

## A Republic If You Can Keep It

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Thank you, Bret Parker, for your kind words, and for all you do in your leadership role as executive director of the City Bar. I know that NYC Bar President John Kiernan will be with us shortly, and I thank him as well. Thank you Barry Garfinkel for your generous introduction, and thank you Scott Musoff, the co-chair with Barry of this evening.

I am deeply honored to have this opportunity to deliver the Arps Lecture. It has a distinguished lineage, honoring the memory of an estimable member of the NY Bar, and of the law firm of Skadden, Arps. I have long admired the Skadden Arps firms for many things, especially its creation of the Skadden Fellowships which do so much good for those in need. I had the privilege of working many years ago with Peter Mullen of Skadden on a project I directed, “The Law Firm and the Public Good” – a project which sought to stimulate pro bono activity among firms. Barry Garfinkel, who invited me, is a friend of long-standing; apart from his own extraordinary legal career, he performed great service to the Second Circuit when for many years he chaired the Second Circuit Judicial Conference planning committee.

Standing here, at this podium, is a homecoming. In 2007, I had the privilege of delivering the Marden Lecture, on the unmet legal needs of the immigrant poor. That launched a decade long effort to bring together diverse constituencies in the effort to secure access to counsel, including the creation of the Study Group on Immigrant Representation, the Immigrant Justice Corps, and the New York Immigrant Family Unity Project. The City Bar’s Justice Center, with the great Lynn Kelly, has been a valued partner in all this. I am proud to say that the Immigrant Justice Corps has had fellows at the City Bar Justice Center.

Now to my subject, “A Republic if you can keep it.”

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In the twilight of the century, with domestic challenges ever present, with ethnic conflict overseas unrelenting, with the power of presidential incumbency under siege, a commentator exclaims:

There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one

aim, do not produce one harmonious result. The sailors, the helmsman, the engineer, do not seem to have one purpose or obey one will, so that instead of making steady way the vessel may pursue a devious or zigzag course, and sometimes merely turn round and round in the water.<sup>1</sup>

It is the closing years of the century, not the twentieth century, but the nineteenth century, and the words are those of Lord Bryce. The nation's specific challenges, of course, are different now than they were in the 1890s, but skepticism about governmental process, about the effective workings of our political institutions have been with us for a long time. Indeed, they have been with us from the dawning days of the republic.

Our founders understood that the Constitution, the charter of nationhood, could not foresee all problems. After all, they had already been through the ill-fated experience of the Articles of Confederation. “Nothing human can be perfect,” wrote Gouverneur Morris.<sup>2</sup> “Surrounded by difficulties, we did the best we could; leaving it with those who should come after us to take counsel from experience.”<sup>3</sup> The architects of our constitutional framework envisioned the mutual interaction of many diverse elements, within and without government operating to secure national purposes. Although each element would act according to its own interests and incentives, together those parts would produce a balanced system assuring national security and domestic peace. Governmental institutions were to be the medium through which energies were absorbed, ideas refined, and outcomes realized, consistent with the popular will. Senator Daniel Patrick Moynihan noted “the degree to which the founders of this nation thought about government.”<sup>4</sup> There was, he said, “little they did not know of politics, seen as the struggle for office and reward, and much that they feared from politics as they understood it. Accordingly, it was to the institutions of government that they looked to confine and to moderate the struggle.”<sup>5</sup>

Many Americans believe today that the governmental system is failing<sup>6</sup> For some, the difficulty is that particular institutions are not working; they see irresponsible legislatures, unaccountable bureaucracies, and imperial courts.<sup>7</sup> For others, the problem is that each institution is, in fact, acting consistent with its incentives and interests but ultimately adverse to the system as a whole.<sup>8</sup> Those who think these perceived flaws are implacable argue for a diminished governmental role.<sup>9</sup> Still others, who acknowledge these flaws, contend that the solution lies in refashioning the structures and incentives of institutions so that they function to achieve national purposes.<sup>10</sup>

