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From Judge to Dean: Reflections on the Bench and the Academy

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In July of 2007, having served nearly seventeen years as a United States District Judge with chambers in Sacramento, California, I moved to Durham, North Carolina, to become the fourteenth dean of the Duke University Law School. I would concede that in the grand scheme of things such a transition must be deemed unremarkable. Lawyers have become soldiers, presidents, artists, and inn keepers. Judges have left the bench to do much the same. Nonetheless, in the somewhat closed worlds of the federal bench and the legal academy, at a time when the two worlds have seemed to drift apart, such a shift in careers may have seemed surprising. And the surprise was from two points of view: it was surprising that a federal judge would leave a position of such prestige, importance, and security, and it was equally surprising that one of the great law schools in the world would contemplate a judge as its next dean. In this Essay, I take the opportunity to reflect on a few of the everyday aspects of this transition, pointing out some of the differences and similarities in the life of the judge and the life of the legal academic. But my ultimate goal is to take a step back and explore whether there might be some unifying theme within which we might see the roles of the judge and the dean as in harmony with some greater purpose and as part of some greater tradition.

Let us go back to the transition from judge to dean, from the world of the courts and the Bar to the world of the scholar and the student. Of course, the first question has been what people should call me. At first, some students, many alumni, and even some faculty, would call me "Judge" or "Your Honor." Apparently "Judge" trumps "Dean" even within the law school. But because I was no longer a judge and not retired, I discouraged this practice. I no longer have the responsibility and burdens of a judgeship, and I no longer need constant reminding that I must maintain a certain detachment in aid of my office. After two years, hardly anyone calls me "Judge" anymore. Admittedly, there are times, such as

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during faculty meetings, when I would not mind the occasional "Your Honor." But now most people call me "David," and that is as refreshing as it was startling for the first year or so.

I also have been learning a new language. Judges do not like jargon probably because generalist judges have to cover so many areas of the law that they cannot keep track of abbreviations and various kinds of shorthand. Also, judges tend to be suspicious of terms that may cover a multitude of possible meanings and whose use, therefore, may result in ambiguity or imprecision leading to confusion. Nor is there any slang unique to judicial officers. But in a university and a law school there is a tendency to take up certain kinds of expressions and formulations. For example, I hear people at Duke University speak of Duke's "convening power." This has an almost religious overtone. Apparently, "convening power" is the power to cause persons to attend a meeting at a certain time and place. I know "convening power"—I used to have it! More common in a law school is the use of terms drawn from other disciplines such as economics and sociology. Law professors and students speak effortlessly of "moral hazard," "endowment or network effects," "path dependence," and so on. Norms are "sticky" or not; causal explanations are "thick" or "thin." Imagine my consternation when I learned that a thick explanation is not necessarily more persuasive than a thin one.

I have noticed other differences between life on the bench and life in a law school. One is the intensely competitive atmosphere in which the top law schools exist. The law schools are in constant, sometimes fierce, competition for students and faculty, for opportunities and rankings. The current downturn in university endowments has given us a brief reprieve from some of the pressures generated by deans with endowment revenue to spend. But that pressure undoubtedly will reassert itself in the next year or two as endowments recover and faculty members across the country who are mobile, accomplished, and productive begin to test the free-agency waters once again.

This kind of competition is just unknown to the courts. Individual judges might be said to compete with one another for advancement, attention, or law clerks, but competition among courts as units for cases or recognition is virtually unheard of. Perhaps some would consider the federal courts to be in competition with the state courts or with private dispute resolution systems, but there is such an abundance of cases that this competition has not been of much importance.[1] To the extent that

1. The Class Action Fairness Act, 28 U.S.C. §§ 1322(d), 1453, 1711–1715 (2006), sparked a bit of competition between state and federal judges over who

some competition exists in the judiciary, it does not drive institutional decision-making, budgeting, and judicial performance in any significant way. And there is no analogue yet within the judiciary to the free-agency phenomenon that has crept into so many areas of life, including law school hiring. Perhaps the market eventually will provide an answer to the low pay suffered by federal judges when the state or even international courts try to pick off federal judicial superstars in the prime of their judicial careers, but that day has not yet arrived.

The law schools, by contrast, are in constant competition for students and faculty. The rankings have intensified this competition, particularly for students. There is a market for students with LSAT scores of 170 and above because this is where many of the top schools want their median LSAT. This desire is driven by the rankings, which are based in part on median LSAT scores. Indeed, the very use of the median rather than some other measure by the most prominent of the ranking systems affects the way in which admissions offices do their work. Yet we would all readily acknowledge that the difference between students is only crudely measured by the LSAT, and the difference of a few points is not meaningful in any sense and certainly does not predict which student will become the better lawyer.

