

AN INTERVIEW WITH Dean David F. Levi

By Justice Robert H. Edmunds Jr.

Dean David F. Levi, a Chicago native, earned his AB in history and literature from Harvard University. He graduated from Stanford Law School in 1980, where he was president of the Stanford Law Review and Order of the Coif. After graduation, he clerked for Ninth Circuit Judge Ben C. Duniway and for Associate Justice Lewis F. Powell of the U.S. Supreme Court.

After working as an Assistant U.S. Attorney, he was appointed U.S. Attorney for the Eastern District of California in 1986. In 1990, he was appointed U.S. district judge by President George H.W. Bush. While on the bench, he served as chair of two Judicial Conference committees by appointment of the chief justice. At the time of his resignation, he was Chief U.S. District Judge for the Eastern District of California.

He became the 14th dean of Duke Law School on July 1, 2007. He is the author of *Federal Trial Objections* (James Publishing 2002) and teaches courses on judicial behavior and ethics.



Dean Levi, please give us some background information about your education.

After I graduated from college, I went to graduate school in history with the goal of becoming a legal historian. I wrote a PhD dissertation in legal history that looked primarily at the law reform movement in mid-nineteenth century England. I looked at court records and court organization, the codification movement, the creation of a public prosecutor, and related topics. I was interested in the role of the profession and the way people were able or unable to use the legal system—topics that still engage me. At some point, I decided that I should have a law degree to have a better understanding of what I was reading and writing about. But then I found I enjoyed law school so much that I wanted an experience of practice rather than going right into teaching.

I was president of the *Stanford Law Review*, which opened the way for me to a clerkship with Associate Justice [Lewis F.] Powell. I wanted to clerk on a district court in the year before the Supreme Court clerkship because I wanted to see how day-to-day justice worked and operated. I was going to clerk with U.S. District Judge [Charles B.] Renfrew, but he was named Deputy Attorney General in the Carter administration before I got to him. Judge Renfrew very nicely arranged for me to clerk for U.S. Circuit Judge Ben Duniway,

who was a senior judge on the Ninth Circuit and who hired one clerk each year. This proved to be a great experience even though it was on the appellate court. Judge Duniway was a craftsman. He told me that he ran an “artisan’s shop” and that he expected very careful, precise, and accurate work from me. He cite-checked the first draft of an opinion I gave him just as if he were working on the law review. Even though I had not made any errors, he spoke to me very sternly about his expectations just in case I might be tempted to slack off. We eventually developed a wonderful working relationship, and I learned a lot from him about careful work, being a fair-minded judge, and working with others.

Judge Duniway was a Kennedy Democrat, and then I went on to clerk for Justice Powell, who had been appointed by President Nixon. I make the point because political scientists are so fixated on who is the appointing president and whether judges are influenced by their political commitments. I saw no difference between these two men that could be ascribed to their political parties as opposed to other factors such as their judicial philosophies and different backgrounds. Their views in many areas of the law were completely indistinguishable.

Tell us about clerking for Justice Powell.

I began the October term of 1981, and I had wonderful co-clerks. One of the best parts of the clerking experience is to make friendships with clerks in your own and in the other chambers.

The justice’s personality and his legal philosophy merged. He was such a decent, moderate, and considerate person, and his approach to legal problems tended to mirror these very same traits. It was a great experience to work with a person like that. I learned a great deal from him and, of course, I worked incredibly hard.

I was fortunate to interact with some

of the other justices from time to time. Justice [William J.] Brennan [Jr.] was such a fun, nice person. Justice [Thurgood] Marshall was an amazing storyteller, and I used to hang out in the Rehnquist chambers. One day then, Justice [William H.] Rehnquist came by and quipped that maybe he should get me a desk. Later, when I became a judge, he remembered me and could not have been more gracious. He took a personal interest in my development and later appointed me to the Civil Rules Committee of the Judicial Conference of the United States and then the Standing Committee on the Rules of Practice and Procedure, committees I came to chair upon his appointment.