In poll after poll, Americans express the sentiment that the country is going in the wrong direction, that our national political institutions—the presidency, the Congress, and the judiciary are not working as they should. In a recent Gallup poll, for example, only 29% indicated that the United States was on the right course.<sup>11</sup> Americans do not look

favorably upon the performance of any of our national political institutions. Only 16% of those polled said that they had a great deal of confidence in the executive branch,<sup>12</sup> only 36% had a very positive or somewhat positive view of the Supreme Court,<sup>13</sup> and only 1% had a very positive view of Congress, with 6% having a somewhat positive view.<sup>14</sup> Indeed, 52% believe that Congress is corrupt.<sup>15</sup>

Certainly, Americans have always expected much from their government and its leaders. As James Q. Wilson observed, we seek many things from government, many of which are in conflict.<sup>17</sup> We want a government that treats each individual alike, but one that is compassionate and makes exceptions for those thought deserving of such exceptions. We want a government that is efficient and expeditious, but one that takes into account the diversity of viewpoints in ways that are hardly efficient. Nevertheless, the feeling of dissatisfaction in this country with our institutions seems at this moment to be particularly acute as the populace is worried about the quality of life for themselves and their children.

Many Americans ask: Have we lost the ability to govern? The answer demands in part an inquiry into the structural problems besetting our national institutions—the executive, legislative, and judicial branches, at the federal and state and local levels. There are two sets of problems, those that have to do with the internal operations of the institutions and those that have to do with the interrelationships between institutions. Both are impediments to the effective functioning of government.<sup>18</sup> Along with many others, in my academic work, I have devoted much attention to the problems of governmental process. To be sure, no one should pretend that attacking problems of governmental process can by itself resolve the nation's problems. It would be foolish to claim that our most compelling social and economic problems would be solved if only government "worked better." Certainly, we expect our institutions to help resolve conflict, to lead. But, where society is deeply torn as to what to do, where those problems are very complex, it should not surprise anyone that our institutions are uncertain as well as to what to do or how to do it. We should not confuse the absence of political will with the failure of governmental processes. Nor should we unrealistically expect speed in all of our deliberations given that our governmental system is intentionally embedded with many checks designed to curb the abuse of power and rash decisions.

My purpose, though, now is not to focus on those matters of governmental process about which I have spoken before. Rather, I seek to raise another concern and to seek your help in addressing it. If we as a country are to continue to tackle our problems, even as there is increasing doubt about the effectiveness of governmental institutions, then there must be a shared appreciation about the constitutional system underlying those institutions. There must be a shared understanding of the principles, values, and basic workings of that constitutional system. If that is lost, then I fear all that will be left will be a corrosive cynicism about the perceived failings of that system, without the recognition of all the reasons our constitutional system is worth preserving. The consequences for us, as a

nation, I daresay, of such lack of understanding can only be harmful to the fabric of our country.

Yet, if anything, there is a disturbing lack of knowledge of such matters. Unfortunately, the Constitution's ideals and the way our system of government puts them in action — is lost on millions of Americans. Surveys show many have only a dim idea of how our government makes and applies laws. Most could not pass the test administered to prospective citizens. To cite a few troubling facts: 70% of Americans in a 2011 poll couldn't identify the Constitution as the supreme law of the land; more than 60% couldn't identify the length of a senator's term, and about the same proportion couldn't name the number of justices on the Supreme Court. In a Newseum Institute survey, one-third of Americans could not name a single First Amendment right; 43% could not even identify freedom of speech as one of those rights. Some 10 percent of college graduates think that "Judge Judy" is a Supreme Court Justice.

In September 1787, as the Constitutional Convention was completing its work, a Philadelphia woman asked Benjamin Franklin what kind of government had been created. He answered, "A republic, madam, if you can keep it." How can we effectively defend the Constitution if we know so little about it? When so few have read its 52-word preamble, with its commitment to "justice," "tranquility" and the "blessings of liberty to ourselves and our posterity" ? When so few are familiar with the Articles of the Constitution and its laying out of the organization of government? When only a small minority are knowledgeable about the Bill of Rights and its nearly 30 distinct promises to all Americans?

