Chapter 2

DISTINGUISHED SPEAKER ADDRESS: RESTORING FAIRNESS TO THE ARBITRATION SYSTEM

Introduction

Edward B. Krinsky[1]

I have the distinct and personal pleasure of introducing Senator Russell Feingold. My introduction will be fairly brief, but I think quite different from what you've come to expect on occasions such as this.

Senator Feingold's interest in arbitration and other forms of dispute settlement dates from at least 1965. In that year, he was Rusty Feingold, age 11. He had a strong desire to learn about mediation and arbitration and a strong desire to experience these processes firsthand, up close and personal, you might say. He accomplished this by having the foresight to select me as his brother-in-law. That intensive course of study lasted for 15 years until 1980 when his sister and I divorced. Fortunately, his interest in dispute settlement survived that event, and he and I have been able to maintain a relationship of mutual respect and friendship. And, of course, to my children, he is still Uncle Russ.

As an 11-year-old, Rusty took full advantage of my presence and evoked my skills as a mediator and arbitrator. He and his father had a dispute about how much Rusty should be paid for mowing the lawn. They both asked me to intervene so that there could be a fair outcome and a work stoppage could be avoided. I recall that, after carefully listening to the arguments presented and considering all of the available public sector and private sector comparability data pertaining to workers classified as lawnmower one, I was able to persuade them to enter into a voluntary, informal amicable settlement, although I don't recall the terms of settlement. Perhaps he does, and you may hear about it.

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[1]National Academy of Arbitrators, Madison, WI.

It became apparent at that same early age that Rusty was not afraid of stiff competition and that he relished the role of underdog. He had a very strong will to succeed even against overwhelming odds. In spite of the fact that I was probably a foot or more taller than he was at that time, he regularly challenged me to play one-on-one basketball in his driveway, which was equipped with a hoop attached to the garage. I won't remind him of the painful outcomes. I'll say, however, that he honed other skills and made up for his shortcomings, no pun intended, by becoming a dominant player of horse, a game, requiring the skills having no relationship to height or weight, in which I am assured is played by both Americans and Canadians, so all here can appreciate Rusty's talents in that area.

Later, while still in grade school, I think, he developed a keen and growing interest in politics. He was a great admirer of Robert Kennedy, whose visage covered the walls of his bedroom. Rusty honed his intellect and his ability to argue persuasively. He was a member of the state champion Janesville Craig High School Debating Team. He went on to college in Madison at the University of Wisconsin and was selected as a Rhodes Scholar, a notable achievement for someone whose athletic skills had not progressed beyond backyard basketball and occasional outings on the golf course.

Upon returning to the United States, he completed his education by getting a law degree from Harvard. Russ, no longer Rusty, then entered politics, combining his skills, intellect, and competitive drive to unseat a veteran incumbent state senator. After serving in the state senate for 10 years, he resumed his underdog role and was elected to the U.S. Senate, where he served for 18 years until he was defeated in the Tea Party landslide.

Throughout his career, Russ has earned the admiration of Wisconsin voters as well as people across the country, who have come to respect his ethics and his interest and willingness to listen and learn. He has held principled positions in the legislature, even where they were unpopular and where he was in the minority or even the sole minority vote. He has been admired, also, for his attempts to achieve bipartisan legislation in an age where bipartisanship has all but disappeared. When he left the U.S. Senate, his bipartisan McCain-Feingold partner, Senator John McCain, said that the Senate would be a poorer place without him.

There is one other bit of evidence of his keen insight, which should not go unnoticed in this forum. After his very first exposure

to the music of Wisconsin's Grammy Award–winning Justin Vernon and Bon Iver, he became an ardent fan and promoted their music, and thus endeared himself to the Academy and to Justin's parents, former Academy President Gil Vernon and his wife, Justine.

In closing these remarks, let me just say that Senator Feingold is sorely missed by his many supporters and admirers in the Wisconsin electorate. He saddened us by his decision to not become a candidate for governor, which, had he succeeded, would have enabled him to attempt, among other things, to reverse the events of the last year and a half in which the Walker administration and his Republican-controlled legislature gutted 50 years of public sector unionism bargaining and dispute resolution to the detriment of all of us. Given Tuesday's results, however, even Senator Feingold might not have changed the outcome.

