

We the People.

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Let me begin by telling you how much this invitation means to me. When Judge Shapiro called me a few months ago, it is ironic perhaps that I had to “ask permission” to come and spend this time with you and that the permission givers, so to speak, were both men. They are colleagues with whom I have formed a partnership called Justice Programs. Our partnership presents interactive continuing legal education programs to lawyers across Tennessee in the fall of each year. This occasion and our first CLE for this fall conflicted. When I called the first and older of my two partners, a former judge, he said he didn’t think I should accept the invitation if it meant missing the CLE. In his way of seeing things, I had made commitments to the partnership; we had advertised our program; I needed to get my priorities straight. Mmmmm.

I hung up. I mulled his points over. I stewed. I dialed the number of the second partner but hung up before he answered. I thought about it. I stewed some more. I waited a day or two. I stewed some more. I got a second email from Judge Shapiro. She inquired whether she had misunderstood. Had I not told her I would get back in touch with her very soon? Indeed I had.

I thought about it. I stewed. I wrote her back. I did what I had intended to do from the beginning. I accepted the invitation, called my partners back, told them that I was speaking to the NAWJ, and that they needed to deal with it.

The irony in that story will perhaps become more obvious as I approach today's topic. The fact that I felt the need to ask and asked is poignant, but not nearly as poignant as the fact that I expected, hoped that my two male partners would understand the significance of my being invited to your table; that it would be so obvious to them as it was to me that I should be here at this table and not there. Ah, hope springs eternal indeed.

In addition to that ironic beginning, let me add another, a confession of sorts. Perhaps a way to do so would be to introduce myself to those of you who don't know me in this way: Hi, I'm Penny. And I am a judgeaholic. Yes, I have a judge addiction. Particularly when the judges are associated with Bunny Baum.

In today's lingo, I am a judicial groupie. I now have passed the point at which my years of not being a judge have exceeded my years of being a judge. Yet I remain addicted to judges. I like meeting with judges, eating with judges, staying with judges, playing with judges, and above all else, talking with judges. Truth of the matter is, I have a hard time saying no to any invitation involving judges.

I have thought about seeking help for this problem, but I realize that I have no desire to rid myself of the addiction or, more appropriately, the connection that I have with judges.

The affinity I have for judges is so well founded that, in my mind, it needs no explanation.

I admire what you do; I honor who you are; and I trust you to individually and collectively make good on the promise of equal justice under law. It's as simple (and perhaps, complex) as that.

Some of you have heard me describe this image, so forgive me if you have, but reflecting upon it has helped bring me to what I want to talk about today, your conference theme, the idea of "We the People."

Two days after I became an ex judge or an ousted justice as folks still like to call me, I flew to Reno, Nevada. I was committed to teach the week following the retention vote at the National Judicial College. (And if I have a favorite place to exercise my judicial addiction, it probably is at the NJC, where committed judges from all over the world with unique backgrounds and insights gather to improve their judicial skills). I remember the difficulty of that long, long flight from Johnson City to Atlanta to Salt Lake City to Elko to Reno, the many hours of solitude, the constant second-guessing, the overwhelming self doubt. And I

remember how I felt when I arrived at the College. The image that came to my mind as I walked in the door and down the hallway of the College was that I was marked; branded, not figuratively, but literally. That across my forehead in flashing scarlet letters, were these words “Not A Judge, Not a Judge.”

I felt a huge sense of loss; of being an outcast; of not belonging. And as I researched the topic for today, We the People, and thought about its many, many implications for judges in general and women judges in particular, I was reminded of my own personal and small experience with exclusion.

Hear me carefully. I am not comparing the two. There is no comparison between my small personal sense of exclusion and the huge, categorical exclusion that women and people of color must have felt at the time of the framing of the Constitution.

Without a doubt, my own personal experience pales in comparison, but it nevertheless provided a backdrop for my envisioning how some of the so-called “people” who were excluded from the table must have felt in 1787.