By the end of two years of clerking, I was ready to go off and be my own person, but I do remember these as formative years. Later, when I became a judge, I had terrific models of both how to be a judge and how to mentor law clerks. I hope I passed along to my law clerks some of what I learned from these two remarkable judges. It is with great sadness that I observe the current trend to the hiring of experienced lawyers into clerkships rather than reserving these precious slots for the hugely important process of bringing new lawyers into the legal profession.

You served as an Assistant U.S. Attorney and then as the U.S. Attorney for the Eastern District of California by appointment of President Reagan. Tell us about your experience as U.S. Attorney.

I would say three aspects of the work left an impression. One is that I had this great experience, at a fairly early age, of being responsible for the work of others, work of great importance and delicacy. Being an administrator and running an office like the U.S. Attorney's Office is a public service at a very high level. It's exhilarating to serve your country and community in that way. It is also nerve-wracking. Eastern California ultimately had something like 55 attorneys in two different offices, one in Sacramento and one some distance away in Fresno. The stakes are high in criminal prosecutions and government civil suits, and the demands on a U.S.

Attorney are correspondingly high.

The second memorable aspect was the opportunity to work in the Department of Justice [DOJ] with its extraordinary culture and its talented lawyers. DOJ has a core of experienced, career lawyers who are completely nonpartisan and remarkably capable. One of the interesting aspects of the DOJ is the way in which the career and the politically appointed lawyers interact so seamlessly. Because my father had been a much-admired attorney general in the Ford administration, I found that I was an object of some curiosity and affection from some of the career lawyers who had served under my dad. I was grateful for it!

Finally, I did have the opportunity to participate in an undercover investigation of public corruption in the California legislature, which led to several indictments and trials, the first of which I handled with two other lawyers. The experience of being a trial lawyer in a big, high-profile trial is unique. It is hard to imagine the kind of pressure lawyers are under in these kinds of cases.

You were appointed to the district court bench by President Bush in 1990.

Although the appointment is the president's, the custom was for the senator of the president's party to make a recommendation, which would generally carry the day. In my case, it was up to California's Republican senator, Pete Wilson, to make the recommendation. I didn't know him when he first suggested me to the White House for the U.S. Attorney position. I did meet him once or twice during my tenure as U.S. Attorney, and once he called me and asked that I cover him for a speech he had committed to give in Fresno because he could not leave Washington, D.C., due to an important vote. One day in late 1989, I was sitting at my desk when he called again out of the blue. I assumed he needed me to cover another speech or something similar. Instead, he said that he had one more judicial vacancy to fill in California and that if I wanted it, he would recommend me. I was 38 when he called and he said, "you are awfully young and you have to think about that."

But he added that, on the other hand, this call might not come again. After thinking it over, I called him back to let him know that I would like to be considered.

Was there any controversy in your confirmation?

No. I was with a group that went through pretty easily and the two senators who showed up for the hearing could not have been nicer. Senator [Herbert H.] Kohl was the junior member of the committee and, he said, he had a lot of questions he had wanted to ask Justice [David H.] Souter during his confirmation hearing, which had occurred some months earlier. As junior senator during those hearings, he had not been given time to ask those questions and he wanted to ask them now. The five of us being confirmed heard him say this and thought, "This is not going to be good." But he asked me very straightforward questions about my experience of being U.S. Attorney and generally what kind of judge I would be. Surprisingly, he even asked me about my history dissertation! At the end of that process, I was confirmed and served from 1990 until 2007.

What stands out in your years as a judge?

Reflecting back on my judgeship, I am struck, first, by the quality of the people that come to the bench and the very strong culture in our federal courts and the strong collegiality there. It's a national system and people are farflung and yet there are judges all over the country who know one another and help one another. Our experiences create a sense that we are a



Justice Robert H. Edmunds Jr. was elected to the North Carolina Supreme Court in 2000. He and Dean Levi first met in 1986 when they were both newly-appointed U.S. Attorneys.

band of brothers and sisters who are all in this together. We care deeply about providing the very best justice system to the American people. The point I am trying to make is that the judicial culture brings out the best in people. You already have very good people coming in, but they get better in that environment. And, of course, the bar has high expectations for judges, as it should. But I have thought about why we still have such good judges because it is not an easy job and, in many respects, it is not even that desirable. It is just a wonderful opportunity for service.

