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Can Pennsylvania Learn Anything From Its Federal Judges?

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For a variety of reasons—some more pleasant than others—public focus on Pennsylvania's court system has increased. Recently, state representative Jeffrey E. Piccola (R-Dauphin), who is also the Chairman of Pennsylvania's House Judiciary Committee, went so far as to liken this state's highest court to a "street gang". (Piccola made the comparison after conducting hearings in August on the "King's Bench Authority"—a unique power of Pennsylvania's Supreme Court to reach into lower courts and assume control of cases.)

In part, the attention on the state court system results from the fact that Pennsylvania's state judges are popularly elected rather than appointed, a Commonwealth tradition since 1850. While many of these jurists are excellent scholars and decision-makers, state judges are, in the final analysis, chosen purely on the basis of politics rather than qualifications. In November of last year, Robert L. Byer, a former Commonwealth Court judge, urging adoption of a more merit-based selection system, pointed out in testimony before Pennsylvania's House Judiciary Committee that Pennsylvania is one of eight states which still chooses all of its appellate judges by partisan elections.

While the press, some lawyers and a growing chorus of citizens are characterizing this system as medieval, lawyers and their clients have a lot invested in it. Many lawyers regularly appear before judges to whom they have given election campaign money. Many judges, in turn, apparently believe that they have no obligation to disclose such payments to opposing counsel or their clients. We are all stuck with the situation until the state legislature comes up with a way to take politics out of being a judge *without* compromising the accountability to citizens which popular elections afford. Some groups, like the Philadelphia-based Pennsylvanians for Modern Courts, are urging state-wide merit selection for appellate judges. There also have been proposals which would require selection of *all* judges along the lines of the merit-based machinery traditionally used for nomination and approval of our federal judges.

For the most part, the system for selecting federal judges in this country has worked pretty well. While not completely apolitical, the federal selection apparatus generally has come up with honest and able (and sometimes extraordinarily so) lawyers to appoint to the federal bench. The exceptions have been relatively few and glaring.

This raises a question: Until this state's legislature meaningfully reforms Pennsylvania's state judicial system, can we look to Pennsylvania's federal judges for guidance and example? The answer should be yes. For over 200 years, federal courts, including those which sit in Pennsylvania, have occupied a special and important place in the nation's history and jurisprudence. As most lawyers well know, under the federal constitution, federal judges, from the trial level up to the United States Supreme Court, are in charge of two main types of cases. The first group is "federal question" cases. These disputes generally involve a federal law, a federal agency or a question of federal constitutional law.

The second group is diversity cases—disputes "between citizens of different states." As the national constitution was being drafted, there was some concern that, for example, if an Ohio resident sued a Pennsylvanian in a state court, the Pennsylvanian would have a home-court advantage. Assignment of such a case to a federal judge—who theoretically would be less provincial than his or her state counterpart—was designed to address possible prejudices toward "outsiders" by a state court.

Apart from federal questions and diversity cases, there is an important third reason for the existence of federal trial courts. It has to do with setting an example. In the 1964 book *Law and Lawyers in the United States* (Harvard University Press 1964), Erwin N. Griswold, then a law school dean and professor, summed up this idea well. When the nation's constitution was drafted, in addition to having federal judges decide disputes that were "federal" or brought by "outsiders", "there was also some desire," Griswold wrote, "that the Federal government take a hand in assuring the steady dispensation of justice." *Id.* at 65.

In other words, Griswold was saying, federal courts—whether they sit in Pennsylvania, California or Puerto Rico—should set an example. Federal judges should bend over backwards to be free from politics, pettiness or prejudice of any kind.

Unfortunately, recent attention upon very human, sometimes colorful but ultimately unattractive traits in this state's non-federal judiciary has reduced the image of our state courts—in the eyes of many in and outside Pennsylvania—to an ugly cartoon in which citizens, business, lawyers, and judges themselves can have little pride or confidence. Arguably, a Pennsylvania resident who is appointed to the federal bench should cultivate and maintain a little isolation and distance in the deal. He or she is no longer just another citizen of Pennsylvania. Although federal judges are, of course, human, the federal courts they administer and the things they do in them should be "better."

Should we expect more from our federal judges? Absolutely. And especially from those sitting in Pennsylvania. As this state struggles to reform the perceived "street gang" quality of its judiciary, these men and women can and should set an example for our state court judges. ◆

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