When the men of the new nation met in Philadelphia that summer to address the political and commercial instability that followed the Revolutionary War, it was not as if they had no exposure to women or people of color as social or political leaders. Centuries before their lifetime, Egypt had been ruled by powerful women

including Hatshepsut, Nefertiti, and Cleopatra. In addition, the Framers were clearly aware of the power and prowess of Elizabeth I, Queen Isabella of Spain, Joan of Arc, and Catherine the Great. In his recent book *The Great Upheaval* Jay Winik writes, for example, that while Catherine could have tried to snuff out the American Revolution, she actually unwittingly helped to midwife American independence. (And isn't that an appropriate choice of terms?) So there is no doubt that those men who joined here to revise the government were aware of the many significant contributions and the great potential of women leaders.

In addition the Framers were well aware of the accomplishments of leaders of color. Men like Crispus Atticus, Salem Poor, and Colonel Tye had played heroic roles in the American Revolution. At the very time of the constitutional convention, Richard Allen and Absalom Jones were at work here in Philadelphia, founding the Free African Society; and Lemuel Haynes, Andrew Bryan, and others were establishing African churches and delivering influential oratories from both the pulpit and the podium.

Moreover, many of those who would later earn the distinction of being called our forefathers were reminded regularly by their wives, sisters, and slaves of the importance of inclusion. Before the framing of the Declaration of Independence, Abigail Adams would tell John, "[I]n the new Code of Laws . . . I desire you would

Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could.” And in later correspondence, **“If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any laws in which we have no voice, or Representation.”** Abigail Adams would also address the issue of slavery with her husband, reporting to him that Prince Hall and others were petitioning the Massachusetts governor for liberation in exchange for defending the colony. She would tell John **“it always appeared a most iniquitous scheme to me to fight ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have.”**

One enslaved woman, quoted in Linda Kerber’s book **“Women of the Republic,”** protested in perhaps imperfect, but not inaccurate prose: **“I have Done as much to Carrey on the warr as maney that Sett Now at the helm of government.”**

And it was not only the disenfranchised who urged consideration of women and others in the new government. Three decades earlier, the Pennsylvania assembly had ordered the State House bell to commemorate the fiftieth anniversary of Pennsylvania’s original constitution written by William Penn. One side of the

bell quoted Leviticus, the twenty-fifth chapter, the tenth verse: “Proclaim liberty throughout the land unto all the inhabitants thereof.” Not only was there no differentiation in this scripture between men and women, there was not differentiation between people of color, leading to the bell’s adoption by the abolitionist movement as its icon and to the renaming of the bell, the Liberty Bell.

A dozen years before the constitutional convention and prior to the publication of his famous pamphlet “Common Sense,” Thomas Paine would evidence his own uncommon good sense by proposing women’s rights in an article published in Pennsylvania magazine entitled “An occasional letter on the female sex.”

But despite the familiarity with women and people of color as political leaders, as courageous and loyal warriors, and as skilled chiefs of states and heads of nations, not a single woman, not a single person of color was invited to the table in May, 1787, when the Framers gathered to revise the Articles of Confederation, and departed four months later with a new government. And yet, ironically, every one at that table, every man who took a seat, and every man that dared to sign the new Constitution was himself, in a sense, an outsider, an immigrant to this new nation.

What would emerge from those months in Philadelphia rather than a revision was a new blueprint for government, at 4400 words, the shortest in length, and now 230 years later, the longest in duration. They would begin the charter with the words we celebrate today: We the People. And it was those words that were printed in particularly large type emblazoned at the top of the Pennsylvania Packet and Daily Advertiser followed by the proposed United States Constitution.

We the People, the document, began. Were we to use those words today, we would clearly understand what they meant. They mean all of us. That is exactly the explanation the high-school graduate who cuts my hair gave when I asked her, “Heather, you know those words at the beginning of the US Constitution, We the People? What do they mean to you?” “They mean all of us,” she said; “everybody.” She then remarked that had the framers met in Seymour, Tennessee, a hamlet in the east Tennessee mountains that the Constitution might likely have begun differently. “What do you mean?” I asked. “Well,” she said, when my granny wanted a family discussion, she would call us all to the table, she would say let’s we’uns sit and talk a spell.”

