

Important Features of the U.S. Legal System
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I apologize for the delay in preparing my paper. I am writing it, however, without the benefit of having read what I'm sure are the excellent contributions of my colleagues from the United States. Although I'm sure there will be some overlap in our papers, I plan to focus on two areas that may have received less attention, but are quite important and may be of real interest to legal educators from other countries.

SELECTION OF JUDGES

Undoubtedly, my colleagues have written about federalism as a critically important part of our legal system. Some may also have written about the impact of federalism on selection of judges, and the ability to be authorized to practice law in the United States; these are the two foci of my paper.

Judges of the federal courts, which include the U.S. Supreme Court, Court of Appeals, U.S. District Courts, and certain specialized courts, are all appointed for life. This system is designed to guarantee the independence of judges in decision-making and, through the years, I expect it has served that purpose pretty well.

Judges of the courts of the 50 states are selected in a manner chosen by the state. Many are elected and, even among those who are initially appointed, there is frequently a requirement that the judge "run against her record" after a set period of years in office. Those who advocate for election of judges believe this makes the judge more responsible to the people and the interests of the people in decision-making. Those who advocate in opposition to judicial election might well concede the point that this makes judges more susceptible to the will of the people in decision-making, but would argue that this is exactly the opposite of what was intended in creating one of the three branches of government in which those in charge of it would not be subject to the whims of the electorate. At least at the federal level, this is believed to be one method assuring that unpopular people or causes will not be discriminated against by the majority. (The Bill of Rights, about which I'm sure some of my colleagues have written, is undoubtedly the biggest protection against this; although even it has not always worked as it was designed to. See, e.g. – *Korematsu v. U.S.*, upholding the internment and forcible detention of Japanese-American citizens during World War II.)

Another feature of judicial elections, that has become more pronounced in recent years, is the huge expense of campaigning for office. This can lead to candidates accepting large financial donations from special interests, whose cases may come before them for decision at a later date.

Although the appointment of judges is deemed by most lawyers and legal educators to be a much better system, it too has its flaws. All appointments are made by the President

and must be confirmed by the U.S. Senate. Although it is somewhat of an oversimplification, it is generally true that, until the past 20 years, this “de-politicized” the process somewhat and tended to lead to more appointments being based on the merits. While there is still some truth to that, it is also true that, with a government in which one party controls the Executive Branch, and another controls at least the U.S. Senate, and where there is less effort at compromise between those two branches, the process becomes much more politicized. This has often led to delays in appointments and an under-staffed judiciary whose case backlogs tend to keep growing.

An additional factor that is beginning to harm the federal judiciary, and many state judiciaries as well, is judicial salaries. In the federal government, and in many state governments, the salaries, which have always been less than similarly qualified private attorneys could make, have become so much lower that judges are leaving the federal bench, or choosing not to seek a judicial position in the states, for financial reasons.

All of that being said, the U.S. still has a strongly independent judiciary with a very large percentage of judges being highly-qualified. If some recent trends continue, however, that could change.

ADMISSION TO PRACTICE LAW IN THE UNITED STATES

Another important feature of U.S. federalism is that the states, not the federal government, determine the rules for admission to the practice of law. It is not possible to be licensed to practice in a federal court without first having obtained a license to practice in a state court. All but about 5 or 6 states require, as a condition to taking the bar exam, that the applicant to take the exam first have graduated from a law school accredited by the American Bar Association’s Section of Legal Education and Admissions to the Bar. This requirement stems from the rules made by the Supreme Courts of the 50 states.

Virtually all state supreme courts have appointed a Board of Bar Examiners that make the final determination about the type of bar examination that will be required, and what score must be achieved to pass the bar examination. Almost all states require a one day “multi-state” exam, which tests students knowledge on general principles of law in major subjects like Constitutional Law, Property, Civil Procedure, Contracts, and Criminal Law. This is a multiple choice examination. Most states also have a second day of the bar examination that is more likely to focus on the law of a particular state. In every instance the individual state determines the score required to pass the multi-state bar exam and the essay examination on the second day. The overall pass rate varies widely from state to state, with some states well over 90%, while others, like California, are barely over 50%.

Once admitted to practice in a state court, it is a relatively simple exercise, consisting of filling out the appropriate papers, to be licensed to practice in the federal courts.

Many people often ask whether, if someone is licensed in one state, he or she can then also practice in other states. This depends of rules of “reciprocity”, with some states

having no reciprocity at all, while others permit licensure if the candidate has practiced for a certain number of years, generally about five.

I am often asked about the ability of graduates of a foreign law school to be admitted to practice in the United States. This too varies depending on the law of the state, and is the subject of major debate at this time. The most well-known, and long-established “liberal” provision for foreign graduates has been New York State, which permits a foreign law school graduate to take a one year LL.M. course in the United States, and then be eligible to take the New York bar examination.

These two issues about which I have written should not be considered the “three most important things that others should understand about my legal system”. Those would be federalism, separation of powers, and the Bill of Rights, and other “weighty” subjects, but the selection of judges and how one is admitted to practice in the United States are important, very practical aspects, of the U.S. legal system, that it is important to understand.