

## DRI's Commitment to Fair and Free Courts

Justice Barbara J. Pariente and F. James Robinson, Jr.\*

In *Williams-Yulee v. Florida Bar*, the United States Supreme Court recognized that, as Chief Justice John Roberts wrote, “Judges are not politicians, even when they come to the bench by way of the ballot.”<sup>1</sup> *Williams-Yulee*, a 5-4 decision, upheld a Florida rule prohibiting judges and judicial candidates from personally soliciting campaign contributions. Chief Justice Roberts’ opinion for the majority continued, “the role of judges differs from the role of politicians. . . Politicians are expected to be appropriately responsive to the preferences of their supporters . . . In deciding cases, a judge is not to follow the preferences of his supporters . . .”<sup>2</sup>

However, many people are urging voters to evaluate judges as politicians. Justice Ruth Bader Ginsburg’s concurrence in *Williams-Yulee*, with whom Justice Stephen Breyer joined, noted that in recent years, “issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not tow a party line or are alleged to be out of step with public opinion.”<sup>3</sup>

Justice Ginsburg’s concurrence in *Williams-Yulee* echoed concerns she had expressed in 2002 in *Republican Party of Minn. v. White*.<sup>4</sup> There she wrote in a dissenting opinion that judges “[u]nlike their counterparts in the political branches, . . . are expected to refrain from catering to particular constituencies.”<sup>5</sup> Judges should “decide individual cases and controversies on individual records,” not on perceptions of an electoral mandate or the public’s will.<sup>6</sup>

Attacking judges for being out of step with the public blurs the roles of judges and legislators. As Professor Rachel Caufield argues, “to allege that judges should universally be assessed based on whether they adhere to political agendas and

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<sup>1</sup> No. 13-1499, 2015 U.S. LEXIS 2983, at \*9 (U.S., April 29, 2015).

<sup>2</sup> *Id.* at \*22.

<sup>3</sup> *Id.* at \*42.

<sup>4</sup> 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting).

<sup>5</sup> 536 U.S. at 803-04 (Ginsburg, J., dissenting).

<sup>6</sup> *Id.* at 804 and 806 (Ginsburg, J., dissenting); *see also id.* (Ginsburg, J., dissenting) (“One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943))).

public opinion is anathema to the unique role that we ask judges to play in refereeing these social and political questions.”<sup>7</sup>

You may disagree with us about the dissimilarity of the roles of judges and legislators in some respects, but in all respects judges alone are responsible to the law rather than public opinion.

The rule of law is an enduring shared value in our form of government. It is the basis for due process and equal protection rights, guaranteeing equality under the law to all citizens and not just to the most vocal, the most powerful or the most organized. Generations of Americans have resolutely agreed that the best way to uphold the rule of law is to insulate judges from popular will and political intimidation.

We may also disagree about the requisites of “good judging,” but our shared history tells us that it is not serving as the megaphone for the majority. We expect judges to issue neutral and impartial rulings based on the rule of law, regardless of how unpopular those decisions may be. The public’s confidence in the ability of courts to do their important work rests on that premise.<sup>8</sup>

The “out of step with public opinion” attack is used because it works. National surveys have consistently revealed surprising evidence of civic illiteracy. A 2012 national survey of civic literacy by Xavier University’s Center for the Study of the American Dream showed that one in three natural born citizens failed the civics portion of the U.S. Citizenship Test, compared to a 97.5 percent pass rate for immigrants.<sup>9</sup> 75 percent of respondents were not able to correctly answer, “What does the judicial branch do?”<sup>10</sup>

A 2014 national survey conducted by the Annenberg Public Policy Center of the University of Pennsylvania found that:

- While little more than a third of respondents (36 percent) could name all three branches of the U.S. government, just as many (35 percent) could not name a single one.

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<sup>7</sup> Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 584 (Summer 2009).