**Public Engagement & Civic Education**. *Justice for All: Courts and the Community Project – A Civic Education Initiative of the Federal Courts of the Second Circuit.*

I think all of us in this room are troubled about this state of affairs. In this very hall, in a previous Arps Lecture, Justice Sandra Day O'Connor urged greater attention to closing the gap in public knowledge of institutions through civic education. Reflecting that concern, upon becoming chief judge, I began to think about how bench and bar could increase public understanding of the role and operations of the courts, and to bring courts closer to the community. Students who learn about and appreciate the Constitution and courts grow up to be adults who respect and support it. Understanding our system of constitutional liberty keeps our democracy strong and safeguards the rights of all Americans .

Two years ago, I called for an initiative, then, to help increase points of contact between the courts and the communities we serve, to facilitate mutual understanding and

help to ensure that the courts are accessible and effective communities in which courts function. My purpose was not to put the courts on a pedestal, but rather foster awareness about the workings of the administration of justice, to provide ways to share ideas about that system, for improving the administration of justice in our federal courts. My hope was to develop a program could be implemented in every district and courthouse in our Circuit. Thus was born the idea for our Second Circuit-wide initiative on civic education and public engagement.

A. *Justice For All: Courts and the Community*

In these intervening two years, I launched a circuit-wide civic education initiative, entitled *Justice for All: Courts and The Community*, to increase public understanding of the role and operations of the courts and to bring the courts closer to the communities in which they are located and which they serve. **To my knowledge, this is the first such judiciary sponsored, circuit wide initiative in this country, involving the federal courts at all levels.** To that end, our mission encompasses two principal approaches: to bring the communities to the courts, and to bring the courts to the communities. I appointed my esteemed colleague, Southern District Senior Judge Victor Marrero, as my co-chair, and together with the Circuit Executive, I formed a Circuit-wide Committee on Civic Education and Public Engagement consisting of judges and court executives throughout the three states of our Circuit. Working with us is an extraordinary group of lawyers and educators. The Committee developed a mission statement to assist its members in defining the Committee's goals for this Circuit-wide program on civic education. I want to pay special tribute to the judges, lawyers and educators participating with such dedication, and to our court staff, especially in the circuit executive office and in the library. In doing our work, we are buoyed by the work already ongoing by the NYC Bar Association and other organizations. The City Bar Diversity Pipeline Initiatives Program hosts several programs for high school students, including the Thurgood Marshall Summer Law Internship Program which places high-achieving inner-city high school students with legal employers for the summer, and provides them with additional programming before, during, and after the summer designed to help them prepare for a legal career. Additionally, the NYC Bar hosted a My Rights, My Nation: Constitutional Rights Symposium for regional high school students to discuss the ways in which the Constitution affects their everyday lives, entitled "My Rights, My Nation: Talking About Constitutional Freedoms – Now and in the Future". Through the Volunteer Lawyers in the Classroom Project, the NYC Bar sends law students and attorneys in various practice areas to local high schools to discuss their areas of expertise

including but not limited to constitutional law, domestic violence, and international law/arbitration.

The circuit-wide initiative, *Justice For All*, has been divided into nine subcommittees: Civic Education Programs; Advocacy Skills; Learning Centers; Reenactments; Student Contests; Civic Ceremonies; Speakers Bureau; Adult Education; and Civic Education Media & Public Outreach. Each of these subcommittees consists of several judges along with members of the Advisory Group. I know that in this room there are many who have participated in various ways in our activities, as members of the various subcommittees, as judges meeting with students or with teachers, as court staff meeting with students and teachers. Could you please stand, I would like to acknowledge your efforts.

