



The Importance of Judicial Independence and Accountability

Roger K. Warren, President, The National Center for State Courts

Good morning, ladies and gentlemen.

My topic for these remarks is “Judicial Independence, Judicial Accountability, and Judicial Reform.” Let me begin by expressing my admiration, President Weng, for your efforts and those of the Judicial Yuan of the Republic of China to reform the Taiwan Judiciary and build greater public trust and confidence in the work of the judiciary. I, too, am no stranger to judicial reform. I worked as a legal aid attorney representing people who could not afford to hire an attorney before I became a judge, and was active in judicial reform activities while serving as a judge in the State of California for twenty years before I left that position to become president of the National Center for State Courts, which is the preeminent American judicial reform organization and seeks to promote judicial reform in the United States and around the world.

The cry for justice is universal. Responding to that cry all over the world, lawyers, judges, court administrators, and judicial educators seek to reform justice systems and promote the rule of law. At this time in our world’s history, there is no higher calling. This morning I would like to reflect with you on our respective judicial reform efforts—in the U.S., Taiwan, and around the world—and discuss those efforts against the backdrop of the principles of judicial independence and judicial accountability.

Let me start with the rule of law. The rule of law is an essential feature of all democratic countries. The essential nature of democracy is government by, for, and of the people. Absent the rule of law, the governed are inevitably subject to the arbitrary will of those who govern. The rule of law ensures that individuals and organizations are protected from arbitrary and wrongful actions of others, including government officials. The rule of law ensures that all persons are treated equally and consistently according to known principles and rules. The rule of law ensures that there are known and enforceable rights between and among individuals, and vis-à-vis the government. The rule of law is essential not only to democratic government, but also to a freemarket economy in which participating buyers and sellers need to know what the rules are and that their respective economic rights and obligations will be enforced.

In practice, the rule of law requires a written, or unwritten, constitution or other public agreement about the powers of government and the rights of the people. It also requires the separation of governmental powers and an independent judiciary to provide checks and balances on government power, to ensure that no branch of the government gains absolute power in order to subvert the rule of law, to ensure that one branch does not interfere in the affairs of another branch, and to ensure that the laws are administered fairly, which we call “justice.”

That judicial independence is essential to the rule of law and therefore essential to democratic government is well recognized. Efforts proceed worldwide to promote judicial independence in developing democracies. Taiwan expressly recognizes judicial independence in its Constitution. Oddly enough, despite America’s strong commitment to an independent judiciary, judicial independence is not mentioned in our Constitution. And yet, in our Declaration of Independence, in

which the American colonies back in 1776 set forth the twenty-seven reasons why they wanted to declare independence from England, almost half of the reasons stated had to do with the poor administration of justice under the English king and the desire in America to establish an independent judiciary.

Indeed, judicial independence is a common and frequent subject of discussion among members of the United States judiciary and bar associations. On the other hand, what is much less frequently discussed or written about is the principle of judicial accountability.

But accountability—the accountability of those who rule or govern to the governed—is inherent in the nature of all democracies. Such accountability, of those who govern to those who are governed, is indeed the aim or purpose of all democratic governments to ensure that government consists of mechanisms or legal processes through which the government is accountable and can be held accountable by the people served. Indeed, the rule of law itself is a two-edged sword. It not only ensures the protection of rights but also enforces responsibilities. Its protections are meaningless if requirements of the law are not obeyed or enforced. It provides that those who rule as well as those who are ruled must be accountable to legal requirements and for the proper performance of their respective responsibilities. No one is either above or beneath the protections or requirements of the law.

The rule of law ensures that all government officials are held accountable to those in whose name they govern: to prevent corruption and abuse of power; to ensure that the laws that are enacted truly reflect the will of the people and the fundamental values and interests expressed in the Constitution; and to ensure that all government officials perform well their responsibilities.

The judiciary is not exempt from these principles. Judicial officials, like all government officials in a democracy, must be accountable to the people for the proper performance of their duties.

Let us examine these principles of judicial independence and judicial accountability in greater depth. Let us start with judicial independence. What is judicial independence? In short, judicial independence is freedom from improper control or influence. It has, I think, two aspects: first, “decisional independence,” the independence of a judge in deciding cases, and second, “institutional independence,” the independence of the court, or judicial branch, or the judiciary as an organization. With respect to decisional independence, it provides that the judge should decide cases solely based on the law and facts that are applicable without regard to political or popular pressure, without regard to the fact that there are some who would corrupt the judicial decision-making process for their own advantage, without regard to partisanship, fear of intimidation, or special interests. The goal of decisional independence is judicial integrity, judicial impartiality, and judicial fairness.