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This strong and healthy judicial culture made the biggest impression on me, and I include the state courts in this, too. We have wonderful people in judicial robes who are just fantastic public servants. I was proud of being a part of that group and really felt challenged by it, humbled by it, and inspired by it.

What also stands out is the importance of some of the cases I presided over. I recall two as particularly important because both ended up in the Supreme Court. First, I had the Open or Blanket Primary case. This case challenged the Open Primary law that had been voted on by referendum and permitted voters in primary elections to vote for candidates in either party. A voter could vote in the Republican primary for senator and in the Democratic

primary for governor. I upheld the law and the Ninth Circuit affirmed me, but the Supreme Court reversed. Even so, Californians redid the system so that it now passes constitutional muster. Quite a few statistical studies were presented in that case. It was fortunate for me that I had taken a course for judges on statistics only a few months earlier. This experience is one of the reasons why I was so keen to include quite a bit of quantitative work in Duke's Judicial Master's Program. While judges are not going to become statisticians, nevertheless it is good for them to have some statistical literacy.

Another case that stands out was one where the state had enacted a durational residency requirement for full welfare benefits. If a person migrated to California, he or she would receive the benefits that would have been received in the state of origin until the person had been a resident of California for a year. California didn't want to become a welfare magnet for people who traveled to the state for higher benefits. I set the law aside as unconstitutional and this time I was affirmed by the Supreme Court.

And then, finally, the other thing that stands out to me about my time as a judge was the opportunity of working on the national rules committees, first the Civil Rules Advisory Committee and then the Standing Committee on the Rules of Practice and Procedure. The administrative arm of the federal courts is the Judicial Conference of the United States, which consists of chief circuit judges from all of the federal circuits, plus a district judge representative, and it is chaired by the chief justice of the United States. The Judicial Conference decides on all sorts of administrative issues affecting the judiciary including amendments to the five sets of rules that govern federal courts—the criminal rules, the civil rules, the evidence rules, the appellate rules, and the bankruptcy rules. In 1992, I was appointed to the Civil Rules Committee as a member and later became chair of that Committee. Afterwards, Chief Justice Rehnquist appointed me to be chair of the Standing Committee, and after he died, I worked with Chief Justice [John G.] Roberts [Jr.]. After I came here to Duke,

Chief Justice Roberts reappointed me to the Standing Committee, but this time as the “academic” on the Committee, so I am still privileged to serve.

While work on these rules committees sounds rather dry and academic, changes in rules can have a major impact on practice.

Yes. The civil rules have evolved from the early 1930s, when they were first put into effect, until the present day, and they have had a significant effect on the way law is practiced. Consider that our current virtually wide-open discovery is a product of the civil rules. This was not the case prior to the rules. But there is no free lunch, and creating a system in which either side can take discovery that is both extensive and expensive has meant that civil cases are usually “tried” through deposition rather than in the courtroom before a jury. This is a loss to our system of justice and to the legal profession. Another example would be the class action rule, which has the power to bring even the largest corporation to its knees, and often does so. It is odd that a mere rule of joinder would have such power, but there is no doubt that it does.

Working on a committee is a great gig. The chief justice must have liked your work to have reappointed you. Let's move on. Tell us why you chose to leave the bench.

In 2007, I got a call from Jim Cox at Duke Law School telling me that he was head of the search committee for a new dean and they had heard of me because of my work on the rules committees. A number of Duke Law professors were in some way involved on various rules committees. He asked if I would consider coming to Duke. What quickly became apparent to me was that Duke was a very special place and that the faculty here were open to the idea of bringing in somebody who didn't exactly fit the traditional mold but who had academic values. The school's mission, its established quality, its dedication to scholarship and public service, and its talented faculty and students were all appealing to me. I had been a judge long

enough that I thought, if I am going to do something else, I had better do it soon. When my wife said, “Well, I could imagine living in Durham,” I said yes.

It has been great. I get to think about some of the same things that I thought about as a judge, along with the ability to help a student get started on his or her career, to help a faculty member create a course or do research or make the kinds of connections that the faculty member needs to make in order to do first-rate scholarship. That’s what’s exciting to me now.

