



# HARVARD LAW SCHOOL

Center on the Legal Profession

## “Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century” Commentary

The Honorable Chief Judge Pattie B. Saris,  
U.S. District Court, District of Massachusetts



## A JUDGE'S PERSPECTIVE

### A Response to *Lawyers as Professionals and as Citizens* by Heineman, Lee, and Wilkins

Hon. Patti B. Saris\*

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At this time of profound change in the legal profession, the authors propose reforms to the institutions they know best: corporate general counsel offices, large private law firms, and leading law schools. It is imperative, they say, that we train young lawyers to be expert technicians, wise counselors, and effective leaders. In my view, these institutions also play a vital role in preparing the next generation of federal and state judges. Thus, a useful addition to the authors' paper would be a discussion of how these institutions can help foster a diverse and independent judiciary.

I have been a judge for almost thirty years, at both the state and federal level. When I graduated from law school in 1976, many of my peers aspired to a career in the public interest, at a law firm, or as a judge. I don't remember anyone who aspired to be the general counsel of a corporation or work in-house. So, I read with interest about the increasing leadership role of the corporate counsel. Indeed, as I talk with my law clerks and meet with young lawyers, I perceive that many young professionals seek to move in-house for both professional and lifestyle reasons. One of my law clerks worked as a summer associate at a prominent Wall Street law firm. During orientation, the firm's managing partner asked the assembled students to raise their hand if they intended to stay at the firm long enough to make partner. In a class of over one hundred summer associates, only five or six students raised their hand. But when the partner

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asked how many intended to go in-house to a client, a few dozen hands darted into the air. The managing partner didn't ask how many students wanted to pursue a career on the bench.

Blackstone once praised judges as the “living oracles of the law,”<sup>1</sup> and the judiciary has historically been comprised of lawyers from both the private bar and the public sector.<sup>2</sup> Private sector lawyers tend to bring with them a rich understanding of current legal issues and lawyer-client dynamics. Public sector lawyers bring with them an appreciation for the role of government in the justice system and knowledge of how to navigate public law. The bench has long benefited from this vibrant mix of lawyers with diverse public and private professional backgrounds. Is the mix changing? The data suggests it is. For much of the last century, two-thirds of judges came from private firms, while one-third previously worked in the public sector, most commonly as prosecutors or state court judges.<sup>3</sup> In recent years, less than one-third of new judges have come from the private sector.<sup>4</sup> The percentage of district court judges coming directly from private practice has steadily declined under each of the past six presidents, dipping below 50 percent during the Carter Administration, continuing to fall during the Clinton Administration, and reaching 34 percent of nominees under President George W. Bush.<sup>5</sup> While summary statistics have not yet been compiled on the Obama presidency, so far he has drawn

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<sup>1</sup> William Blackstone, 1 *Commentaries on the Law of England* 68, 69 (1767).

<sup>2</sup> Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 140 (2010) (discussing the “long-standing practice” of selecting “private lawyers” to serve on the district court bench) [hereinafter, Wheeler, *Changing Backgrounds*]. By private lawyers, I don't mean just those who practice at large corporate firms, but also private lawyers who represent less well-funded clients.

<sup>3</sup> *Id.* at 146

<sup>4</sup> *Id.* See also Senator Elizabeth Warren, Remarks before the Alliance for Justice, Feb. 16, 2014, *available at* <http://www.afj.org/press-room/press-releases/afj-report-senate-rules-reform-opens-the-door-to-more-professional-diversity-among-federal-judges>. Senator Warren has called on President Obama to nominate judges who have experience representing workers in labor and employment disputes, who have worked at public interest organizations, or who have served as public defenders.

<sup>5</sup> Wheeler, *Changing Backgrounds*, at 141.

heavily from the state and federal judiciary. State court judges and magistrates have comprised a combined 55 percent of his district court nominees.<sup>6</sup>

In my view, several factors have contributed to the changing composition of the bench. First is the difficulty and uncertainty of the Senate confirmation process. Judges must be vetted by the White House, their home-state Senator, the FBI, the American Bar Association, and sometimes a merit selection committee. Nominees must disclose the details of their finances and personal lives, and complete an extensive Judiciary Committee questionnaire describing the cases they've worked on throughout their career and providing the text of all public speeches they've delivered. The nomination then culminates with a confirmation hearing and a Senate floor vote, which can take months to be scheduled. In the 111th Congress, from 2009-2011, the average judicial confirmation took 174 days—nearly six months, and that only accounts for the 56 percent of nominees who were eventually confirmed.<sup>7</sup> Forty-four percent of nominees had to await confirmation by the next Congress.<sup>8</sup> By comparison, only 5 percent of President Reagan's nominees waited more than six months to be confirmed.<sup>9</sup> These delays have collateral professional consequences, particularly for lawyers at private firms, since “clients shy away from lawyers who are unlikely to be available for the duration of their legal problem.”<sup>10</sup> Russell Wheeler, a federal courts scholar at the Brookings Institution, has posited that this financial toll is a key reason behind the rise in the percentage of district court judges who were magistrate or

