

Maintaining Public Trust in the Judiciary

A Comment from Judge James Wynn on Judge Diaz's Hallows Lecture

In his Hallows Lecture, my colleague, Judge Albert Diaz, rightly identifies several important debates facing the judiciary today—the increasing politicization of the bench, the enduring need for judicial independence, and the interplay between those topics. Judge Diaz offers thoughtful commentary on how to improve the mechanisms through which we select state and federal judges—whether by election or appointment—and on the continuing debate regarding whether federal judges should be subjected to term limits. I take up several of Judge Diaz's points with an eye toward what I believe is, and must remain, the fundamental focus of these vibrant debates: the public's confidence and trust in the integrity of the judiciary.

As Judge Diaz notes, the judiciary has become increasingly politicized in recent years. Politicization is a threat to judicial independence, which contemplates a judiciary free from partisanship, political pressure, special interests, and popular will, and instead envisions courts guided by the will of the people as embodied in the United States Constitution and its amendments. Judge Diaz points out that a judge's commitment to deciding cases in accordance with the law of the land is undermined when our mechanisms for selecting judges require judges to act like politicians, whether by adhering unswervingly to a political party's ideals in the hopes of receiving an appointment or by making campaign promises to decide cases along lines designed to please the electorate.



James A. Wynn, Jr.

Politicization is particularly problematic in the context of elected judges. Today, races to fill judgeships look more and more like traditional, political elections. Judicial candidates make promises to be “tough on crime,” or forecast how they will decide cases involving controversial issues like abortion or the death penalty. Candidates' propensities to make these predictions are exacerbated by the exponential growth of judicial campaign contributions, particularly by special interest

A Student and Teacher of American Progress

In an Interview, Judge James Wynn Sees Progress—and How Gradual It Can Be

Judge James Wynn said recently that he was reading a book about Julius L. Chambers, a prominent lawyer in North Carolina and a leading figure in some of the major civil rights cases of a half century ago. Wynn described what happened when Chambers made his first appearance before the North Carolina Supreme Court: The chief justice left the courtroom. “He didn't want to hear a black man arguing a case,” Wynn said.

Wynn asked, “So how did we move from the '60s, where someone would have the audacity and the approval to do that—to walk out—to today, when it would be impeachable behavior?” Many younger people don't seem to realize how such behavior was common not so long ago, Wynn said. “The pendulum has moved so far from that kind of conduct.”

groups that may be future litigants in the judge's court. Judges who hope to win their races face increasing pressure to raise money—and lots of it—from these powerful interest groups, which in turn request promises to decide issues in accordance with the groups' positions. The fundamental problem with this phenomenon is not that judges' deliberations are actually influenced by these contributions, but that such contributions lead the public to *believe* that justice goes to the highest bidder. As Chief Justice John Roberts said at his confirmation hearing, "Judges are like umpires. Umpires don't make rules, they apply them." From that analogy, it is easy to glean that allowing judges to raise money from special interest groups is akin to permitting major league baseball players to contribute money to influence the selection of the umpires who call their games. Who could have confidence that an umpire selected due in no small part to a pitcher's financial contributions would accurately call that pitcher's balls and strikes? How can the public—when it sees judges making promises about their decisions before understanding the facts and the law, or accepting financial support from future litigants—trust in the system's integrity and have confidence in its outcomes?

But while the presence of politics in judicial elections seems evident, choosing to appoint judges rather than elect them does not end politicization—it simply changes the type of politics involved. After all, every judge is "elected" by some influence of politics, whether directly

by the public's choice in the voting booth or indirectly through appointment by elected officials. In particular, special interest groups that urge judges to forecast how they will rule on certain issues, in exchange for endorsements, lobbying efforts, and favorable press, increasingly wield persuasive power over the public. This influences elected officials' appointment decisions and renders even appointed judges subject to the judiciary's increasing politicization.

One proposal for enhancing the public's confidence in the integrity of the judiciary in the face of politicization is to impose judicial term limits. A primary concern with such a plan is, as Judge Diaz recognizes, that judges' terms will expire just as they hit their stride, creating the risk that the public will be deprived of judges who are experienced and efficient in administering justice. Methods for combating this effect have consequences ▶▶

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Trailblazers have been at the heart of the sometimes slow, certainly incomplete, but undeniable progress on race-related issues. Wynn cited as personal role models people such as Chambers and other African-American lawyers of past decades, such as Henry Frye, who became the first African-American chief justice of the North Carolina Supreme Court, and Clifton Johnson, who was a judge on the North Carolina Court of Appeals.

Let us update the more general list by adding the name of James A. Wynn, Jr., L'79. Now a judge on the United States Court of Appeals for the Fourth Circuit, which encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina, Wynn was born in the mid-1950s and grew up on a farm in the highly segregated world of eastern North Carolina. He has credited a close family that valued education for giving him the drive to go to college. In fact, he graduated from the University of North Carolina at Chapel Hill in three years, with a degree in journalism. He began to look for jobs in that field but decided to consider law school. ▶▶

of their own. For instance, in an attempt to fill the bench with experienced judges and sidestep the risk that judges' terms will expire as they reach peak understanding of the job, the judges who are selected to fill vacant judgeships increasingly may be older. Similarly, a one-term limit on judicial service

could dissuade elected officials or the electorate from choosing younger candidates, depriving the system—and the public—of judges with fresh ideas, diverse viewpoints, and varied backgrounds. An alternative to term limits would be to impose an age cap on judicial service or a mandatory retirement age. Setting such a cap at, for example, 80 years of age would give judges the freedom to make hard

decisions by insulating the judges, to some extent, from public opinion, while allowing the public to reap the benefits that arise from years of experience on the bench. Setting an age cap rather than a term limit could also minimize the risk that qualified, young jurists would be overlooked.