Senator Feingold has indicated to me that he will speak to us, among other things, about the subject of mandatory arbitration. We hope that this will include some observations about the importance of preserving collective bargaining rights, unions, and arbitration in both the private and public sectors of our society. Please join me in giving a very warm welcome to Senator Russell Feingold.

Distinguished Speaker Address: Restoring Fairness to the Arbitration System

Russ Feingold[2]

Thanks a lot, Ed. I think you're still a foot taller.

It is an honor to be asked to speak to you. President Golick, it's an honor to be here. Congratulations on your leadership of this organization. And I want to thank Gil Vernon, who was the initial contact for my coming to this event. It's one of the first communications I got after I was given my walking papers as a senator. So it was greatly appreciated that this organization wanted to hear from me. I thank you for that, and, of course, reiterate that your son's music was the very first choice of our campaign playlist called FeinTunes. The first choice was Bon Iver.

Ed, thank you. I obviously enjoyed it, and it brought back memories of the years that we had together. In fact, I did go to a number of arbitrations; some might have been mediations, where Ed invited me to come as a teenager. I got in a car with him, and I

[2]Former U.S. Senator (D-WI).

went. I watched him handle these things. This provided me with a role model of conduct: the way people can conduct themselves as adults in a public setting as professionals, in a civil way without there being policemen in the room. I remember thinking, "This is an important thing that I want to know more about." It is true that throughout my life, I've been interested in mediation, arbitration, and other methods of alternative dispute resolution because of that initial exposure that I had.

I don't remember the adjudication of the lawnmower incident being entirely favorable to me. But, I don't remember it being particularly harsh either. I certainly would have asked him to adjudicate another similar matter in the future. But, Ed, I admire you tremendously, your career in this area, and your leadership in this. Thank you so much for introducing me and for all the kind words.

Since leaving the Senate, I've spent a good deal of time as a visiting professor, first at Marquette University Law School in Milwaukee, and I was lucky to spend a very tough winter in Palo Alto teaching at Stanford. And I'll be teaching for a while at Lawrence University this coming fall.

As Ed said, I wrote a book during the first year, 2011, called *While America Sleeps*. It's about a subject that greatly concerns me, and that's my view that we've had a tremendous amount of policy failures, both domestic and internationally, in the wake of 9/11. I don't think we've really turned a corner in a way I thought we would. I don't start off by just noting what a calm and quiet year and a half that's been in Wisconsin, in the doldrums where nothing really happened. Obviously, it was just the opposite.

This is a very painful episode for all of us to watch the collective bargaining rights for most public employees being repealed. I want you to know that, although certainly there were other reasons that you can argue for the fact that we did not defeat Scott Walker, it is not accurate to say it's because people don't believe in collective bargaining. Some would say it's because of the big money that was spent. I think that's a little too easy. And coming from the second part of McCain-Feingold, that's an interesting thing to say. I think money is a factor. I'm going to talk about money in my speech today. But it wasn't the main reason

The exit polling actually showed that it was tied or maybe a little bit in favor of restoring the collective bargaining law. The reason we didn't win is simple. People don't like recalls. People don't believe in undoing elections. It creates a very difficult second bar.

So, if you don't believe me, you should know that the exit polls show that the same people would have voted strongly for Obama.

This was about the fact that it was an unusual proceeding. People weren't willing to take the step. It is not a repudiation by the people in the State of Wisconsin of the idea of collective bargaining. We will fight even if it takes five to ten years to bring back that great right to our public employees in the State of Wisconsin. We will never relent on that issue.

Now in addition to the book and my teaching and my work on many Wisconsin campaigns, I formed a nonprofit advocacy group called Progressives United that is focusing on one of the biggest threats facing our republic: the increasing ability of extremely wealthy individuals and corporate interests to dominate not just our government's policy making, but also our most fundamental democratic institution: the election of those who represent us in government.

Progressives United was established as a direct response to the disastrous 2010 Supreme Court decision called *Citizens United*,[3] in which more than 100 years of settled law was overturned, and the prohibition on corporations using their corporate treasuries for political expenditures was lifted. That prohibition was instituted by the Tillman Act[4] in 1907, not McCain-Feingold. It was signed into law by President Roosevelt—President Theodore Roosevelt; that's TR, not FDR. That law was more than 100 years old.