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<sup>6</sup> *Broadening the Bench: Professional Diversity and Judicial Nominations*, Report of the Alliance for Justice, Nov. 4, 2014, at 11, available at <http://www.afj.org/wp-content/uploads/2014/07/Prof-Diversity-Report-11.4.2014-FINAL.pdf>.

<sup>7</sup> Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 234 (2012).

<sup>8</sup> *Id.*

<sup>9</sup> Wheeler, *Changing Backgrounds*, at 147. The average district judge nomination took two months under President Reagan.

<sup>10</sup> *Id.* at 140.

state court judges, not practicing attorneys.<sup>11</sup> Despite the delays, eventual confirmation has been all but certain for district court nominees—the confirmation rate was 95 percent under President George W. Bush and 86 percent under President Clinton.<sup>12</sup> In President Obama’s first term, however, the rate fell to 78 percent.<sup>13</sup> Some lawyers may be unwilling to endure the long delays and intensive vetting process.

The path to becoming a state court judges is similarly rocky. Thirty-nine states elect judges, either through traditional partisan elections, non-partisan contests, or judicial retention votes after merit selection.<sup>14</sup> These elections are becoming increasingly expensive and competitive. In the 2012 election cycle, a record \$56 million was spent on state Supreme Court races alone, according to the Brennan Center for Justice.<sup>15</sup> Judicial elections, which have long revolved around a candidate’s qualifications and judicial philosophy, are beginning to resemble modern political campaigns, with TV advertisements, direct mailings, and spending by outside interest groups.

The second factor that might deter would-be judges from the private sector from pursuing a seat on the bench is that judicial pay has not kept pace with compensation for other leadership positions in the profession. In 1969, district court judges were paid 21 percent more than the average dean of a top law school and 43 percent more than senior law professors, whereas now

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<sup>11</sup> *Id.*

<sup>12</sup> Russell Wheeler, *Judicial Nominations and Confirmations in Obama’s First Term*, Brookings Institution, Dec. 12, 2012, available at <http://www.brookings.edu/research/papers/2012/12/13-judicial-nominations-wheeler> [hereinafter, Wheeler, *Judicial Nominations*]. In November 2013, the Senate adopted a parliamentary rule change that is poised to expedite the confirmation process going forward. Indeed, the *Wall Street Journal* recently reported that the pace of judicial nominations quickened in the second half of 2014. Joe Palazzolo, *Record Backlog Jams Courts*, WALL ST. J., April 7, 2015, at A1 [hereinafter, Palazzolo, *Record Backlog*].

<sup>13</sup> *Id.*

<sup>14</sup> Billy Corriher and Jake Paiva, *State Judicial Ethics Rules Fail to Address Flood of Campaign Cash from Lawyers and Litigants*, Center for American Progress (2014), available at <https://www.americanprogress.org/issues/civil-liberties/report/2014/05/07/89068/state-judicial-ethics-rules-fail-to-address-flood-of-campaign-cash-from-lawyers-and-litigants-2/>.

<sup>15</sup> Alicia Bannon et al., *The New Politics of Judicial Elections*, Brennan Center for Justice (2013), available at <http://newpoliticsreport.org/content/uploads/JAS-NewPolitics2012-Online.pdf>.

they make considerably less.<sup>16</sup> And the limits on outside income and the acceptance of honoraria created by the Ethics Reform Act of 1989 make judges reliant on base salary.<sup>17</sup> Last year, the judiciary received its first significant pay modification in years, to account for the denial of cost-of-living adjustments.<sup>18</sup> And yet, a district court judge still takes home less than a third-year associate at a major law firm. The comparatively low pay may be particularly onerous for younger lawyers who have had to pay off large amounts of student debt. Judicial pay is likely one of the reasons why federal courts in high-cost cities have “low proportions of [former] private practitioners”<sup>19</sup> on the bench.