On your seats is a brochure on our new Circuit-wide initiative: *Justice for All: Courts and the Community*. This brochure contains the Committee's Mission Statement, a listing of the components of the Second Circuit Civic Education Initiative and a roster of the Committee's judicial members and advisors. I encourage each of you to read this brochure to learn about this exciting new civics education project underway in our Circuit and think about the ways in which you can be involved in this effort to increase the public's understanding of the rule of law and the courts; enhance their education about the vital role of the judiciary in our nation's history and justice system; and bring the federal courts closer to the communities in which they are located.

Let me share with you a few of the many activities, programs and events being planned and being held in the courthouses of our Circuit:

B. Civic Education Programs Subcommittee Activities.

In New York City, the civic education subcommittee, co-chaired by our excellent leaders, Judges Marrero and Laura Taylor Swain, has partnered with the Justice Resource Center ("JRC") of the New York City Department of Education to develop programs for courthouse visits for students and professional development seminars for teachers, and enhance the general social studies curriculum for New York City public school students. Federal courthouses, where citizens go to enforce their rights, belong to the people, and are locations that should welcome visitors for tours, lectures and other events. At the

Thurgood Marshall Courthouse in lower Manhattan, for instance, we have hosted monthly visits for high school students to watch oral arguments in the Court of Appeals, view district court proceedings in the Southern District and participate in legal research modules called Library Labs. Programs feature courthouse tours, presentations about the architecture and history of our courthouses, and presentations by judges and staff about the federal courts, including their probation and pre-trial services departments, and also partners, including the U.S. Marshal Service, U.S. Attorney's Office, and Federal Defenders.

Plans are underway to expand these programs to other parts of the courts of the circuit. With advance notice, our project welcomes court visits from school groups, mentorship program participants and community groups throughout the Second Circuit (which covers Connecticut, New York and Vermont), as well as dialogue on how we can assist educators in enhancing civic education. Civic education opportunities are potentially available every week day (other than national holidays).

In another successful collaboration with the JRC, the civics education subcommittee developed and presented, with the integral participation of federal judges, faculty from numerous law schools and practicing lawyers, an unprecedented week-long summer professional development program for New York City and Albany, NY, teachers in 2016. The program focused on the teaching of a comprehensive high school civics education curriculum (“We the People”). The teachers who participated in this special program were selected from among those working in schools in economically challenged areas. Our judicial colleagues, presided over a mock hearing at which teachers offered four minute presentation speeches on topics related to the week’s lessons. We very much expect to replicate this program in the future, and to provide additional courthouse-based professional development programs during the school year. Our civics education subcommittee also collaborated on and hosted a New York City Teachers Professional Day at the Thurgood Marshall Courthouse in the spring of 2016, which featured discussions with judges, a legal research seminar and a screening of the film “Justice is a Black Woman.”

We have collaborated with New York City’s Justice Resource Center (JRC) to develop civil and criminal law, constitutional law, mock trial and legal research courses for high school students enrolled in special law-focused public school programs throughout New York City, and we provide venues and logistical support for moot appellate court and mock trial competitions. To that end, the subcommittee worked with Eric Contreras, then Executive Director of Social Studies for the New York City Department of Education, to review the proposed new social studies curriculum for New York City public school students. Aided by Russell Wheeler of the Governance Institute at the Brookings Institution, subcommittee members reviewed the law focused

curriculum with a view to enhancing its lessons about the courts, the role of the courts in our government and civic education. Now being implemented in public schools is that Introduction to Law school curriculum, in grades 9 -11 (grade 12 still in development). The curriculum being introduced -- reaching 60,000 students and the product of a collaboration of the New York City Department of Education, the Judicial Resources Center, and judges and educators we recruited for this purpose – consists of the following:

- 9th grade: Intro to Law 1; Intro to Law 2
- 10th grade: Criminal Justice; Criminology
- 11th grade: Constitutional Law
- 11th grade: Moot Court and Mock Trials

As noted above, 12<sup>th</sup> grade Legal Research and Writing course is still in development.

