



THE LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA
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Keynote Address

Delivered by Arizona Supreme Court Chief Justice Ruth V. McGregor (Retired)

At LWVSC Convention Banquet in Sumter, SC, May 14, 2011

First, allow me to express my thanks to the League of Women Voters of South Carolina for inviting me to join you this evening. As you are well aware, the League has long been a champion of maintaining an impartial, qualified and diverse judiciary; the current initiative of the League to ensure judicial independence and to increase diversity in South Carolina is part of this long tradition. All of us who care about these matters are indebted to the work that has been done and to the League's plans for the future and so, to all those who work so hard for the citizens of this country, we extend our appreciation and support.

The League of Women Voters, like most of you and many of our citizens, understands that a concern for maintaining an impartial, independent judiciary is not a new concern. In this country, we have valued and understood the need for judicial independence since our founding; of the 27 reasons stated in the Declaration of Independence for declaring our independence, nearly half concerned the poor administration of justice under King George III. The most direct charges involving judges stated that the King had obstructed the administration of justice "by refusing his assent to laws for establishing judiciary powers" and that he made judges "dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." So the concept of judicial independence was one of the ideals for which the founders of this country fought.

It is also important to understand, however, that the concept of judicial independence does not mean that each judge is free to act in whatever manner she chooses, so long as the decision has something to do with the job of being a judge. Rather, judicial independence refers to a judge's approach in deciding cases: It depends upon the concept that each judge must decide cases fairly and impartially, based upon a dispassionate review of the facts and the law, free from pressure to reach a specific result and free of external pressures, whether political, economic, or personal. An insistence upon judicial independence is really shorthand for saying that judges must promote the rule of law by resolving cases without fear or favor: Without fear as to political or popular repercussions; without favor of one litigant over another; and without preference based upon

status in the community, wealth, race, gender, ethnicity, or religion. These standards reflect a significant goal, and they demand much from our judges.

But reaching this goal is essential. Our uniquely American form of democracy simply cannot function properly unless our judges are impartial and independent. Those conditions are essential not only to our form of government, but also to assure the trust and confidence of those who depend on our courts. People come to the courts to resolve issues that affect their most basic interests. We rely upon judges to make decisions that impact our businesses, our families, our right to receive compensation from those who wronged us, and our very liberty. Our courts are able to make those decisions, and to have their orders followed, only because the public trusts and accepts the decisions.

As Alexander Hamilton famously pointed out, courts have the power of neither the purse nor the sword: they have only the power of judgment. To assure the continued confidence of the public in our courts and their continued acceptance of court decisions, we must be able to assure them that objective, impartial judges will make those decisions.

And just as the principle of judicial independence does not allow judges to act as they please, the concept does not mean that judges can act without being held accountable. Accountability for judges does have some limitations: Because the judicial branch is not a representative branch of government, judges must not be held accountable for furthering the goals of the majority over the goals of the minority

But judges should be held accountable for dispensing justice efficiently as well as fairly. They are accountable for following the constitution and laws as enacted, whether by Congress or a state legislature or a municipality. And we are accountable to the other co-equal branches of government, as we observe our proper place within that government. Judges must be accountable to the justice system as we all work to make the system operate properly.

And they are accountable to the public: judges must respond to the needs of the public, although not to the public opinion. They are accountable for making the justice system accessible to all who need the services of the courts. They are accountable for providing the public a means to express approval, concerns, and criticisms. And judges are accountable for assuring that those who appear before us will have their disputes resolved by a neutral, objective judge

But what being accountable does not mean is that judges give up their responsibility to act independently in deciding each case: That would not be accountability; it would be a failure to fulfill judicial duties

So what can concerned citizens do to assure that our judges are impartial yet accountable to the persons they serve? And what steps can we take to reassure the public that their trust in and dependence on our courts is justified?

The answers will vary from one state to another, as state systems for selecting and retaining judges differ, but I believe we can define some general principles that apply to all our systems. The first principle requires us to define a way to ensure that only well-qualified persons can hold judicial office. Arizona, like South Carolina, uses a nominating commission to select those to be considered for a judicial position. Our systems differ in several important respects, but they share a common requirement: Because nominating commissions are responsible for taking the first step in assuring impartial judges, it is imperative that commission members fulfill their obligation to evaluate applicants on basis of judicial qualifications, not on political clout or influence.

That is a worthy goal, but how is the public to know whether a nominating commission is fulfilling this basic obligation?