Judge Diaz also discusses whether life tenure during good behavior creates the risk that judges will remain on the bench longer than their intellectual acuity

permits. That could indeed be addressed to some extent by term limits or age caps. But the more plausible approach would be to develop independent competency committees to review internal complaints regarding a judge's continued ability to perform his or her duties, as some states have already implemented. Keeping the complaint process internal would allow fellow judges to express concerns about a colleague's continued ability to fulfill the duties of the bench without opening the door for displeased litigants or ideological opponents to submit frivolous complaints. Another reasonable proposal would be to include competency provisions in the Judicial Code of Conduct, requiring federal judges to self-report health issues that may affect their capacity to handle the court's demands.

I thank Judge Diaz for using his Hallows Lecture to add to the continuing dialogue on how to improve our judiciary. As we search for ways to promote and enhance the public's perception of the judiciary, we should remember the words of Justice Hugo Black from *Chambers v. Florida* (1940), reminding us that "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement" and that judges serve as the "constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." But we should also remember that the public's *perception* that their judges are fulfilling this calling matters most. ■

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A Student and Teacher of American Progress (continued)

"It occurred to me that I did not want to go to a law school in North Carolina," he said. "And you say 'Why?' Because I felt I had been born there, reared and raised in North Carolina. I felt if I went to law school in North Carolina, I would never leave North Carolina."

Wynn can't say exactly what led him to take an interest in Marquette Law School. He considered other schools, but Marquette became his focus. It wasn't that he had come to visit Milwaukee to check things out. In fact, he had never been to the Midwest before arriving as an enrolled law student. And it wasn't a personal connection to Milwaukee or Marquette. Maybe it had something to do with his religious nature—he's a Baptist, but he liked Marquette's Catholic, Jesuit identity and underlying religious values.

Whatever led him to choose Marquette, Wynn said that it was one of the best decisions he has ever made. He credited Robert Boden, dean of the Law School then, with offering financial aid that made it possible for him to enroll. Boden also took a personal interest in Wynn that helped him adjust to ▶▶

living in a new place offering new challenges (such as winter). Wynn says that he found law school intimidating at first and didn't always find the course material engaging.

But he realized in later years that some of the coursework that didn't appeal to him was very valuable. And he developed lifelong friendships with fellow students and an enduring connection not only with the Law School but with Marquette as a whole. He serves currently on the university's board of trustees.

Marquette was the setting for another life-shaping decision for Wynn. A Navy recruiter visited the school, and Wynn was persuaded to enlist in the Judge Advocate General's Corps. He did four years of active duty, based in Norfolk, Va., and 26 years in the Navy Reserve. He retired from the Navy at the rank of captain. "I love the Navy," he said, and his service has meant a lot to him.

Wynn's law practice in Raleigh, N.C., led him to become a judge on the North Carolina Court of Appeals and also to serve as a justice of the North Carolina Supreme Court.

In 1999, President Bill Clinton nominated Wynn to the U.S. Court of Appeals for the Fourth Circuit. Wynn would have been the first African American to serve on that court. But Jesse Helms, who was then a senator from North Carolina, kept the nomination from going forward. In 2009, President Barack Obama nominated Wynn to the Fourth Circuit, and in 2010 he was confirmed. (In the interim, Roger L. Gregory had become the first African-American judge on the court.)

For all that has changed in courtrooms and in society as a whole since the Jim Crow days, Wynn is well aware of what hasn't changed and the continuing need for the law to be a force for equal treatment and opportunity for all. But his years as a judge have taught him the need to make change wisely and deliberately.

"The law is a powerful, powerful tool which, if used properly and used in a manner in which you're able to work within a system gradually, can effectuate positive change," he said.

Now in his 60s, Wynn said he has become more interested in "the philosophical side of life." He's more interested, both on the bench and in other settings, in motivating people to reflect on their lives and on what they should be doing, and he is less interested in telling people what to do.

Wynn said, "I increasingly look to this role as a judge and check myself. Am I being the best judge I can be?" He said judges need to keep asking themselves whether they are being fair and impartial and whether they are adhering to the law and precedent and not just pushing causes. "Ultimately, we have to work to have a judiciary that has the public's confidence." This means doing all that can be done so that "the integrity of the judiciary is the highest we can make it."

He applies similar standards to his involvement with Marquette. Are the Law School and the university doing all they can to fulfill their missions? To a major degree, his answers are "Yes." Said Wynn, "I love the way the Law School is going, and Dean Kearney has been wonderful for the school. I believe the overall quality of the Law School has risen tremendously over the years."

Wynn is glad to have introduced his colleague, Judge Albert Diaz, to Marquette Law School, and vice versa. His colleague's most recent trip to Marquette was to deliver the E. Harold Hallows Lecture, which provides the cover story of this issue of the *Marquette Lawyer* (with a comment by Judge Wynn beginning on page 20).

Wynn agreed to become a trustee of the university because "I have so many wonderful, positive feelings about Marquette." He has great praise for the initiatives launched by President Michael R. Lovell and his administration.

But that brings his thoughts back to justice and making communities better places. Marquette, Wynn says, needs to keep its focus not only on academics but also on the spiritual sides of all who are involved with the university, and it needs to do all it can to serve the Milwaukee area, particularly neighborhoods in the heart of Milwaukee. He knows that the university's leadership agrees on the need for striving to serve others better. ■