Further projects for the 2016-2017 academic year include collaboration with the New York City Department of Education on the enhancement and implementation of judiciary and law-related aspects of the general social studies curriculum, through commentary on draft materials and the development of components that will enhance students' understanding of the role of the courts, particular legal issues, and significant historical events.

As part of our activities, we also hosted participants in several internship programs for law students and high school students in our New York City courthouses during the summer of 2016. These included the Sonia & Celina Sotomayor Judicial Internship Program, whose high school interns were placed in judges' chambers and attended weekly seminars on practical topics such as college applications, career exploration and cyber-security, as well as legal research training in our law libraries, other law-related skills, and legal history.

C. Advocacy Skills Programs & Competitions. This summer, Eastern District Judge Bianco, the dynamic chair of the Advocacy Skills Subcommittee, hosted a week-long advocacy program for ninth graders at the D'Amato Courthouse in Central Islip,



culminating in a mock trial competition for the students. Over 80 high school students, from over 20 schools in Nassau and Suffolk County participated in the program, whose speakers included 7 federal judges, the U.S. Marshal for the Eastern District, two FBI agents, a U.S. Secret Service agent and several prosecutors and defense attorneys. The speakers described their roles, and taught basic advocacy skills for the mock trial competition. The students observed a Naturalization Ceremony. They heard from two law professors about issues implicated in *Miranda v. Arizona*, this being the 50<sup>th</sup> anniversary of that landmark decision. At lunch one day, the keynote speaker was Mary Beth Tinker, the plaintiff in the Supreme Court decision, *Tinker v. Des Moines*. The Advocacy Skills Subcommittee, is also hard at work developing a template to replicate the JRC's mentor-based moot court and mock trial program outside New York City with assistance from the Nassau Bar Association and Hofstra Law School for Long Island-based high schools.

At Thurgood Marshall, we hosted the final round of the New York City-wide Moot Court competition last December and the last four rounds of the multiple-round New York City-wide mock trial competition. This summer, we hosted our (now) annual moot court argument for the New York Intellectual Property Association's summer associate program and the Legal Outreach summer mock trial competition in August.

The Advocacy Skills Subcommittee continues to encourage individual courts to host student moot court and mock trial competitions with judges presiding over these student competitions. It makes all the difference to the students to be able to argue in a real courtroom where their arguments are heard by actual real-life judges.

A subcommittee, chaired by Geoffrey Crawford of Vermont, is reviewing how best to stimulate such competitions as student essay contests, to replicate efforts already underway in parts of the Circuit that would like to take on this activity.

In all this, I thank our judges and bar members who have volunteered to preside at these student advocacy skills competitions.

D. Learning Centers. With the energetic initiative of Eastern District Judge Pamela Chen, who chairs the Learning Centers Subcommittee, we are working to create a model

and exhibit materials for physical and virtual learning centers that can be used, or adapted for use, in each of our Circuit's courthouses. It is envisioned that these Learning Centers will cater to visitors of all ages, backgrounds and levels of knowledge regarding the federal judicial system, its judges, its courthouses and its role in maintaining our republican form of government. We expect that the learning center at the Thurgood Marshall Courthouse will be open in the spring; my cochair, Victor Marrero and I, are working with the Circuit Librarian and the learning center subcommittee to make that a reality.

E. Reenactments. Under the leadership of Judge Denny Chin and Kathy Chin, our project is supporting the reenactments they have produced of historic cases, programs like the Amistad case, the trial of Susan B. Anthony, the Rosenberg case, the trial of Wyatt Earp, the Heart Mountain Draft resisters case. With the help of the Second Circuit Library staff, the civic education website, about more in a moment, will include pages devoted to these reenactments and visitors to the website will be able to learn about the reenactments and requests scripts and slides so they can present the programs in their home communities or in our courthouses.

