our Judicial Hellholes program has been bringing to out-of-balance civil court jurisdictions for 11 years now helps ATRA and its allies in their concerted advocacy for positive reforms."

According to Neil Coughlan, president of the D.C. based Judicial Evaluation Institute, "JEI analyzes the individual decisions of judges involving six areas of jurisprudence in order to evaluate sitting state judges based on their support or opposition to the expansion of legal liability."

But even though JEI's intensive method cannot determine why a judge makes decisions which are pro- or anti-business. it's painstaking method is clearly measuring statistically significant judicial bias.

The biggest cost to society of the reluctance of federal courts to play their constitutionally assigned role of adjudicating diversity cases could be the real, though intangible, erosion of confidence in the neutrality of our judicial system. This lack of confidence in the neutrality and therefore, rationality our system of civil justice has endless unseen impacts on the decision making of scientists, doctors and business leaders, all to the detriment of the well-being of our citizens.

Over time these termites of distrust are undermining the foundation of the rule of law in America. America has always taken for granted that the rule of law was one of our greatest national assets—a comparative advantage in a competitive world. Evidence suggests, that assumption is no longer justified.

If U.S. litigation costs remain significantly higher than other countries as other economic differences between countries narrow, the United States will be unable to compete effectively in the global marketplace. This disparity will inevitably influence decisions by corporations about where to invest their resources.

According to a study by the Pacific Research Institute the U.S. spent 2.2 percent of its GDP on tort costs, compared to 0.7 percent for the United Kingdom, 0.8 percent for Japan, and 1.1 percent for Germany.

The American business community has pursued several strategies to respond to the creation of biased jurisdictions in which they can get trapped.

At the national level Congress has repeatedly asked to preempt the laws driving "plaintiff-friendly" jurisdictions. ATRA lists 25 bills passed by Congress since 1972 to limit liability, the last of which was the Class Action Fairness Act.

While the passage of CAFA was considered a big success, the failure of a products liability bill in the late 90s contributed to the frustration of national businesses in dealing with the treatment they were getting in "plaintiff friendly" jurisdictions.

At the state level, the majority of state legislatures have tried to reform their liability laws based on concerns that an anti-business legal environment would hurt job creation and economic growth.

However, as Victor Schwartz and Lea Lorber explained in a 2001 law journal article "Unfortunately, there has been a decline in the respect that state courts give to their sister branch, the state legislature. In over ninety decisions, state courts have "nullified " civil justice reform measures."

In the course of this project I have come to believe that the reluctance of federal courts to exercise jurisdiction over diversity cases ultimately forced national companies to engage in the often distasteful political contest with forum-shopping mass tort and class action lawyers
for influence over the election of state judges.

As Charles Kolb, head of the centrist and anti-judicial election Committee for Economic Development put it, "Some state courts actually became known publicly as favoring plaintiffs, and in these instances, the perception was fueled by large campaign contributions to individual judges by members of the trial bar.

"After several years of these contributions, the United States Chamber of Commerce began to return the fire, raising millions of dollars to support judges who were seen as more "business friendly…The result has been a steadily increasing judicial arms race. Contributions to judicial campaigns went from $83.3 million from 1990-99 to a stunning $206.9 million in 2000-2009."

Observers across the political spectrum believe that this high-stakes, well-funded battle has eroded respect for the American legal system and confidence in the impartiality of elected judges. The Brennan Center recently found that Americans believe, by significant margins, that campaign spending has an impact on judicial decision-making. Among the findings of a recent survey:

> 88 percent of Democrats, and 70 percent of Republicans, believe campaign expenditures have a significant impact on courtroom decisions.

> Only 23 percent of all voters believe campaign expenditures have little or no influence on elected judges.

Given the level of concern, it seems odd that, to date, there has been very little discussion of the fact that the Constitution provides that these cases against out-of-state defendants should be decided by federal judges with life tenure and salary protections instead of by state judges who face periodic election or recall votes

The good news is that returning to the Framer's formula for preventing bias against out-of-state defendants could be easier than it looks.

Congress enacted the Class Action Fairness Act of 2005 ("CAFA") after finding that "the Framers established diversity jurisdiction to ensure fairness for all parties in litigation involving persons from multiple jurisdictions" and that the requirement of complete diversity in large interstate class actions had given rise to "the precise concerns that diversity jurisdiction was designed to prevent."

Since its enactment in 2005, the minimal impact on federal courts of covered class actions has been encouraging. The Fourth Interim Report on CAFA to the Judicial Conference does not suggest an unmanageable flood of diversity cases as defined by CAFA: Diversity class action filings in the federal courts averaged 11.9 per month pre-CAFA and 36 in 2007 and diversity class action removals went from 17.2 per month pre-CAFA to 18.1 in 2007.

If the general rule for removal of cases from state to federal court was completely consistent with Article III, what would be the impact on the workload of state and federal courts?

First, enforcing the Constitution's diversity mandates would take some of the most complex and expensive to administer cases out of overburdened state courts. State judiciaries handle nearly 95 percent of all court cases filed in the United States.

In 2009, the most recent year statistics are available, the total number of cases filed in federal courts, was 384,330 -- not including bankruptcy. In state courts the number was 47.3 million, not including traffic offenses. However, "In fiscal year 2011, courts in more than 42 states were forced to reduce their budgets."

Second, while more research and discussion are obviously needed, there are four reasons to believe a return to a minimal diversity rule would be manageable by the federal courts:

1) Diversity cases already comprised 35% of the federal docket of 289,630 cases filed in 2011.

2) Most cases being kept in state courts by the tactics of the trial bar are complex cases amenable to handling by the well-regarded federal multi-district litigation process.

   In fact, Public Citizen, in an effort to defeat federal asbestos trust fund legislation issued a report entitled "Asbestos Cases In the Courts: No Logjam" which extols the success of the Asbestos MDL and quotes a government study which reported that

   "At its height of the Asbestos MDL, over 100,000 cases were being supervised by one federal judge. Since 1991, Judge Charles Weiner has presided over 105,000 asbestos-related lawsuits. He has closed out 78,000 of them… represent[ing] more than 10 million individual claims."

3) There are relatively few diverse complex cases in magnet jurisdictions. Definitive statistics are not readily available, but we should assume that every complex case in even magnet jurisdiction could be removed to federal court.

4) While motor vehicle cases represent 52% of cases being filed in the US, only 2,890 were filed in federal court in 2011.

While more research is needed on both the potential costs and benefits of returning to the Founders' formula for preventing judicial bias, and I hope the Searle Institute will consider undertaking some of those studies, no probable financial cost seems too high to do our best to protect a litigant's right to an independent and unbiased judge with the real hope of dramatically reducing the corrosive influence of the incidence and perception of judicial bias in America's civil justice system.

In my opinion, this would be among the most consequential legal reforms undertaken since the litigation explosion began.

Thank you.