If the competition among law schools is somewhat parochial, another characteristic now shared by many American law schools is anything but parochial. I have been struck by the internationalization of the modern law school. Since I went to law school, the field of international law has grown tremendously. Like many other schools, Duke Law School now offers many courses in international and comparative law, in addition to a JD/LLM in international law for American students and an LLM for graduates of foreign law schools. These are large programs accounting for nearly one-third of our student body. Our international law curriculum addresses legal issues that may never come before American courts but may be disposed of by the World Trade Organization, international arbitration, or other international tribunals.

This new focus echoes the globalization of the world's economies, the internationalization of our large law firms in major cities, the creation of new international agreements and tribunals,

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should handle multistate class actions. Usually judges are all too happy to give up cases; the multistate, diversity class action was somewhat unique in this respect, and even here some important federalism principles underlie the debate, not simply competition for interesting work.

and perhaps to some extent the shift of capital markets and business from the United States to other financial and commercial centers. While it is probably true that our domestic courts see more transnational work now than before, in general this trend takes legal work into other tribunals and venues outside of the United States. I confess that as a district judge I was largely unaware of this transformation in law practice, teaching, and scholarship. I did not expect that my perspective would become more international by leaving the bench and becoming a dean, but this has been the case.

Leadership is another area of difference between my experiences as a dean and as a judge. I was chief judge of the busiest federal district in the federal system, with two large courthouses three hours apart from one another. Yet the opportunities for leadership were rather limited—not non-existent, but necessarily limited because of the court's lack of administrative autonomy; lack of control over its budget, staffing, and resources; and intense focus on the appropriate resolution and processing of individual cases. The day-to-day work of a trial judge involves more of what one would call case management than leadership. Undoubtedly, a judge in a different system or in a larger court might have a different point of view. For example, the chief justice of a state supreme court, like the Chief Justice of the Supreme Court of the United States, has an important leadership role and is in a position to shape, protect, and maintain the judiciary; to represent the judiciary to the public and to the other branches of government; to develop long and short-term plans; to affect the assignment of resources; and to develop consensus, shared aspirations, and an *esprit de corps* among their colleagues.[2] But the typical, individual judge has few opportunities and even less time for leadership beyond the normal round of Bar and community activities, as important and fulfilling as these activities are.

A law school, on the other hand, as I have come to learn, thrives on leadership from its dean and from its faculty. The dean and all members of the faculty are expected to think about the future of the legal profession and legal education, and they are expected to lead the law school community so that the law school anticipates the needs of the changing, dynamic world of law practice and law scholarship. This is a very great responsibility, and it is also interesting and engaging. As dean, I bear the added burden of making sure that the faculty keeps itself sufficiently

2. I thank Chief Justice Laura Stith of the Supreme Court of Missouri for this point.

well-informed of the life of the law outside of our walls so that it can join with the dean in charting the future of the law school.

Fundraising is one aspect of a dean's job that has no obvious counterpart in the life of a federal judge, at least on first impression. During the dean search process, I was asked whether, as a judge, I had any experience in fundraising. It was a trick question, and I gave a trick answer. I answered "yes," knowing full well that federal judges may not directly or indirectly have anything to do with fundraising. I answered "yes" because in settlement conferences, and perhaps in some other settings, like fee awards, judges ask parties and lawyers to put in more money or take out less. In this sense, judges raise funds, and they do so on the basis of reasons. Sometimes those reasons are based on applicable law and the facts of the case, on the basis of which the judge makes a calculation or a prediction about the likely outcome of the case. But often the reasons are social—aimed at repairing or restoring a relationship.

Law school fundraising is not very different; in fact, it is easier because instead of fear of the unknown—the dominant emotion in a settlement conference—the dominant emotions in fundraising are loyalty, idealism, and a desire to be part of something bigger than oneself. And it connects back to leadership because in our society philanthropy is an opportunity for leadership. Alumni and others can shape the future of our profession and of legal education through the funds they give. They can make a critical difference in the lives of aspiring young lawyers who later will make a similar difference for someone else.

One constant in the shift from judge to dean has been significant: both positions are wonderful places from which to observe the American public and are great perches from which to watch and appreciate the Bar in this country.

One of the best parts of being a trial judge is meeting so many members of the public in jury selection. It was always inspiring to me to hear the life stories of average Americans, to understand how so many of them dealt so nobly with adversity, and to sense the seriousness of purpose they brought to the task of being a juror. It filled me with optimism and even awe. I have had the same feelings of wonder in my dealings with Duke Law students. They are smart, astonishingly so, but they are also kind and idealistic. They want to make the world a better place, and they are not embarrassed to say so. They engage in a huge amount of pro bono activity while they are students. In the graduating class of 2008, for example, a graduate of West Point and a graduate of the Naval Academy started the Veteran's Assistance Project. The project helps veterans file claims for health care and financial benefits.