The answer lies in a second common principle: The process for selecting judges should be made as transparent as possible. When we consider the fact that the selection of any judge can impact so many people in so many important ways, it seems to me that the public should know as much as possible about those being considered.

Until about five years ago, it was difficult for the public in Arizona to know much about judicial applicants. Our selection process was being rightly criticized for lack of transparency, and so we changed our approach, increasing transparency wherever we could. We began by posting all applications, minus personal information, on the Supreme Court's web site. We encouraged the public to comment upon any applicant, through letters, calls, or emails to members of the commission. We did a better job of notifying members of the public that they could attend commission meetings to comment publicly upon any applicant. We opened to the public all phases of the commission meetings. Commission discussions of applicants, reports of the results of commission investigations, interviews of applicants, and voting on the list to go to the Governor are all done in open session. Soon, budget permitting, the meetings will be streamed live over the internet.

We have benefited greatly from these changes. We have learned some things about some applicants that the commission needed to know. We have entirely eliminated the criticism that commission decisions are made behind closed doors.

Several other states have made similar efforts to make the selection process more transparent, and why not do so? I can think of no advantage of withholding from the public information about the qualifications—or lack thereof—of those who seek a judicial position. We are asking them to trust our judges; we should trust the public with information about those being considered.

I believe that making the process transparent also makes it more likely that diversity on the bench will increase. Why should we be concerned about diversity? First because survey after survey has shown that the one's views of the fairness and impartiality of the bench is powerfully

impacted by the race or gender of the respondent. For instance, Justice at Stake conducted a survey in 2001 asking respondents whether judges are fair and impartial. Sixty-two percent of whites said yes, but only 45% of African Americans. Similarly, a recent survey in Florida asked whether courts treat men and women the same: 64% of male attorneys said yes, which was a view shared by only 37% of female attorneys. And recent empirical research suggests that diversity has a positive impact on courts' decision making. Indeed, basic notions of fairness require that judicial positions be open to all those best qualified, without regard to group membership.

A transparent process, with the judicial qualifications of all made apparent, makes it much more difficult to deny a nomination to a qualified women or minority-group applicant.

But initial selection of the best qualified should not end our attention to the evaluation of our judges. We retain an obligation to assure that those selected remain accountable to fulfilling their duties as judges.

How do we evaluate judicial performance? Perhaps the best and most thorough examination of how best to measure and assure judicial accountability came from the Institute for the Advancement of the American Legal System at the University of Denver. After carefully surveying and analyzing various methods for evaluating judicial performance, the Institute recommended evaluation methods for states with commission/appointment system, as well as election systems.

In general, the Institute recommends that judges should be evaluated on those areas important to serving well as a judge, areas such as legal knowledge, judicial demeanor, integrity, communication skills, including clarity in instructions and decisions, conduct free from discrimination and impropriety and, where appropriate, administrative performance. Shouldn't the public know these things about their judges?

The Institute also concluded that the best practice is for those who actually see a judge in action complete the evaluations. We adopted such an evaluation process in Arizona in 1990. All those who appear before a judge evaluate the judge's performance: witnesses, jurors, litigants, and lawyers, and trial judges evaluate appellate judges. As a result, a judge's evaluation is based on performance, not on reputation or rumor.

Judicial performance evaluation is of greatest value if the results are made public. It does not help engender confidence in the courts if the public does not know whether a judge is performing his duties. But if the results are made public, we provide a basis for trust and confidence in the courts.

The Institute concluded that, done properly, judicial evaluation furthers both judicial independence and judicial accountability.

So back to the question of the night: how can we assist the League of Women Voters in reaching its goal of ensuring judicial independence and increasing diversity in our state courts? We can take several steps. We can become informed about the factors and procedures that help assure the appointment of qualified, impartial judges, and we can urge change where it is needed. We can encourage use of selection criteria in an even-handed way that is likely to increase diversity. And we can support a judicial evaluation system that provides the public with reliable information about judicial performance. All this can best be accomplished through procedures that, by providing transparency, assure the public that they can trust the judicial system.

Although judicial independence is basic to our form of government, perhaps it, like other freedoms we enjoy, has become something we take for granted and therefore give little thought and attention. Eric Hoffer once remarked, “It is a perplexing and unpleasant truth that when men already have ‘something worth fighting for,’ they do not feel like fighting.”

The League of Women Voters has shown that it will fight for judicial independence and diversity. And your presence here indicates that you regard our justice system, based upon the principles of judicial independence, as something still worth fighting for.

This is a fight we cannot lose if we want to retain the principles on which our country was founded.

Thank you for allowing me the privilege of meeting with you.