<sup>8</sup> Caufield, *supra* note 7 at 582-83; see also Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV., 308, 310 (1997); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (“[t]he power and the prerogative of a court to [resolve disputes] rest[s], in the end, upon the respect accorded to its judgments.”) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

<sup>9</sup> [http://xuamericandream.blogspot.com/2012\\_04\\_01\\_archive.html](http://xuamericandream.blogspot.com/2012_04_01_archive.html)

<sup>10</sup> *Id.*

- Just over a quarter of Americans (27 percent) know it takes a two-thirds vote of the House and Senate to override a presidential veto.
- One in five Americans (21 percent) incorrectly thinks that a 5-4 Supreme Court decision is sent back to Congress for reconsideration.<sup>11</sup>

In a March and April 2015 Pew Research Center survey just 33 percent of the respondents knew that there are three women on the U.S. Supreme Court.<sup>12</sup> 14% thought there was just one woman on the Court.<sup>13</sup>

Attack ads are a demonstrated “*mobilizing force*” spurring increased voter participation in state court elections.<sup>14</sup> Repeated negative attacks in a retention election may make up much of the information available to voters. Those attacks may trump voters’ general favorable impressions of courts. A 2014 national survey of registered voters commissioned by the National Center for State Courts found that 60 percent of the respondents said state courts are fair and impartial, providing equal justice to all. The survey also found that “public opinions of the courts are soft and can shift quickly based on external factors or high profile media stories.”<sup>15</sup>

Professor Larry Aspin’s study of retention elections from 1964 through 2006 found, “[i]n the typical retention election [where judges are retained], non-judge specific factors (e.g., political trust) play large roles, whereas judge-specific variables (e.g., a judge’s controversial act, organized campaign against retention, negative recommendation from a judicial performance commission) play large roles when judges are defeated.”<sup>16</sup>

If retention elections are to serve their intended function of providing a measure of public accountability while insulating judges from the harmful effects of popular opinion and political pressure, then, as Professor Caufield notes, “voters must be able to participate in a meaningful way apart from individualized campaigns that advance narrow political agendas.”<sup>17</sup>

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<sup>11</sup> <http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/>

<sup>12</sup> <http://www.people-press.org/2015/04/28/what-the-public-knows-in-pictures-words-maps-and-graphs/>; Meredith Dost, *Dim public awareness of Supreme Court as major rulings loom*, May 14, 2015, <http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/>.

<sup>13</sup> *Id.*

<sup>14</sup> Melinda G. Hall and Chris W. Bonneau, *Attack Advertising, the White Decision, and Voter Participation in State Supreme Court Elections*, 66 POLITICAL SCIENCE Q. 115, 119 (2013).

<sup>15</sup> <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx>.

<sup>16</sup> Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007).

<sup>17</sup> Caufield, *supra* note 7 at 588.

DRI is doing its part to improve civic literacy. In 2005 DRI formed its Judicial Task Force to examine issues and problems facing American judges and to determine where DRI might have a role in addressing these matters. Its purpose is spelled out in its Mission Statement: “to research and identify issues in the states that threaten to disrupt the independence of the judiciary.”

In 2011, DRI’s Judicial Task Force issued its important white paper *Without Fear or Favor — A New Decade of Challenges to Judicial Independence and Accountability*.<sup>18</sup>

DRI is also partnering in the National Association of Women Judges’ *Informed Voters--Fair Judges* project, a non-partisan national project to educate the public about the role and importance of fair and impartial courts in our democracy. The project has a website: <http://ivp.nawj.org/>. The website is an excellent resource for a fair courts service project, presentations to civic groups and schools, including community colleges, and Law Day and Constitution Day talks. Posted there are alerts, presentations, talking points, radio and television public service announcements, state specific information and a five-minute film produced by the Discovery Channel and narrated by retired Justice Sandra Day O’Connor.

As DRI’s Judicial Task Force aptly concluded in *Without Fear or Favor*, the “fairness of our legal system hangs in the balance . . . [we] must take the steps necessary to address these problems facing the judicial branch.”<sup>19</sup> DRI is taking those steps. It is building coalitions of court advocates. It is providing resources to its members and the state defense organizations.

Years ago, two U.S. legal scholars, Bruce Fein and Burt Neuborne, each at different ends of the political spectrum, joined in an essay on the value of fair and free courts. There they wrote, “It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.”<sup>20</sup> That is our challenge.

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<sup>18</sup> DRI, *Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability*, p. 80 (2011), <http://www.dri.org/News/DRIRports>.

<sup>19</sup> *Id.*

<sup>20</sup> Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?* 84 *JUDICATURE* 58, 63 (2000).