A lot of judges are involved with academia but only tangentially. What do you do as dean?

The dean’s main job is, in my father’s words, to radiate the values of the institution. Duke is a premier research law school. That’s our deep DNA; that is why people come here, why students come here, why faculty come here. That is our nature. That is our goal. That is our burden. That is our obligation, our responsibility. We are one of a handful of really top research law schools in the world. Having academic values and being a promoter of what this school can do through its research and its academic reach, that’s the primary thing for me as dean.

A second part of being dean, I think, is a commitment to the law, to the legal profession, and to the public interest. A part of the openness of the faculty to me is simply that I had a career in public service. Duke has always been close to the profession and the practicing bar. The legal profession is going through a period of turmoil and we want to be a part of the solution.

A third part of my duties as dean is forward planning. The dean is given the time and resources to consider where we are today and where we want to be a year from now, five years from now, 10 years from now. I try to understand what our students are going to need, what our faculty will need, and generally which programs and areas the school should particularly support and develop. I also get to do some teaching and a little bit of writing, just like a regular faculty member.

What courses have you taught?

I taught a course on Studying the Judiciary, where we asked students to develop an empirical study of the judiciary or a judicial decision. I taught a course last year with the president of Duke University, Dick Brodhead, and a brilliant young faculty colleague, Jed Purdy. We looked at the founding, the Civil War period, and the period right around the New Deal, and we had a blast. I think one of the memories I treasure most was when Dick Brodhead—who taught literature at Yale and was a hugely successful and beloved teacher—said to me that before teaching our course he had thought that it was only through great literature that one could penetrate the deepest questions of human existence but that now he came to understand that law was another, equally or even more effective, way to penetrate those very same questions.

I also fund-raise. When people challenge my judicial background as failing to prepare me for this duty, I’ve come to respond: “What do you think a judge does at a settlement conference? You essentially fund-raise.” You tell one side, “you need to do more,” but you have to give your reasons for it, just as I do now. I like fund-raising. The creation of a philanthropic community around the institution is extremely important. Philanthropy builds a sense of ownership by friends and alumni and others and furthers the recognition that higher education is incredibly important for the future of our country and to our region.

What on becoming a dean did you least expect?

I had not expected the faculty to be so institutionally minded. Faculty members have some stereotypes of judges and judges have some stereotypes of faculty. One of the stereotypes of the faculty is that faculty are prima donnas who care more about themselves than their students or school. I have not found this to be remotely the case. A faculty member has that same sense of pride in the institution, in what they can do for people, what they can do for the profession, that you would find in a judge. There is that same

sense of service, of wanting their work to matter, of wanting to help their students, colleagues, school, and country. I felt great pride when I stood up in court as U.S. Attorney and told jurors that I represented the United States of America. I have that same pride today when I get to stand up and say that I am the dean of the Duke Law School.

Under your leadership, Duke has created a JD program for judges and the first group of judges is halfway through. What are your aims for that program?

The big vision is to try to bring really good judges and really good academics together. We thought joining them would help judges become more thoughtful judges and it would help the academics become more thoughtful academics. This is exactly what is happening. The judges are saying that this is an exhilarating experience and that it is a chance to reflect, re-gather their intellectual energies, and understand more deeply what they do as judges. They are learning about areas of law that they didn’t know about. And they are having some unique experiences. In addition to receiving marvelous teaching from Duke instructors, they had the chance last summer to study constitutional interpretation with Justice [Samuel A.] Alito [Jr.] and will have the opportunity this coming summer to study judicial writing with Justice [Antonin G.] Scalia.

When does the next class matriculate?

The next group will start in 2014 and any judge who is interested should be in touch with us, with John Rabiej [administrative director for Duke’s Center for Judicial Studies], and ask for an application. Some judges already have. We cover almost all costs. This is one of the ways in which I have been lucky enough to give back to the judiciary and to unite the various parts of my life in the law. I couldn’t be happier than to see this degree for judges take wing.

Thank you, Dean Levi. ■