Consider that for a second. The Tillman Act, which prohibited the use of corporate treasuries for political campaigns, was on the books before Howard Taft became president. It had been the law of our land for seven years before the beginning of World War I in August of 1914. The year the Tillman Act became law, the winner of the Nobel Prize in literature was Rudyard Kipling. This is a while ago. The Tillman Act was on the books for six years before the 16th Amendment to the Constitution permitting an income tax was ratified. That's a pretty long time for a law to stay on the books and be considered good law. It was around so long that no one, and I mean no one, ever said to me that it raised any constitutional concern. That's a measure of just how activist the *Citizens United* decision was. It was recklessly activist.

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[3]Citizens United v. Federal Election Comm'n, 558 U.S. 50 (2010).
[4]Tillman Act of 1907, 34 Stat. 864 (Jan. 26, 1907).

The consequences of the *Citizens United* decision have been swift and substantial. We've already seen them in the Republican presidential primaries. The political committee set up by the associates of Governor Romney, funded in great part by wealthy corporate interests, disposed of his opponents in succession using this tactic. Of course, these same kinds of committees funded by the same kinds of interests have been at work at the state and local levels as well. What happened in Wisconsin was in part related to the wishes of people like the Koch brothers in Texas, who took advantage of this new Supreme Court ruling to pour a huge amount of money into funding the passage of the law, just the initial effort to pass the law apart from the subsequent recall attempt. And this is just the beginning.

It's only been two years since *Citizens United*. The interests that were empowered by that decision are only just beginning to learn how to exploit it. It's not as if these wealthy corporate interests were without influence before *Citizens United*, of course. Their influence was considerable and even dominant at times. I saw this firsthand as a member of the Wisconsin Legislature for 10 years, and then even more intensely in the U.S. Senate for 18 years.

The peak of that influence may have been in the 1990s when so-called soft money contributions began and grew quickly. This is what McCain-Feingold[5] prohibited. Soft money was an abuse of use of the loophole in limitations on corporate money that had been established by the Tillman Act. It was, frankly, first exploited by the President Clinton campaign in the mid 1990s, and it had a real impact on policy in Washington. There are many examples, including the passage of disastrous corporate-dominated trade policies, including NAFTA and GATT; and the most-favored-nation status for China that helped ship millions of private jobs overseas and particularly gutted our manufacturing in Wisconsin. Both parties were in on the deal, because both parties were taking soft money. It was Clinton and Gore, and Dole and Gingrich, all on the same side. The only guy that wasn't for it was Ross Perot, of whom I was not a great fan. But he did say, "Just listen for the great sucking sound of American jobs." And that's exactly what happened.

Another thing that was purchased by soft money was the fiscally reckless budget and tax policies enacted in 2001 and 2003 with

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[5]The Bipartisan Campaign Reform Act of 2002 (BCRA; McCain–Feingold Act), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).

bipartisan support. These have had a huge role in causing us to have an unbalanced budget of record proportions.

But one last example of soft money influence, and possibly its greatest legacy, was the series of financial deregulatory measures that were enacted, including the elimination of the commonsense and time-tested Glass-Steagall Act[6] that had protected Main Street banks from the vagaries of Wall Street and other measures that helped pave the way for the growth of financial behemoths, banks that were so massive that they became too big to fail. Those actions led to the financial crisis that triggered the worst recession since the Great Depression and economic downturn from which we are still trying to recover.

The real telltale about these bills is that the vote isn't 53–47 or 55–45; the vote on all these was either 90–10 or 92–8 or 85–15, because both parties were bought off. I'm happy to tell you that I was on the "no" side of these votes. Both parties played this game, and that's exactly what's happening now with these unlimited contributions. It has enormous impact on the policy outcome as well as on the campaign. That's the critical thing to remember. It's not about what it does just to the campaigns, it's what you get after people win the election regardless of which party.

Note that every one of those policies was enacted before the *Citizens United* decision removed the last remaining barriers to complete corporate dominance of our campaign finance system. I mention all of this by way of background to the topic, which, obviously, interests so many of you here, and that's mandatory arbitration, because the rise of mandatory arbitration clauses in franchise, consumer, and employment contracts is another facet of the increased concentration of economic power in the hands of corporate interests.