But the framers chose the words “We the People.” Not, we the landowners; not we the British-born; not we the white men, but “We the People.” Were we to use those words today, in this room alone, We the People would include a stellar and

diverse array. It would include a former police officer, who led divisions aimed at eradicating youth crime; Fulbright scholars who have lectured in Zimbabwe and taught judges in Uganda, Tanzania, and China; those who have studied the plight of torture survivors as well as those who specialize in military law, health care law, and defense policy; It would include experts on the topics of equality theory and gay, lesbian, and transgender rights; voting rights, constitutional law, political theory, and environmental policy. Were we to use that phrase today --We the People-- in this room alone we would find all the expertise needed to contemplate and build a new nation, a nation of equal opportunity, but despite the collective talent, wisdom, and determination in this room, not one of you would have been allowed a seat at the table.

Despite this reality of exclusion, the framers did use words of inclusion: “We, the People.” I believe – and I am no constitutional historian – that this phrase, at a minimum, was meant to signify unity – at least against the remainder of the world. And while no one could rightfully claim that the Constitution created inclusiveness, I also believe that the phrase “We the People” and many similar references throughout the Constitution and the amendments – either intentionally, or coincidentally, or perhaps by virtue of divine intervention, provided the flexibility necessary for future inclusiveness.

In some ways, the document itself proves this point. Let us remember the words that follow our focus:

We the people of the United States in order to form a more perfect union, establish justice, insure domestic tranquility provide for the common defense, promote the general welfare, and secure the blessings of liberty for ourselves and our posterity.

This historic document established the rights of many, not just of the very few who drafted it.

Scholars have debated and written volumes about whether the use of the gender neutral phrase “We the People” was intentional. Some theorize that the failure to specifically include women like the purposeful exclusion of non-white and non-free men, reflected the belief that women had no role to play in the new government; others believe that the choice of gender-neutral inclusive terms was purposeful allowing the document to evolve in its application as times changed.

Jan Lewis, in her book “Women, Slaves, and the Creation of a Liberal Republic,” seizes upon the proposal of James Wilson, a Pennsylvanian to suggest that the Constitution clearly contemplated an inclusion of women, albeit it with a unique role from that of men. Wilson’s proposal was that representation in the lower house of Congress should be based on population, not wealth. But Wilson’s

proposal also included a crude and inappropriate reference to non-free persons. Thus, Lewis notes, at best Wilson's proposal brought women into the discussion not for their own sake, but for the sake of offering delegates a manner of dealing with a more divisive issue, that of slavery. Even at its best, the discussion did not bring women to the table. But this proposal which became Article 1, Section 2, by which women were counted for purposes of allocating representation in the House of Representatives, comprised a significant component of the suffragists' rhetoric when they first petitioned congress for the right to vote in 1866.

Whatever their intention, the men who framed the Constitution avoided gender labels, choosing the words "We the People" for the all-important opening and similar androgynous terms throughout the constitution and the amendments, with one or two exceptions. One such exception is the Constitution's reference in Article II to the President as "he;" perhaps that too will soon turn out to be merely that, a reference. Otherwise, the Constitution uses generic, encompassing language. In addition to "We the people," in the Preamble, there is reference throughout the document to members, and persons, and citizens, and inhabitants. In 14 of the amendments, reference is made to people, persons, citizens, and electors. Even a cynic must admit, that although they did not invite it, the framers left room for

inclusiveness. Even though we weren't invited to the table, they left us room. Fortunately for us, our sisters of yesterday did not delay while seeking permission.

I have talked perhaps too much about where we as a people have been, under the theory (I think it was Alex Haley, who said) that "you can't know where you are going until you know where you have been," So the question becomes then, having seen where we've been, where are we going?

138 years after Elizabeth Cady Stanton and Susan B. Anthony formed the national women suffrage association, the number of eligible women voters exceed the number of eligible male voters; more significantly, a higher percentage of women are registered to vote (67.6 as compared to 64.0), and at least in 2000, a higher percentage of the registered female voters actually went to the polls (61% as compared with 58%).