Moreover, those who successfully secure a seat on the state or federal bench are likely to find themselves working in a court system that is underfunded. In his 2013 year-end report on the federal judiciary, Chief Justice Roberts warned of the perils of underfunding the courts.<sup>20</sup> Further budget cuts, he said, could “pose a genuine threat to public safety” by delaying criminal trials, and delays on the civil side, he cautioned, could lead to “commercial uncertainty, lost opportunities and unvindicated rights.”<sup>21</sup> Many state courts are likewise grappling with swelling dockets and contracting resources. Linger budget shortfalls from the financial crisis have

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<sup>16</sup> John G. Roberts, *2006 Year-End Report on the Federal Judiciary*, available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf>.

<sup>17</sup> 103 Stat. 1716, 1760-63 (1989)

<sup>18</sup> *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012), *cert. denied*, 133 S.Ct. 1997 (2013), held that the denial of certain cost-of-living adjustments for federal judges was an unconstitutional deprivation of judicial compensation in violation of the Compensation Clause of the U.S. Constitution. In an order filed on December 10, 2013, in *Barker v. United States*, No. 12-826 (Fed. Cl. filed Nov. 30, 2012), this holding was applied to all Article III judges, effective that date. Judicial salaries were reset to include the missed adjustments, resulting in the salaries of circuit judges set at \$209,100, district judges at \$197,100, the Chief Justice at \$253,000 and the Associate Justices at \$242,000. These salary levels were then further adjusted by the one percent cost-of-living adjustment provided to nearly all federal government employees and officials, in accordance with Executive Order No. 13655 (Dec. 23, 2013), effective January 1, 2014. See *Judicial Salaries Since 1968*, available at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/judicial-salaries-since-1968.aspx#1>.

<sup>19</sup> Wheeler, *Changing Backgrounds*, at 147.

<sup>20</sup> John G. Roberts, *2013 Year-End Report on the Federal Judiciary*, available at <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>.

<sup>21</sup> *Id.* at 9.

forced some state courts to cut back on everything from building maintenance to law clerks, pre-trial services, and security personnel.<sup>22</sup>

In light of these obstacles, private sector lawyers may be hesitant to don a black robe. This is compounded by the fact that the modern district court judge sometimes seems more like Sisyphus pushing a pile of paperwork than an oracle of the law. As has been widely observed, the jury trial is “vanishing,”<sup>23</sup> and in its place comes the “managerial judge.”<sup>24</sup> Only 3 percent of federal criminal cases go to trial; the other 97 percent are resolved through plea bargains.<sup>25</sup> And, in every year since 2005, less than 1 percent of civil cases in the federal courts have gone to jury trial.<sup>26</sup> The civil caseload of many judges includes complex statutory causes of action, involving patent litigation, multi-district litigation, securities law, and whistleblower claims.<sup>27</sup> As the caseload has changed, so too have the judge’s day-to-day responsibilities. For several decades now, the Federal Judicial Center in Washington, D.C. has trained new judges in case management techniques. Judges impose deadlines, resolve discovery disputes,<sup>28</sup> and “use the

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<sup>22</sup> See, e.g., Andrew Oxford, *New Mexico Judges Call for Boost in Courts Budget*, SANTA FE NEW MEXICAN, Feb. 9, 2015, available at [http://www.santafenewmexican.com/news/legislature/new-mexico-judges-call-for-boost-in-courts-budget/article\\_171e43d9-7cd5-5bf4-bfba-5f19a930b3dd.html](http://www.santafenewmexican.com/news/legislature/new-mexico-judges-call-for-boost-in-courts-budget/article_171e43d9-7cd5-5bf4-bfba-5f19a930b3dd.html).

<sup>23</sup> The term “vanishing trial” is credited to Marc Galanter in his article, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459 (2004).

<sup>24</sup> The term “managerial judge” was coined by Yale Law Professor Judith Resnik in *Managerial Judges*, 96 HARV. L. REV. 375 (1982).

<sup>25</sup> Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014.

<sup>26</sup> Marc Galanter and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, Pound Civil Justice Institute (2011), at 4, available at <http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf>.

<sup>27</sup> It is worth noting that the decline of trials is a trend that has not been confined to particular areas of civil law. While the decline has been sharpest in tort and contract cases, it has also been observed in prisoner cases, labor disputes, and civil rights cases. See Galanter and Frozena, at 6.

