Interest Group Judiciary

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When Tiffany Cabán ran for Queens County District Attorney, her primary pitch wasn't her prosecutorial or managerial experience, as she had neither, but her identity as a "queer Latina." There was an assumption that her identity meant she would be more understanding, more empathetic toward people who looked like her, whatever that means. Essentially, she was announcing a bias, and if the bias appealed to voters, they would elect her.

In a campaign for prosecutor, this isn't entirely a new concept. Candidates historically noted their endorsement by police unions for the "tough on crime" positions, which reflected a similar, if opposite and more related to the job, bias, and it worked well for a long time.

But is that what we would seek of federal judges? Cato Institute's Clark Neily makes the case.

Looking only at criminal cases—and excluding judges with experience on both sides—former prosecutors (223, 29.5 percent) outnumber former criminal defense attorneys (58, 7.7 percent) by roughly **four to one**. Similarly—and again, excluding those with experience on both sides—former courtroom advocates for government (336, 44.5 percent) outnumber former advocates for individuals against government (46, 6.1 percent) by roughly **seven to one**.

The numbers may be shocking to some, but not to any lawyer practicing in federal courts. There are a number of well-known reasons why prosecutors and government lawyers, along with Biglaw, find their way onto the federal bench. It's not a job one got from the want ads, but from the political pipeline. Your name was proffered to the President by your senator, and if you weren't on the radar of politicians, they wouldn't know you existed. If you didn't go to the right cocktail parties, how would your name ever get sent to the White House?

Since federal judges have to be confirmed by the Senate, and are vetted by the FBI for the dastardly deeds one may have done as a wayward youth or defending an otherwise lovely major narcotics supplier, even those criminal defense lawyers who somehow managed to curry political favor or recognition had background check issues. We weren't the government's favorite people, and made some enemies along the way.

Then there were the arguments made, the positions taken, the briefs written and cases won. When the nation quaked in fear of crime, our words in defense of bad dudes sounded like a really good reason not to make us judges. Our duty to push the envelope of defense as far as we could didn't make for great soundbites for the position of a neutral.

At the same time, the profile of prosecutors rose during the crack epidemic of the ’80s, fighting the good fight and, after winning big, high profile cases, came the reward of a robe. Louis Freeh had just won the Pizza Connection case. John Gleeson took John Gotti out. Who better to make judge, despite their youthfulness and lack of worldly experience, and a United States Attorney could phone a senator with the certainty that his call would be taken.

Hey Alphonse, Rudy here.
Hello Rudy! Got my leather vest right here. Are we going out for a photo op?
Not today, Al, but can you make this kid Louie a district court Judge?
Done. Any potholes to fill?

The only thing surprising about Cato’s 4 to 1 Ratio is that it’s not worse. But the other piece of the equation is why it should matter.

Some people might be inclined to dismiss the federal judiciary’s imbalance between former government advocates and former government opponents as irrelevant. After all, judges take an oath to be impartial and to faithfully apply the laws and the Constitution in each case, regardless of the outcome. But this blinks at deep-seated and empirically valid intuitions that most people have about the potential for bias created by an adjudicator’s past experiences—especially experience that involves advocating for a particular institution or cause.

It’s a very common-sensical notion, that people would bring their life experience with them into the courtroom and it would inform their actions. Neily then makes the point with some analogies

Here’s a final illustration that cuts closer to home. Imagine you’re a former criminal defense attorney who gets called for jury duty in a drug-dealing prosecution. Your chances of being seated on that jury are slim to none. Why? Because the prosecutor will most likely use one of her “peremptory” challenges to keep you off the jury on the entirely reasonable assumption that, in light of your professional background, you are likely to have certain biases and predispositions that will tend to color both your perception and your assessment of the prosecution’s case.

He’s right that you would be struck, but it’s a circumstance where there’s no purpose to taking a chance of bias and there’s an additional problem, that a lawyer in the jury room would have an edge on other jurors and her view be given greater weight, making it ridiculously risky.

But for lawyers who actually practice criminal law, there’s anecdotal experience in the trenches that teaches us that judges don’t turn out to be so simplistically biased. In fact, life experience with defendants often sours a judge on what should, from such a shallow perspective, his preferred team. He knows what really happens behind the scenes, whether guilty defendants or lying agents. He knows the tricks of the trade. He did it himself, and he know when you’re trying to do it to him. Ironically, what often happens is that former prosecutors turn out to be wonderful judges for the defense, and former criminal defense lawyers turn out to be nightmares.

In other words, it’s just not as simple as former prosecutors are pro-government and former defense lawyers are pro-individual. Far more important than past employment is the individual, This isn’t to say that there shouldn’t be more criminal defense lawyers on the bench, since there are a great many good, smart, fair, solid judges hiding behind their gunslinger facade, who would

otherwise never be considered. But it is to say that the common-sense assumption that criminal defense lawyers (and, to some, public defenders specifically) would inherently make more Constitution-friendly judges is the sort of simplistic thinking that just doesn't pan out in reality.

Nor does it work that way in the trenches. Appellate Courts are collegial bodies, where a judge with different life experience can offer it to the decision-making mix. This is especially important at the Supreme Court level, where no one has offered a defense-side perspective since Thurgood Marshall left the building.

But in the district court trenches, judges are lone wolves, You get the judge to whom you're wheeled out, whether she looks like you or she looks like she wants to skin you alive. So what if there's a "queer Latina" on the bench in the district if your assigned judge is an old cis-het white male? World-view is nice, but it's not going to help when you don't get to pick the judge most inclined to be biased in your favor.

Yet, the good news it that most judges try to be fair to the extent they're capable. And if you want to pick a judge least inclined to be cognizant of constutitional rights, it's neither the former prosecutor nor former public defender. It's the former Biglaw partner, who neither knows criminal law nor likes anything about any defendant, no matter what color he is. And he's likely never tried a case himself, making him the least qualified person to be a judge in the room.