Duke Law students develop many similar opportunities for service each year.

From the bench in Sacramento, in the California state capitol, in the county seat, I had the privilege of watching many fine lawyers practicing in a great tradition. Justice Robert Jackson spoke of these lawyers, the unsung heroes of the Republic, in his lyrical essay on the "county-seat lawyer." He said:

> [The county-seat lawyer] understands the structure of society and how its groups interlock and interact, because he lives in a community so small that he can keep it all in view. . . . [T]he circle of the man from the small city or town is the whole community and embraces persons of every outlook. He sees how this society lives and works under the law and adjusts its conflicts by its procedures. He knows how disordered and hopelessly unstable it would be without law. He knows that in this country the administration of justice is based on law practice. . . . It was from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing Republic stands as [their] monument.[3]

I have been lucky to meet many such unsung heroes in our history. I think of my good friend Congressman Robert Matsui, who died in 2005. He was deeply rooted in the soil of the Central Valley in California. Like so many lawyer statesmen before him, Congressman Matsui built a career of national service on the strong foundation of a local law practice, representing persons from all walks of life, and entering with passion into the political life of his city. As a child of six months, he was interned at the Tule Lake Internment Camp. Imagine how moving it was for him in 1988 to secure passage of the Japanese American Redress Act.

In the short time that I have been dean of the Duke Law School, I have come to understand that many of Duke Law's graduates practice in this tradition, and many are developing new traditions that will be just as important to maintaining a free and self-governing Republic in a healthy and safe world.

There is John Adams, a 1962 graduate from Duke Law School, who just eight years after graduation created the Natural Resources Defense Council, which has become a powerful force in environmental litigation and advocacy. He played an instrumental role in writing the Clean Air and Clean Water Acts.

Our 1986 graduate Gao XiQing was Duke Law School's second Chinese student and the first Chinese resident to pass the

3. Robert H. Jackson, *The County-Seat Lawyer*, 36 A.B.A. J. 497 (1950).

New York Bar exam. Today he is the general manager of China's state investment company, holding over $200 billion in sovereign funds. He suffered as a child during the Cultural Revolution but eventually made it to Duke Law School. After graduation, he worked in a law firm on Wall Street for two years and then returned to China in 1988 to teach law in Beijing. He risked his future by standing with his students in Tiananmen Square in 1989. He helped to create the legal structure for China's stock exchanges and later helped to create the Chinese social security system. He is still closely connected to his alma mater and is now a Duke University trustee.

There are many more such stories of Duke Law graduates' accomplishments in county seats, in major financial centers, at home and abroad. These are the lawyers who create and serve, who protect and defend the Constitution, and who use their training as lawyers to pursue the public good as they see it. And, of course, some of these Duke Law graduates have chosen the life of the judge.

I am frequently asked whether I miss being a judge. There are times when I do, but, in truth, what I miss most is the judiciary itself, by which I mean my judicial colleagues. Now that I have left the judiciary, what stands out most to me about the experience of having been a judge is the wonderful quality of the other judges I have come to know. Despite threats of violence, a loss of personal privacy, increased bureaucracy, reduced resources, and a growing income disparity, the federal judiciary is still a remarkably capable and dedicated group of men and women.

I am speaking now not only of my own colleagues in the Eastern District of California and the Ninth Circuit, but of the many federal judges I have come to know and have had the privilege of working with over the years on national committees. Indeed, I will go even further. Although I have never sat on the state court bench, I have known, worked with, and reviewed and relied upon the opinions of a good many state court judges. I will include that body of judges in my words of praise.

In this country we have a thoughtful and independent judiciary. Our incorruptible judiciary is one of the jewels in the crown of our democracy and is a foundation on which our economy, social cohesion, and political system rest.

Two questions begin to emerge from my reflections above. They are of very great importance and seem to intertwine and come together, like the two mighty rivers, the Sacramento and the American, that course through Sacramento, joining together in the historic center of town, close by the United States courthouse where I worked for so many years. The first question focuses on

our county-seat lawyers and others like them. How has it happened that lawyers have been our nation's leadership class from the beginning of the Republic to this day? The second question focuses on our dedicated judiciary. If you agree with my assessment of the quality of our judges, state and federal, then we have something to explain. How is this possible, and how did it come to pass? It is not a given that many of our best would give up the freedom, financial rewards, and excitement of law practice and law teaching to enter the judiciary.