Institutional independence seeks to ensure that the court, or judicial branch, or all judicial officers are free from improper influence and interference in the governance and management of the judiciary’s own affairs. Its aspects include judicial selection; judicial retention; judicial evaluation; judicial discipline; judicial compensation; the proper funding and budgeting of the judiciary; and legislative or executive branch encroachments into the power of the judiciary, or into the administration of justice or interference with personnel, facility, or internal financial management of the judiciary. Here, the purpose is to promote the effective governance and management of the judiciary and the proper exercise of judicial power.

Speaking from the American experience, judges often fail to remember that judicial independence is not an end in itself, but a means to an end. The objectives of judicial independence are the rule of law, separation of powers, and the fair and impartial exercise of judicial power to safeguard a free society and to protect rights. Judicial independence is a means toward those objectives. When judges talk about judicial independence as an end in itself, it can cause the public and other branches of government to think that the judiciary regards itself as superior to other branches of government, or is arrogant.

Furthermore, judicial independence is not total independence. It is limited independence. It is not freedom from all influence; it is only freedom from improper influence. With respect to judicial decision making, for example, it is not freedom from criticism; it is freedom from unfair criticism, intimidation, or retaliation. It is not freedom from appellate review; it is not freedom from the influence of arguments presented by counsel in the courtroom, but it is freedom from *ex parte* or improper contacts or communications.

And, with regard to institutional independence, it is not that the court or judiciary is superior to any other branch of government. It is that we are coequal: the role of the legislative branch in enacting legislation and appropriations, the role of prosecutors in the enforcement of law, these are coequal functions of government. There must be an attitude of mutual respect between the branches of government: of cooperation, dialogue, and effective communication. The judiciary cannot operate in a vacuum. Judicial independence is not judicial isolation or judicial separation. Separation begets suspicion; suspicion begets mistrust. Independence is served through *interdependence*. In the U.S., this thought was expressed by one of the justices of our Supreme Court in this way: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but inter-independence, autonomy but reciprocity."

There are many threats to judicial independence. There are those who would corrupt the judicial process for their own personal advantage, or the advantage of their party, family, or friends, or for revenge, or malice—in order to injure. There are those who offer money or promises, and those who threaten, or conduct *ex parte* communications with the court. There are those who would improperly seek to influence judicial selection, or the criteria and considerations that should be used in judicial evaluation. There are those who would deny sufficient funding to the judiciary, or seek to control its personnel, or seek to selectively fund only their own pet projects, or fund the judiciary only on special conditions. There are those who would fail to support the judiciary's efforts to improve its' own performance.

You know as well as I that the proper exercise of judicial power in an independent judiciary requires great courage. An effective judiciary certainly requires competence and skills on the part of judges. But, more important, it requires courage, courage to do the right thing, moral courage. We need to create in our judiciaries a culture of courage, one that rewards honesty as well as punishes corruption. A culture that treats corruption as not just illegal, but as unacceptable to us within the judiciary. We need to create a culture within the judiciary in which those who would subvert the rule of law are subject to our own disapproval, even scorn, within the judiciary. A former justice of the United States Supreme Court has spoken of this need for resolve and for courage within the judiciary in this way: "It is in vain that we insert Bills of Rights into our Constitutions as checks upon legislative power unless there be firmness in our courts, in the hour of trial, to resist the fashionable opinion of the day."

But perhaps the biggest threat to judicial independence in many of our judiciaries, including in the U.S., is ourselves. We have a cartoon character in the United States named Pogo who said that “we have met the enemy, and it is us.” We must look at ourselves and our own performance honestly. There are many sources of dissatisfaction with the justice system. In the United States, for example, the public thinks that justice is too slow, that it costs too much, that people cannot afford attorneys, that there is favoritism in the courts, that African-American citizens in the courts are treated less fairly than European-Americans, that English-speaking Americans are treated better than non-English-speaking Americans, and that judicial decisions are sometimes influenced by political considerations, or campaign funding in our judicial election processes. These deficiencies are real in the United States. Legitimate dissatisfaction with the judiciary is a far greater threat in the long run than improper influences. We must look at our own performance honestly. We in the judiciary are not solely responsible for these deficiencies; other branches of the government share in the responsibility. But it is we in the judiciary who must lead the charge; we must create a culture of continuous improvement in the judiciary.

Although there are many sources of dissatisfaction with the judiciary, in the United States the most damaging source of dissatisfaction is the perception of unfairness. It is only dissatisfaction with regard to the fairness of courts that is directly linked to the level of public trust and confidence in the courts. The public may feel the courts are too slow or cost too much, but that does not undermine their faith or trust in the courts. But when they think that the courts are unfair, that the judges are not neutral, that the judges are not honest, that the judges are not trust worthy, that the judges do not have integrity, these are issues of character, not competence—when the public feels that there are character flaws in the judiciary, that’s what undermines their trust and their confidence in the entire justice system.

And this threat, I think, is our greatest threat in America, because the absence of public trust will inevitably result in persistent threats to judicial independence. And understandably so. Why should other branches of government, or the public, defer to an independent judiciary, if the judiciary cannot or does not demonstrate its ability to govern and manage itself effectively, or to decide cases fairly and promptly?