So given those figures, where are we? In terms of elected office, the country has now had 29 elected female governors, and in Washington, women have for the first time achieved a trifecta, with the governor and both US Senators being women. Research shows that voters give female governors significantly higher marks on qualities such as honesty, cooperation, and toughness. Yet, just the other day, I heard a male candidate for president express his opinion that the constitution was

still a viable instrument if Americans would just elect the right kind of men, men of high character, as he put it, to go to Washington.

135 years after Victoria Woodhull and Frederick Douglas declared their candidacy for President and Vice President, but were denied access to the ballot, a female and African American male candidate both vie for the Presidency. Yet, journalists still insist on telling us what shade of blue Candidate Clinton is wearing at the debates.

138 years after Belle Mansfield of Iowa joined the licensed bar and 135 years after Charlotte Ray became the first African American woman to be a member of an American bar association, 29% of attorneys are women, but only 16 % of partners in major law firms are females.

137 years after Esther Morris became the first woman judge in the country, 28% percent of the state judiciary and about 20% percent of the federal judiciary are women; but only 10 percent of the state judiciaries and less than 15% percent of the federal judiciaries are people of color. For the first time in our history, however, more than half the states have two or more women on their highest court, an indication that we are moving away from mere tokenism and toward the recognition of the contribution that women make to the bench Yet yesterday, when

I announced to my evidence class that I would be addressing some 300 women judges at the NAWJ Conference, a young man commented “there’s that many!”

138 years after Lemma Barkaloo became the first woman law student in the nation; and 110 years after Lutie Lytle, an African American woman, became the first woman law professor, only about 19% of full law professors are women and 13% percentage of law professors are people of color.

So where are we? We the People.

A few weeks ago I sat at a top twenty law school at a conference sponsored by the Justice Sandra Day O’Connor Project on the State of the Judiciary. It was a wonderful conference, including many knowledgeable speakers; and yet, it was the afternoon panel, some 14 speakers in, before a female presenter addressed the conference. It’s much too late for women to be excluded from the table.

As I was completing my comments for this meeting, I read with dismay about two judges facing disciplinary actions for their conduct on the bench, both in cases involving pro se domestic violence victims. The first judge recently decided a visitation dispute by tossing a coin. The judge admitted to tossing the coin, but said it was to demonstrate the randomness of the decision and to encourage the parents to negotiate a settlement. Of more concern was the judge’s conduct in a pro se order of protection case. The court found that the judge informed a pro se litigant

that an order of protection would not be granted unless the litigant displayed the wound that she claimed her estranged husband had inflicted. The wound was on the woman's thigh. Twice the judge told the young woman to lower her pants. Ultimately she did so. A court officer claimed that the judge later commented on the women's undergarments. The state supreme court ordered the removal of the judge because of his disregard for the dignity of litigants appearing before him and the dignity of the judicial process.

The second judge's conduct was described in an article entitled "Immigrant: Judge told me to go home." Anna Calixto went to court to seek an order of protection from her husband. The journalist, who was present in the courtroom, reported that the judge asked the woman if she was in the country legally. She responded that she was, based on a temporary workers' permit from the INS. In fact, Ms. Calixto has lived in the US for 13 years, and is a legal immigrant. Anna Calixto described what happened next, "the judge shrugged his shoulders. He told me I had no rights in court. to go back to where I came from. He told me to go back to Nicaragua. I told him I have two children. What am I suppose to do? He said "there are Americans here in this country who can take care of your children."

According to the journalist, the judge then tossed the application for the order of protection across his desk and later dismissed it. When I realize that this

was in a courtroom in the United States, a country with 37.5 million immigrants, in a courtroom in a state ranked sixth for the fastest-growing immigrant population; I ask myself Where are We? We the People? Mrs. Calixto commented, “If he’s a judge I thought he was suppose to be fair and look after the people. Even if I’m not an American, I am still a human being.” When a female law professor was asked to comment on the case, she said, “People need to read the Constitution. The U.S Constitution says we the people. All people citizen or noncitizen have a right to fundamental due process if they are on U.S. soil. And then she added, “unfortunately this is not an isolated incident.” Within hours the county commission in the judge’s home county – 21 members, all of whom are American and 18 of whom are male, made a motion to endorse the judge’s actions. And I ask myself Where are We? We the People? It is much too late for women, for people of color to be denied equal access to the courts and equal protection under law.