Part of the answer to the first question is in the training that we provide in our law schools—the training of "thinking like a lawyer." Clarity of thought and the ability to simplify, articulate, and persuade are part of this training. The courage to take a position and the equal courage to modify and compromise in the face of reasoned opposition—these too are part of the lawyer's art and craft and part of what we teach. These are also the skills and the personal traits of leadership in a democracy, and I suggest that it is for this reason that lawyers in our country have been so well-suited to leadership in government and politics.

The future of the Bar's leadership position is not entirely secure. We have competitors, as we should. My friends in the public policy and business schools, for example, consider that they train the government leaders of tomorrow because, as they see it, such leaders need management skills and knowledge of economics, finance, and statistics. One may concede the point and concede it gladly: in the modern world, a law school that is part of a great university has a golden opportunity to teach interdisciplinary skills and to impart knowledge drawn from other disciplines. We encourage our students to enter any of the long list of dual-degree programs we offer, for example, in business, public policy, environmental management, and global health—and over a quarter of our students do so. We teach economics, finance, accounting, and entrepreneurship within Duke Law School. We encourage students to learn another language. Many members of our faculty hold joint appointments in other schools and departments. We urge this kind of interdisciplinary training not primarily because we think it necessary to secure the historic leadership role of the Bar going forward—although this is an important benefit—but because law practice increasingly demands such training and skills. We think that our graduates will be best prepared to practice at the highest levels, here and internationally, if they have a strong foundation in other disciplines in addition to law. This is the foundation that will help them cope with the broad set of problems that face lawyers who create new products, new institutions, and new laws and regulations and who work with clients and lawyers

from other countries, other cultures, and other legal traditions. It is fortuitous that law scholarship also recognizes the importance of interdisciplinary approaches. Thus, far from pulling the legal academy away from the practice, which has been the stereotype, the interdisciplinary approach actually prepares our graduates for a certain kind of sophisticated and demanding law practice, as well as law teaching, research, and scholarship. It also prepares them to take up leadership positions in government and politics, just as they have since the founding.

The second question concerns the quality of our judiciary. Why is it so good? The pay and the conditions of service are certainly not the explanation. Nor is the power or prestige of the position a sufficient answer. It would be difficult to demonstrate that our most accomplished litigators around the nation are eager to leave practice in their prime and join the bench, although there are some who do.

Nor can it be explained by the wisdom of the various appointing authorities. It also would be difficult to argue that the selection or election process only seeks out the most capable among us. Thus, it is not enough to say that we have an exceptional judiciary because already exceptional lawyers are selected to become judges. To explain the high quality of our judiciary, we must look elsewhere.

I identify three reasons: First and foremost, the Bar from whence our judges are drawn has strong traditions and high expectations of the judiciary. The ideal of the neutral, dedicated, fair, and scholarly jurist is deeply embedded in our legal heritage. In ways that are subtle and not so subtle, the Bar keeps this ideal before the judiciary and insists that all of our judges strive to achieve it. Further, the experience of being a lawyer and being a part of a learned profession in this country is elevating and prepares for further service all members of the Bar who take their oaths seriously.

Second, our concept of due process and fair procedure places unique demands and responsibilities on the judiciary. The legal process itself, the adversary system, the drama of the courtroom, the clash of ideas and interpretations, the right that every party has to be heard, the power of advocacy—all of these things put the judge in a role that requires diligence, judgment, objectivity, and reason. Participation in such a process for the judge is, quite simply, transforming.

Finally, there is our faith. As lawyers and judges we share a strong faith in the rule of law and the concept of equal justice under law. We think our future as a nation depends upon them.

I believe that it is from this mysterious alchemy that good lawyers become extraordinary judges, calling upon the better angels of their nature, forming a judiciary of remarkable importance and quality, rooted in the Bar and drawing daily sustenance from it. Because of the training provided by our law schools, and by the experience of practice, we have a Bar of great skill and character, a Bar that has a tradition of democratic leadership that continues to inspire. And because of our legal traditions and the strength of our Bar, we are able to sustain a judiciary of great competency and moral courage.

In the end, all things merge into one[4]: whether as dean or as judge or as advocate or as professor, all of us have the privilege and responsibility of being members of a learned profession. There is no wall between the academy and the profession, or between the Bar and the judiciary. Because of our training, our experience, and our powerful legal culture, all of us are and should be ready to serve and assume new roles within the profession and within our democracy. Much has been given to us, and much is fairly expected.

4. NORMAN MACLEAN, *A River Runs Through It*, *in* A RIVER RUNS THROUGH IT AND OTHER STORIES 104 (1976) ("Eventually, all things merge into one, and a river runs through it. The river was cut by the world's great flood and runs over rocks from the basement of time. On some of those rocks are timeless raindrops. Under the rocks are the words, and some of the words are theirs.").