F. Civic Ceremonies. Our project, under the vigorous leadership of cochairs, Judges Margo Brodie and Michael Shea, worked on programs for Law Day and Constitution Day celebrations, including naturalization programs throughout the Circuit. The subcommittee has provided a template for such events. Through the subcommittee's efforts, Justice Sotomayor videotaped remarks which were shown at all naturalization programs in the Circuit. There was substantial media coverage of the Ellis Island ceremony I mentioned earlier and the ceremonies of the Eastern District, one of which featured a star of the show, Hamilton. The late Gerald Walpin, a subcommittee member, prepared a quick which contains sixty questions about the Constitution and the Supreme Court. The subcommittee is also considering developing a list of recommended "minimum standards" for courthouse visits in each district – for instance necessary website information, the appointment of a visits coordinator, and a series of ready-made programs.

G. Speakers Bureaus. Our plan, devised by superb subcommittee cochairs Victor Marrero and Bankruptcy Judge Elizabeth Stong, is to coordinate speaking events for

judges, professors, lawyers, and scholars about the legal profession and the work of the courts, participating in school and other communal events. In this regard, we are working with law school deans to involve their faculties and students; Dean Trevor Morrison of NYU Law School, hosted a luncheon meeting of deans throughout the circuit, who gave generously of their time and thinking.

Judges and lawyers will visit local schools and community organizations for presentations, panel discussions, or Q&A sessions. Examples of places visited by federal judges include:

- Middle schools and High schools;
- Community colleges;
- Senior centers;
- Child and family services non-profit organizations;
- Youth groups, including Local Boy Scout and Girl Scout troops;
- Public radio stations

Examples of topics that judges and lawyers may address include:

- Our Federal courts and how they function;
- Your Constitutional rights and duties;
- Careers in the law and law enforcement;
- How does one become a lawyer, a judge, and law enforcement agent?
- Our jury system;
- Financial literacy and why it matters;
- Significant and historic trials

H. Adult Education. For adult audiences, our project is developing financial education programs on consumer bankruptcy and consumer credits, expanding the Credit Abuse Resistance Education (CARE) program, and forming panels of lawyer educators to partner with judges for presentations on financial literacy in a variety of locations, reaching a wide population, including seniors, veterans, immigrants, and victims of domestic violence). The energetic and thoughtful Bankruptcy Judge Shelly Chapman chairs this subcommittee.

I. New Civic Education Website

An initiative of this magnitude requires a permanent public presence where teachers, students and the public can access information about the many activities, programs and events happening at the courthouses of our Circuit.

Under the skillful guiding hand of the Subcommittee on Civic Education Media & Public Outreach, chaired by Connecticut Magistrate Judge Holly Fitzsimmons, together with Circuit Librarian Lou Lopez and his staff, I am pleased to announce that our Circuit has developed a new and exciting public face to its Circuit-wide initiative on civic education. There are two components to our *Justice For All* website: a civic education website for the public and an internal website for judges and court executives. This easily accessible website, which will be debut later this month, will provide the public with a calendars of events, lectures, advocacy skills competitions and other civic education events and ceremonies in the courthouses of the circuit. It will house a wealth of downloadable resource and educational materials and other information about our Circuit-wide Civic Education Initiative: *Justice For All: Courts and the Community*.

We continue to seek the assistance of judges, lawyers, educators, academics, curators, architects, engineers, journalists and citizens with an interest in our *Justice For All: Courts and the Community* project. Please be in touch with the Circuit Executive's office with any ideas or inquiries. I look forward to working together on this effort to promote understanding of the judiciary, and to keep our judicial institutions vital for the communities we serve. Together, we have a collective responsibility to promote civic education, so that our Constitution and government remain vital for generations to come. What is at stake, harkening back to Franklin, is nothing more and nothing less than the preservation of a republic, if we can keep it. My colleagues and I look forward to continuing to work together with NYC Bar Association on this important project.

I thank you for your attention and for your great courtesy.