In fact, I think a bargain is struck. In consideration for judicial independence, the public expects proper and effective performance. The judiciary is accorded independence as a means to the end that we perform the job well, decide fairly, and administer the laws justly. We are public servants. If we do not perform our responsibilities well, we will inevitably face persistent attacks on our own independence. To state it different, our own poor performance will be the door through which the strongest challenges to our judicial independence will enter. If we take no responsibility for our performance, we are in no position to complain about the attacks upon our independence. Democracy is a system of checks and balances. No governmental power, including the judicial power, is absolute. If we exercise judicial power ineffectively, improperly, or poorly, other branches will surely seek to check our authority, to influence our decision making, and to interfere in our operations. We must be accountable for our performance.

So I come to the conclusion that in the United States, and around the world, the path to judicial independence is judicial reform: the continuous improvement of how we do business—our individual and collective performance as judges, as a branch of government. Increasing our skills and competence is important. But being mindful of our values and our character is much more important. Most persons who are not lawyers believe that they do not have the qualifications or experience to judge our competence. They do not know whether we have correctly decided the

law, but they do believe that they are in a perfect position to judge our character, integrity, honesty, and fairness. It is whether we are *worthy* of public trust that counts. These are the fundamental moral values that probably underlie the proper exercise of all governmental power, but especially of the judicial power. We must communicate to the public our courage and our commitment to reform, to continuous improvement, and to the quality of own character—which in combination will build and increase public trust in the judiciary.

It is often said that judicial independence and judicial accountability are inconsistent. The inconsistency I think is exaggerated. As we have seen, judicial independence is merely a means to an end. The end is the benefits that flow to the people from effective democratic government. Judicial accountability, on the other hand, is an end in itself. The accountability of all governmental power, including the judicial power, to the people is the end of democratic government. Absent judicial independence, the judicial power cannot be properly exercised so as to meet the people's rightful expectations.

One important question remains: how should we be judged? To what standards or by what criteria should judges and courts be held accountable? And what are the mechanisms through which the judiciary should be held accountable? The mechanisms, I think, are pretty clear: appellate review; in some cultures, e.g., ours, judicial elections; codes of judicial conduct, judicial discipline processes, judicial evaluation processes, a court culture that promotes proper performance of judicial responsibilities, pressure from our peers that promotes the proper exercise of judicial power; and the openness of our records to public inspection. All of these are proper mechanisms of accountability.

But the standards by which our performance should be measured are much more obscure. It is critical that we set the appropriate standards for our own performance and communicate these standards effectively and demonstrate over time that we meet them. If we fail to do that, we will be held accountable by whatever standards others may choose, and be held accountable to the wrong standards, standards like popularity or consistency with a partisan point of view, or furtherance of someone else's special or personal agenda. Being held accountable to someone else's standards will inevitably result in the attacks on judicial independence, improper efforts to influence or control judicial behavior. We must adopt and communicate clear standards in order to align our expectations of ourselves with others' expectations of us.

In the United States, for example, ten years ago, we established standards for the performance of both the appellate courts and trial courts, and these standards have now also been adopted in other countries, in parts of Australia, and in Singapore. The appellate court performance standards set forth some ten or fifteen standards by which the performance of appellate courts can properly be measured, and the trial court performance standards set forth twenty-two standards by which the operations of a trial court can properly be judged.

I brought a copy of those standards and I am happy to share them with you. For example, with regard to a trial court, these standards are divided into five areas: that the court should be expected to provide fair and equal access to citizens; that the work of a court should be expeditious and timely, that its work should be characterized by equality, fairness, and integrity, that there should be judicial independence and accountability, and I think most importantly, that there should be public trust and confidence in the judiciary. We at the National Center of State Courts, are now working with the state chief justices in the United States and other court leaders to expand these standards in order to create core principles of court performance and core principles

of judicial accountability—a clear statement by the judiciary about what should be expected of a well-run court. Taken together, these core principles will form a vision of what an effective court system, an effective judiciary, looks like. They will form a vision that can guide judicial reform activities to meet those standards. They will form a vision that resonates with other branches of government and the public to build greater faith, trust, confidence, and respect in the work of the judicial branch.

Today's leaders lead by the power of their vision, not the authority of their office. Paying attention to judicial accountability, and defining standards by which our performance should be measured, will allow us to effectively lead judicial reform efforts, and allow us to deepen the public's trust in us by showing that we are worthy of that trust. Ultimately, judicial authority is a moral one, and public trust and confidence in the judiciary is the ultimate measure of our performance. This thought was expressed by another former justice of our Supreme Court in these words: "the court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction." So, in conclusion, it is we the judges who understand these things most clearly and who feel most deeply about these values; it is we who must provide the vision; it is we who must set the standards; it is we who must lead the charge. Thank you.