We may, on occasion, be at the table; we may, on occasion, be included; but we are far from reaching equality.

Sometime after the Constitution prefaced with those inclusive words “We the People” was ratified it came to rest at our National Archives in the Nation’s capital. Between 1787, the document would have multiple homes – in the Library of Congress, hidden in an unused gristmill on the Potomac, in a private home in

Leesburg, and even once on a railroad sleeper car bound for Fort Knox. But its final resting place is the National Archives, a building that is bordered by four stirring statues – statues that symbolize how poignant the phrase “We the People” remains in the American democratic experiment.

On one side, facing Pennsylvania Avenue, stands the statue of the Past – an aged male figure holding an ancient scroll and a closed book. His gaze is one of solemnity and resignation. He stares downward and contemplates yesterday. Adjacent to the Past is the Future – this, the statue of a young woman with her uplifted eyes and an expression of optimism, she holds an open book, an unfinished story, if you will. Her base is inscribed with Shakespeare’s famous words “What is Past is Prologue.” Thus she – the future, our future – cautions us that we must examine current events not only with an eye toward tomorrow, but with an understanding of yesterday.

At the buildings’ Constitution Avenue entrance are two other statues. A male martial symbol with helmet, sword, and lion’s skin, entitled Guardianship and inscribed “eternal vigilance is the price of liberty.” And adjacent to Guardianship the statue of Heritage, a young woman cradling a child, while bearing a sheaf of wheat in one hand and an urn in the other. Symbolizing respect for the

ashes of past generations and the hope for prosperity, the statue is inscribed, “The heritage of the past is the seed that brings forth the harvest of the future.”

Upon reflection there could be no better theatre to house our nation’s most treasured document, still an unrealized experiment.

Fully aware, mindful, and remorseful of the past, with the book closed on overt exclusion, privilege, and prejudice

Looking with wisdom optimistically toward a future of inclusion, yet waiting to complete the nation’s unfinished story true equality.

Guarding liberty with might and strength and courage, while recognizing that our best hope lies in the harvest of the future.

Last week at a bar association lecture, a well-known male trial lawyer asked the crowd of about 75 people this question “Who has heard of Alice Paul?” His point related not to her suffrage work, but to her graduation from the Washington College of Law at American University. I was seated on the front row. Of course, I had heard of Alice Paul, and that was not solely because of Judge Martha Craig Daughtrey’s famous canine. I raised my hand. I looked around. Not a single other hand was raised. And this was in a room of men and women, all ages, all highly educated, with diverse ethnic and cultural backgrounds. The heritage of the past is the seed that brings forth the harvest of the future.

Alice Paul who was born but a few miles from here and received two degrees from the University of Pennsylvania devoted her life to achieving equal rights. Unlike me, Alice Paul did not seek permission to come to the table; she observed exclusion and fought for inclusion; she sensed inequality but had a vision of equality. Her life seems to me a befitting symbol for the future of “We the People” and a perfect icon for the NAWJ. The National Association of Women Judges is dedicated to protecting the rights of individuals under the rule of law, to fairness and equality in the courts, and to equal access to justice through strong, committed and diverse judicial leadership. Like Alice Paul, women judges in their struggle for fairness and equality will face disappointment, adversity, and challenge.

But let me suggest:

There can be no greater disappointment than an unkept promise of justice.

There can be no greater adversity than an illusory promise of equality.

There can be no greater challenge than meeting the Constitution’s promise of liberty for ourselves and our posterity.

When Alice Paul faced difficulties, she remembered the advice of her mother, advice that is a fitting closing for today:

“When you put your hand to the plow, you can’t put it down until you get to the end of the row.”

**Where are we? We the People? We are not yet at the end of the row. But
the plow is in good hands**