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Judicial Independence in an Age of Political Polarization

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GENERAL SESSION 5

Judicial Diversity in the Courts

Panelist: Steven Gonzalez
Chief Justice, Washington Supreme Court

Where does the judicial system stand in terms of achieving diversity and why? Have political factors impacted judicial diversity and the perception of a fair, impartial, and independent judiciary?

“Judicial Diversity in the Courts”
AJS National Conference, Wednesday, November 24, 2021

Remarks of The Honorable Steven C. González
Chief Justice, Washington Supreme Court

Thank you very much for allowing me to be here with you. Let me start by saying that I do not see my role as mollifying or agreeing, but I see my role as challenging you. So if I offend you in any way, I apologize. My remarks are to challenge you a bit.

First of all, I would say that three men were found guilty of murdering Ahmaud Arbery. That’s the context of what we are talking about: law enforcement, justice, and faith in our system.

I hear many people say that we need to restore faith in the police. I think that is completely a majority perspective. Some communities never had that faith in the first place. We cannot restore what never was.

It is instead about building that faith where it never existed. I think the same is true of the judiciary. We talk about building and restoring faith in the judicial system and in just outcomes. Many in our communities do not believe that ever was the case. We pat ourselves on the back for how just and fair we are, but let’s be honest with ourselves.

Let’s look at the history of the judiciary. Let’s look at Dred Scott, Plessy v. Ferguson, Korematsu, and the list goes on. We have not always risen to the occasion.

In each of our jurisdictions, looking at the volumes of published cases, we will find vile language describing African Americans, Latinos, Asians, Native Americans, etc. in cases that can still be relied upon for precedent. Those books are our legacies, and it is our job to overturn that language or at least to disavow it every chance that we have and to actually build faith in the judiciary that may never have been there among some groups.

LBGTQ+ people were told they could not marry and they were not the same; that their love was not same as our love; the list goes on.

I challenge you not to be so satisfied with who you are, but to look instead at what we want to be.

That being said, I want to say that I have great respect for Justice Liu, but I have one criticism of his slide presentation. I noticed the term “Hispanic” and “Latino-Hispanic.” Some of that is driven by the sources from which those descriptors

come. Others were from his own survey. Using the term, Hispanic is a controversial term. I see it akin to calling an Asian person an Oriental, a Black person, a Negro. It is an English term and was imposed upon us. It is a term that emphasizes a connection to Europe, to Spain. Many of us do not recognize that connection so much if at all. Some do. But it excludes everyone who is of Portuguese descent or enslaved people brought to Latin America and it excludes the indigenous populations that survive to this day. I would encourage you to use a different term. Latino and Latinx are not perfect, but at a minimum it has a geographic reference to those who have ties to Latin America. So, I would encourage Justice Liu to go back to his slides and if he persists in using Hispanic, to at least have the alternative, Hispanic/Latino/Latinx. My preference would be to eliminate the term, "Hispanic" altogether or at a minimum, use Latino and have an asterisk to an explanation of the terminology below.

Upon reflecting on what we are doing here, it reminded me of a haiku: Uchitokete, koori to mizu no, nakanaori - *while melting, ice and water resolve their differences*. I think that is what we are doing. As we come together, as we touch each other, surround each other, we become that one thing and we realize that ice and water are really not so different. I hope that is what we are doing, that my point is to open a meaningful and deep conversation, and I apologize if I offend.

I want to say something about how we present who we are -- how we restore faith in the judicial branch. We talk about how we are not politicians, that we are not just legislators in robes. I want us to be careful, because if we do that, we implicitly denigrate the other two branches of government. We are then doing what we are telling them not to do to us.

We heard from Representative Amy Perruso during this conference. If that is what a politician sounds like, I would be proud to be called a politician. They are supposed to be protecting everyone's constitutional rights and not just those who pay money for their campaigns. We are all part of the core of this democracy. We should be careful as we hold ourselves out that we do not push down on the other two branches of government.

I think one issue that we judges have is that we are, as a profession, conservative. I don't mean in terms of a capital R or D -- in terms of politics. I mean that we are reticent to do anything and that is because our job is to respond to cases coming before us. That is only part of our job, however, especially if we are the supreme court or on the rules committee or if we are deciding an issue that would affect an entire branch of government. There, we have the legislative and executive functions within the judicial branch.

Let me give you an example. It may not be as big an issue in Hawai'i, but the treatment of the undocumented on the West Coast is significant. Years ago when I was a trial court judge, I and two of my colleagues raised the issue of having a policy that would prevent ICE enforcement of civil arrest warrants in our courthouses. Some responded by saying that was political, and we should not do that. My response was that it has been politicized but access to justice is not political. We own that; that is our

branch. It is our responsibility to make sure that everyone, regardless of any documents given or denied to them, can come to court and testify, can be there with their children in juvenile court, can appear when they are witnesses, and not be arrested. If they fear being arrested by immigration, then they will try to resolve their disputes extrajudicially since they do not feel safe coming to court. After much debate we were finally able to adopt the policy.

We should stand for access to justice and to say it proudly despite the criticism that might come.

Ten years ago, I joined the Washington Supreme Court. When I joined the court, I was the only person of color on the court. There had only ever been one before me and he had retired ten years prior. We now have four people of color on our supreme court; we are seven women and two men. We learned earlier that the demographics of the people on the bench show that white people are overrepresented. I would posit to you that white people are not more qualified to be judges than people of color. White men are not more qualified than white women, yet three times more white men than white women are on the bench. They are not three times more qualified. On the Washington Supreme Court, we have two Latinx justices, one Asian, one Native American, one black, three women of color, three Jewish justices, two lesbian justices, one immigrant, one disabled justice. Obviously, I counted some of us more than once since often we are more than one characteristic.

I am the first Chief Justice of color on our court and the first Jewish chief on the court. All of the five people of color ever on our court initially were gubernatorial appointments.

This diverse group is doing very well. We are not more efficient in conference; it takes longer to get the work done because we listen to each other, and we have different views. The extra time is worth it.

Some embrace the idea of diversity, but if your hiring does not match it, then I am not sure that your deeds live up to your words.

Some want diversity, but they want those diverse voices to sound like them, so they can feel better about themselves. We are not about window dressing. We are about changing the face and heart of our justice system, who we punish and how we punish them; who we choose to rehabilitate and how. All the scientific evidence shows that a heterogeneous group is better than a homogeneous one. We also need to make sure our allies can help raise the issues as well so it does not fall only on us.

As we think about how we engage in this difficult discussion about diversity and inclusion, I would also like to speak on the topic of civility. I believe in civility, but sometimes the term is misused. Often civility is a euphemism for etiquette and protocol. I don't care so much about that. Civility is substance. Civility is justice.

I urge you also not to care so much about etiquette and protocol. Imagine that you are in a room discussing whether a gay couple may marry or adopt a child. Who is most likely to feel emotional and get upset during the discussion? Would we criticize them for emoting? or reacting?

All emotions, if sincere, are involuntary. We should give people room to get upset and not find them in contempt when they are in court, but to give them some grace and understand why they may feel strongly about the issue.

There may be some backlash to frank discussions and to change. I urge judges to treat each term as their last and to act accordingly. There is a lot that we can do in the judicial branch to make our deeds consistent with our words, to bring us closer to the promise that we are all equal before the law. Thank you.