

## Third Circuit: A Profile of the Honorable Stephanos Bibas

Judge Stephanos Bibas joined the Third Circuit in 2017. He came to the court from the University of Pennsylvania, where he was a law professor for 11 years. During that time, Judge Bibas became a leading scholar on criminal procedure. He also argued six cases before the U.S. Supreme Court as the director of the law school's Supreme Court Clinic. Before Penn, Judge Bibas spent six years teaching law at the Universities of Chicago and Iowa, and was also a research fellow at Yale Law School.

Before becoming an academic, Judge Bibas served as an Assistant United States Attorney in the Southern District of New York and was in private practice in Washington, D.C. Judge Bibas also clerked for Justice Anthony Kennedy of the Supreme Court and Judge Patrick Higginbotham of the Fifth Circuit. He received degrees from Columbia University and the University of Oxford, and his law degree from Yale. Judge Bibas was born and raised in New York City.

In June 2017, Judge Bibas was nominated to fill a vacancy that arose when Judge Marjorie Rendell took senior status. He was confirmed five months later, and then was sworn into office in December. His formal investiture took place in April, where Justice Kennedy administered the judicial oath.

The author had the pleasure of speaking with Judge Bibas from his chambers in Philadelphia. Judge Bibas discussed a range of subjects, including becoming a judge, the differences between life in academia and on the bench, initial impressions on the court, and what he hopes to contribute going forward.

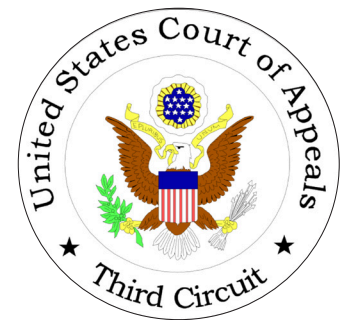
When Judge Bibas was approached about possibly becoming a judge, he viewed it as a tremendous honor. His family taught him that "when you are asked to serve" the public, "you serve." And because he enjoyed appellate litigation, the Judge saw the chance to be an appellate judge as presenting "a new way of being involved in appellate litigation" and an opportunity to "see and be involved in a wide range of fascinating disputes."

As might be expected, balancing the competing time demands of the nomination process and teaching law proved challenging. Judge Bibas' teaching responsibilities included running Penn Law's Supreme Court Clinic. While the confirmation process was underway, he was working on a Supreme Court merits brief in a case he was supposed to argue for the clinic. And when he was confirmed in November 2017, the Judge still needed to finish grading and transition the Supreme Court case. So he needed to arrange a short delay in his swearing-in so that he could finish those

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responsibilities. Both the law school and the court were “very accommodating” and agreed to delay his swearing-in by a month.

Now settled in as a member of the court, Judge Bibas noted the contrast between the role of a law professor and that of a judge. As a professor, the Judge was free to “speculate or to theorize or to shape the law the way I want it.” He could write an article to “spell out a grand theory of where the law might go.” There was less concern about how someone might use the words in his articles, especially since “part of your point is to be provocative.” Judges, on the other hand, must “color within the lines” and are concerned with how an opinion could be “misused, misunderstood, taken out of context, or misquoted.” And rather than writing in broad terms, the panel must write on the narrowest grounds, leaving additional “details for another day when we have to get to them.”

Judge Bibas also pointed out that being a law professor is in many ways a “solo job,” as a professor typically sets his or her own schedule and research agenda. But the court does its work in “threes or more” and is seniority-driven. That makes it “very important to maintain collegial relationships, even across disagreements.” So Judge Bibas “listens first to others before attempting to speak.” Given the need for cooperation, the court’s members are “good about respecting one another’s differences,” “try very, very hard to come to a consensus or an agreement,” and are “sparing about dissenting and concurring.”

Judge Bibas’s experience is unique on the Third Circuit. As a former academic and Supreme Court litigator, he sees cases from the top down, “from the bird’s eye of the Supreme Court.” But he also is one of a few judges on the court without experience as a trial judge (even though he does have trial court experience as a prosecutor). Judge Bibas hopes to gain that experience by sitting by designation in the district court.

Now that Judge Bibas has been on the Third Circuit for almost a year, he has some impressions about those who practice before it. He noted “there are some repeat litigators who clearly know the court, watch the court, study the court, and are excellent advocates.” But some lawyers are “not always focused on what is most effective.” He advised them not to “insult the district court” but be “appropriately critical” when asking for reversal. For those practitioners with less experience, Judge Bibas suggests “consulting with others” to get a “second opinion or get another set of eyes.”

As for written advocacy, Judge Bibas recommends focusing on the proper use of authority. Some cases bind the Third Circuit, while others are only persuasive. Judge Bibas has noticed that some practitioners rely on district court opinions and magistrate judge recommendations as if they are binding. They are not, so briefs

citing them should explain why they are persuasive. “Draw out the similar facts, draw out the phrases from it that make it persuasive.” Without those needed details, the court is left to “wonder why that’s the centerpiece of your case.”

Advocates also should think through the ramifications of the legal rule or test that results from a particular decision. Often “advocates jump straight to the citations without framing them in terms of the broader rule or point of principle that the court ought to apply.” Judge Bibas suggests that it is better to “step back and articulate the rule or principle, and then use persuasive cases as illustrations,” rather than “just hitting us with a flurry of cases that don’t bind us.”

Judge Bibas pointed out that oral argument in the Third Circuit is not automatic. But if the brief “shows that you are attentive and focused on a genuinely hard issue,” that will increase the odds the court “is going to want to have you up there to have a conversation with you.” During argument, judges’ questions “telegraph what we are worried about in the case.” So rather than focusing on a “prepared script” about the clients’ strong points, advocates should be prepared for “a back-and-forth conversation about their weak points.” Moot court arguments can help prepare for that discussion.

Even though the court’s work will occupy Judge Bibas, he still plans to continue teaching part-time. He pointed out with seeming pride that he has been teaching criminal procedure for 17 years. And he expects to continue doing so in the Spring of 2019. Judge Bibas enjoys mentoring students and helping to form new lawyers. He also plans to continue writing about criminal justice, his passion for many years. Judge Bibas is particularly interested to see what his perspective on criminal cases will be once he has “seen a lot of it from the appellate perspective.”

Judge Bibas’s focus in the short term is “to grow and soak up some wisdom from my colleagues.” But he knows there is “work to be done to sustain a collegial court” and to “maintain the integrity and independence of the judiciary.” He also believes that judges “have a very important role in public education.” Many young people do not understand how our government works, and Judge Bibas believes judges can help educate students about the role of the courts. In Judge Bibas’ words, this is “something that I hope I can do my part to pass on” to future generations. 