The Pennsylvania General Assembly is embarking on a very important legislative journey to discover the best way to determine the very important subject of how Pennsylvania’s appellate judges should be chosen. We must, in my opinion, applaud them for undertaking this expedition, and the PBA is here to suggest to them the best path forward based on years — in fact, decades — of thoughtful consideration of the subject. The journey is long overdue. However, we fear the trek may end in a very bad place: the formation of appellate judicial districts in discrete geographical areas.

Before we provide advice on how the PBA believes is the best way to select judges, let’s ponder for a bit the role of the courts.

If we are being honest, the third branch of government is often treated as the unwanted stepchild, as often found in fairy tales, of the three branches of the family of government: paid little attention to on most occasions, often given insufficient funds and tasked with hard duties that are rarely acknowledged — you can see how the literary allusion fits.

When the courts do garner attention, it is usually only momentarily when controversial decisions are handed down, which constitutes a very small percentage of the actual workload. Is the attention on this small number of cases warranted? Absolutely. Can citizens properly have strong feelings about such decisions? No doubt. Is criticism, even harsh criticism, legitimate? Of course. The judges themselves often throw sharp elbows at one another; why should citizens be less restrained?

But the courts do other very important work on a day-to-day basis that goes unseen. And that work involves decisions so consequential as to be life-altering to the human beings represented in the cases set before them. These cases many times involve decisions few of us would ever want to be confronted with. Quick examples: the length of a criminal sentence, the determination of the custody of a child, the inheritance of a life’s fortune, the future of a family business, the list goes on. For the individuals involved in these matters, they are no less important, and probably much more, than the major decisions we all notice, discuss and criticize or cheer.

The courts are as vital and important as the other branches of our government to the life, liberty and property that our government was established to protect on behalf of the citizens of this great commonwealth and nation. The selection process of judges is critically important.

This brings us to the selection of our judges who are faced with these awesome responsibilities. Why is the PBA uniquely qualified to opine on this subject? Because on close evaluation, a fair-minded individual will conclude that the PBA is not clouded by any partisan, pecuniary, ideological or self-interest on the subject.

The PBA supports the merit selection of appellate judges based on a system that would appoint the most outstanding lawyers in character, learning and judgment; in the least partisan manner practicable; while respecting and reflecting the great diversity of our commonwealth. The PBA has held this position since at least 1947. The position has been reaffirmed by the PBA House of Delegates, a body composed of hundreds of attorneys from all parts of the commonwealth with varying viewpoints and varied legal practices. This position has been reaffirmed throughout the decades on at least 14 occasions!

As attorneys, we are truly and uniquely positioned to understand the role of judges. Many points can be made on the benefits of merit selection as opposed to judicial elections, especially by district, but I think one position, expressed by the PBA’s policy views, is most persuasive.

Merit Selection: Yes. Election by Districts: No.

By Fredrick Cabell Jr.
Judges should not have constituencies. They should be devoted to and constrained by the law, as derived from the Constitution and statutes, and on no one or nothing else. Government executives and legislators have constituents. We live in a representative democracy, and it is through those officials that laws are properly created. Therefore, those officials should answer to those constituents they represent. These officials represent the will of the people.

Alexander Hamilton famously wrote that judges have “neither force nor will, but merely judgment.” (emphasis in original) If this is to be true, and in a proper representative democracy it must be true, then judges must be governed and responsive only to the law.

Elections, which we oppose for appellate judges, have at their very essence, the object of being chosen to represent citizens. Candidates for office seek to represent a constituency. Constituents, quite properly, place demands on their representatives. Their primary demand is that elected officials do their will.

Judges must, if they are to properly carry out their duties to our nation and the commonwealth, be responsive to the law and not to the momentary demands of a constituency. Their job is to follow and apply the law without taking into account the views of a constituency. How could they practically, never mind by principle, do this? Should they hold office hours where constituents visit and express their views? Should they host town halls? Receive and draft correspondence? Attend public events and mingle?

And after meeting and considering their constituents, should they ignore the laws put before them in cases? Laws that were carefully crafted through an arduous legislative process designed to avoid the rule of the mob and the feelings of the moment? A legislative process designed to examine facts, develop knowledge and apply solutions and rules reflecting the input of the broad society? A process so brilliant — and when viewed from the perspective of the millenniums — so unique, as to seem almost divinely inspired.

Currently before the General Assembly (and by the time this is published, maybe the people in the form of a ballot question) is a proposal that would not lessen the influence of the concept of a constituency, but instead further deepen and emphasize it: the election of appellate judges by geographical districts.

Under this proposal, rather than a statewide constituency, appellate judges would have a limited geographic district and thus an even more compact and demanding constituency. A constituency now even closer to the judge and possibly less likely to care about those carefully crafted laws designed to govern us all? What is the judge now to do? Are the judges now to listen to their local district and forego the law of the state?

Imagine a hypothetical discussion of appellate judges — say a panel of three — as they deliberate in their chambers. “I know what the law says, but my constituency demands I do this! I have received hundreds of letters. I have listened at the town halls. I have been stopped in the grocery store. I am sorry, fellow judges, but I must disregard the law and vote my constituency.” But that is not how it is meant to be in a representative democracy with three separate branches each having a unique purpose. Let’s not compound the error that already exists. Let’s all oppose the election of judges by judicial district.

Fredrick Cabell Jr. is PBA director of legislative affairs. For additional information on the PBA’s legislative program, contact the PBA Legislative Relations Department at 800-932-0311, ext. 2232, or email fredrick.cabell@pabar.org.