It is presumptuous for me, I suppose, to try to discuss this in front of this crowd. You invited me, and I care about that. So, I'm not going to tell the experts that I know the most about this topic. But, I feel passionate about it. It would be a lot more fun to tell you that mandatory arbitration clauses and consumer credit and employment contracts were conceived in a secret underground lair at an undisclosed location perhaps near Cortland, New York, by a clandestine conclave of arbitrators standing in a circle, each holding a candle, and mumbling dark chants as they laid out their wicked plans to impose arbitration on an unsuspecting world. It

[6]The Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (June 16, 1933).

would be fun to say that and have Oliver Stone make a movie about it.

But sadly, of course, that's not what happened. I'm sure you'll be disappointed to hear that arbitrators are not responsible for the growth of mandatory arbitration clauses. It was not some secret "full employment for arbitrators" scheme. The increasing use of mandatory arbitration provisions would have been much more the natural progression of such proposals as powerful interests discover their benefits over time. It's really just another example of powerful corporate interests advancing policies that work to their advantage. It's another facet of the kinds of developments I discussed earlier.

This is not irrelevant and should inform us as to the underlying justice of such contract clauses. Mandatory arbitration provisions, at least those about which I'm concerned, are not being demanded by individual consumers as a condition of their agreeing to sign up for a credit card. Consumers don't even know mandatory arbitration is in the contracts they sign. Nor is mandatory arbitration being demanded by potential employees as they consider whether or not to work for a particular business. These provisions are being imposed on consumers, potential employees, and others by interests that are by comparison much more powerful, and that is telling.

Mandatory arbitration as a general matter is not inherently good or bad. It's a process through which disputes are resolved as an alternative to going to court. It's a process that has worked extremely well in the area of labor relations where the two parties, the union and the employer, come to the process on relatively even terms. However, it's a much different matter when one party can impose a mandatory arbitration requirement on a much weaker party.

Now, how did I come to this issue? Well, 99 percent of the time, somebody, a staff member or constituent, comes up with the idea of a bill. This is one of the only times I've come up with it myself. The reason it happened was that I was on the shuttle from New York to Washington, and I got a copy of *The New York Times* in 1994 or 1995. There was a story about people who were being hired by securities firms in New York having to sign a mandatory arbitration agreement in advance of their employment with regard to sexual harassment or discrimination or race discrimination. I read that, and I thought, How can this be? How is it possible that

somebody has to make that judgment before they felt the sting of discrimination? So it troubled me.

I went back and introduced a bill just on that subject. Then I found the same thing in livestock contracts coming out of Iowa and Wisconsin. Then we found it in the credit card issue in the course of the bankruptcy law. We found it in place after place. We actually managed in one case to win, to actually pass a law prohibiting mandatory arbitration in one area. I was the author of the bill.

Car dealers: I didn't agree with these guys on anything. They'd come in every year, and they'd say, "Russ, how come you're not with us in this?" Usually anti-consumer stuff as far as I was concerned. But then they came in one day and said, "Russ, we're being treated pretty tough by these auto companies. They're forcing us to sign mandatory arbitration agreements about our franchise arrangement." And I said, "We've got something here. I'll help you." All of a sudden, I've got Jeff Sessions and Orrin Hatch and all these Republicans who were close to their car dealers. They were with me on this thing, and, we passed the law.[7]

One of the conversations I had with some of the car dealers at the time was, "You don't impose mandatory arbitration on the people that buy your cars, do you?" "Yeah, well . . . ." I said, "Well, if we're going to work on this together, you're not going to do that anymore." I have a feeling maybe they're back to it. But, I was looking for some consistency. It was important to be able to show that you could at least pass a law that the court even allows it a specific directive from Congress. And law can be an exception to this.

In the end, when I looked at all these, I believe that the U.S. Constitution speaks to this concern. One of the most fundamental principles of our justice system is the right to take a dispute to court. The right to a jury trial in civil cases on federal court is contained in the Seventh Amendment of the Constitution. Many states provide a similar right for civil matters filed in state court. Unfortunately, mandatory arbitration clauses are slowly eroding the legal protections that should be available to all Americans. A large and growing number of corporations now require millions of small businesses, consumers, and employees to sign contracts

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[7]Motor Vehicle Franchise Contract Arbitration Fairness Act, S. 1140, 107th Cong. (2001) (enacted as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002)).

that include these clauses. Most of these individuals have little or no meaningful opportunity to negotiate the terms of the contracts, and so, finding themselves not realizing that the provision is in the contract, having to choose either to accept the mandatory arbitration clause or to forgo securing employment or purchasing needed goods and services.