<sup>28</sup> District court judges also increasingly rely on magistrates to help manage complex litigation. While no new district court judgeships have been created since 2003, many additional magistrate positions have been added by Congress. See Joe Palazzolo, *U.S. Magistrate Judges Play Outsize Role in Handling Heavy Case Loads*, WALL ST. J., April 7, 2015, at A6.

many tools at [their] disposal to try to push the parties toward settlement.”<sup>29</sup> The managerial judge is not an anomaly but instead the norm, at least at the federal level.

As a consequence, some say judges have become invisible, and are “holed up in their chambers while overseeing a largely paper process.”<sup>30</sup> My colleagues, Judge William Young (D. Mass.)<sup>31</sup> and Judge Lee Rosenthal (S.D. Tex.),<sup>32</sup> among others, have urged judges to spend more time on the bench in open court. While the judiciary is divided on the question of whether “a well-tryed case is a failure of a trial court or its crowning achievement,”<sup>33</sup> it seems to me that the professional life of a judge has changed as a result of motions to dismiss post-*Iqbal*,<sup>34</sup> the pervasive use of summary judgment motions, and changing rules governing class actions. My experience has been that even at the district court level, the day-to-day experience of judging on the civil side of the ledger involves research, writing, and case management based on the parties’ voluminous record—not trials.

Furthermore, the “exponential”<sup>35</sup> rise of mandatory arbitration, which places civil decision-making in private hands, detracts from the central role courts have traditionally played in resolving civil disputes. Arbitration, mediation, and other alternative dispute resolution mechanisms are commonly used in a vast range of disputes. Today, most of the country’s ninety-four federal district courts have mediation programs, which are attractive to litigants looking for a faster,<sup>36</sup> safer, and cheaper alternative to a trial.<sup>37</sup> In some districts, the civil backlog means

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<sup>29</sup> Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1288 (2010).

<sup>30</sup> William G. Young, *Keynote: Mustering Holmes’ “Regiments,”* 48 N.E. L. REV. 451, 486 (2014).

<sup>31</sup> “American jury verdicts come closer to genuine justice than any other human institution ever conceived.” *Id.* at 463.

<sup>32</sup> Steven S. Gensler and Hon. Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 N.E. L. REV. 475 (2014).

<sup>33</sup> Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 747 (2010).

<sup>34</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>35</sup> Higginbotham, at 752.

<sup>36</sup> According to statistics of the American Arbitration Association (“AAA”) for the year 2008, the median length of time from the filing of an arbitration demand to the final award in domestic, commercial cases was just 7.9 months.

litigants may have to wait “a year or more” for district judges “to rule on pretrial motions due to their packed dockets.”<sup>38</sup> This is one of the reasons why more than forty percent of companies today use binding arbitration clauses to steer employee claims away from the courts, a sharp increase from the estimated 16 percent of companies that used such waivers in 2012.<sup>39</sup>

So, like the bar, the bench is in transition in terms of who aspires to judgeships, the funding of the judiciary, what duties a judge performs, and how the private bar resolves civil disputes. As the Academy and the private sector seek to train young lawyers to be leaders, they should not marginalize the bench as the domain of criminal law, or treat serving as a judge as the next logical career step for prosecutors, defense attorneys, magistrate judges and state court judges. In my thirty years on the state and federal bench, I have found that the work of a judge is varied, intellectually rigorous, and inspiring in terms of the values we protect. District court judges decide thorny and consequential questions of law, and continue to occupy a “venerable role” in the American constitutional system.<sup>40</sup> The triad of institutions the authors discuss—the Academy, corporate counsels, and law firms—should strive to encourage young lawyers to consider a career on the bench, and make judgeships attractive to lawyers from all sectors of the bar by supporting reforms to improve the salary structure, increase funding of the courts, and smooth the process for becoming a judge. The vitality of an independent judiciary depends on it.

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By contrast, in 2010, the median length of time from filing through trial of civil cases in the U.S. District Court for the Southern District of New York was 33.2 months. Edna Sussman and John Wilkinson, *The Benefits of Arbitration for Commercial Disputes*, ABA Dispute Resolution Magazine (2012), available at [http://www.americanbar.org/content/dam/aba/publications/dispute\\_resolution\\_magazine/March\\_2012\\_Sussman\\_Wilkinson\\_March\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf).

<sup>37</sup> See D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453 (2007) (arguing that for the modern litigant, trials are sources of unacceptable risk and expense).

<sup>38</sup> Palazzolo, *Record Backlog*. The Administrative Office of the U.S. Courts recently asked Congress to create 68 new district court judgeships in high-volume districts to reduce these delays.

<sup>39</sup> See Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J., March 31, 2015, available at <http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287/>

<sup>40</sup> Higginbotham at 762.



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