Perhaps most disturbingly, mandatory arbitration clauses are being used to prevent individuals from trying to vindicate their civil rights under statutes specifically passed by Congress to protect them. In too many instances, mandatory arbitration clauses can be downright hostile to individuals attempting to assert their rights. Administrative fees, both to gain access to the arbitration forum and to pay for the ongoing services of the arbitrator, can be so high as to act as a de facto bar for many individuals who have a claim that requires resolution. I'm told, you can correct me if I'm wrong, that arbitration generally lacks discovery proceedings and other civil due process protection.

Furthermore, under a developing body of case law, there is no meaningful judicial review of arbitrators' decisions. So, unfortunately, in a number of contexts, mandatory arbitration is fast becoming the rule rather than the exception. In particular, the practice of forcing employees to use arbitration has been on the rise since the Supreme Court's *Circuit City*[8] decision in 2001. Unless Congress acts, the protection that is provided through law for American workers, investors, and consumers will slowly but surely become irrelevant. We need to assert that the arbitration system has a more equitable design, one that reflects the intent of the original arbitration legislation, the Federal Arbitration Act (FAA).[9]

Even as early as the 1920s, there were concerns about the efficiency of the civil court system and the desire to find speedier alternatives. The intent of the FAA as expressed in a 1923 hearing before a subcommittee of a Senate Judiciary Committee was "to enable businessmen to settle their disputes expeditiously and economically."[10] The idea behind the FAA was to encourage agreements to settle disputes outside the court system by assuring the participants that the courts would enforce the decisions of

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[8]Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[9]9 U.S.C. §1.

[10]Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 2 (1923).

arbitrators. Calvin Coolidge signed the FAA into law on February 12, 1925, to make arbitration an enforceable alternative to civil courts. In a later hearing on the FAA, it was clarified that the legislation was not intended to apply to the employment contracts of those businesses. This distinction is important, because it illustrates that, while arbitration was something that the FAA's original sponsors wanted to promote, they were also careful to make clear that they didn't intend for arbitration to become a weapon to be wielded by the powerful against those with less financial and negotiating power.

Unfortunately, mandatory arbitration does put many employees and consumers at just such a disadvantage. We need to return fairness to the arbitration system, and that's the goal of the Arbitration Fairness Act that I originally introduced in 2007 and has been recently reintroduced by the Senator from this state, Senator Al Franken.

Of course, arbitration can be a fair and efficient way to settle disputes. For many years I've supported voluntary alternative dispute resolution methods, and we ought to encourage their use. However, currently, citizens do not have a true choice between arbitration and the traditional civil court system because of predispute mandatory arbitration clauses. The Arbitration Fairness Act ensures that the less powerful, like consumers and job seekers, really do have a choice. The bill does not apply to mandatory arbitration systems agreed to in collective bargaining, and it certainly does not prohibit arbitration if all the parties agree to it after a dispute.

Over time, the arbitration system has grown to overwhelmingly favor businesses that retain the services of arbitration firms. Not surprisingly, the effort to restore some balance by making sure the consumers and employees truly have a choice has met with stiff opposition from the interests that benefit from the mandatory arbitration clauses buried in so many consumer and employment contracts.

Proponents of the current system claim the Arbitration Fairness Act will virtually end arbitration, making civil justice far more expensive and less available for all. If arbitration is as fair and cost-efficient as the defenders of mandatory arbitration argue, then surely franchisees, consumers, and employees will choose it when they have the freedom to make a real choice.

The problem with the current system, as years of experience have shown, is that arbitration has proven very beneficial and

efficient for the large repeat player and not so for the individual consumer-employee. Indeed, one effect of the Arbitration Fairness Act may be that, once consumers and employees have a real choice, arbitration programs will then be a much greater incentive to make their systems fair if they want to stay in business.

The rule of law means little if the only forum available to those who believe they have been wronged is an alternative, unaccountable system where the law passed by the legislature does not necessarily apply. By enacting the Arbitration Fairness Act, we can protect Americans from exploitation and strengthen confidence in arbitration as a valuable, alternative method of dispute resolution.