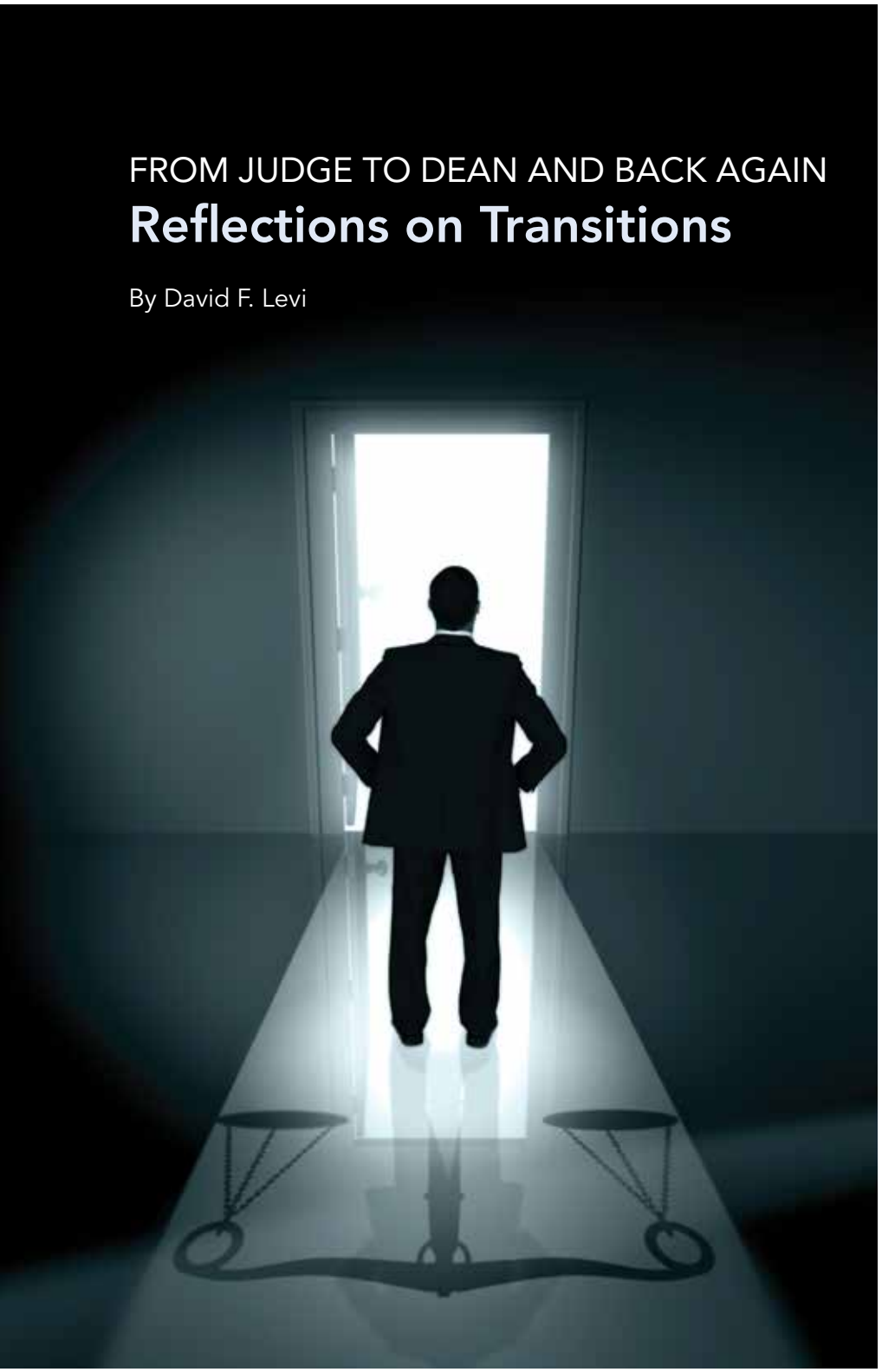
FROM JUDGE TO DEAN AND BACK AGAIN

# Reflections on Transitions

By David F. Levi



I left the federal bench in 2007 to become dean of the Duke Law School. I left the dean position in 2018 and now direct the Bolch Judicial Institute at Duke Law School. I am also president of the American Law Institute (ALI). In many ways, it seems I have come full circle, although not exactly. I will explain.

All Article III judges remember where they were when the president, the attorney general, or some government official called to tell them that they would be nominated by the president to judicial office. There must be some analogous event in the life of state court judges. In my case, I have no recollection because I missed the call, although I was expecting it. In the summer of 1990, the phones—clunky old landlines—were down in the federal building in Sacramento, California, where I was then U.S. attorney. The White House operator happily settled for a call to my home. President George H. W. Bush and my surprised spouse had a delightful, lengthy chat. At least she remembers where she was.

Fast forward to 2006. By then, I was happily ensconced in my role as the chief U.S. district judge for the Eastern District of California. I had been a member and then chair of the Advisory Committee on Civil Rules and had more recently become the chair of the Standing Committee of the U.S. Judicial Conference on the Rules

of Practice and Procedure. I had a full docket of cases in one of the busiest districts in the country. Because I was chief and also chair of a Judicial Conference Committee, I had four law clerks. I admired my fellow judges and had strong personal and professional relationships with each of them. In short, I was a judicial veteran and, to the extent one can in such a challenging job, I had caught my stride.

This time, I did not expect the call, and I do remember where I was: sitting at my desk in the U.S. courthouse. Out of the blue, I received a telephone call—judges did not receive much email in those days—from Professor Jim Cox of Duke Law School. I assumed the call was about a possible law clerk or something connected to his work on securities regulation. Instead, he asked a question carefully crafted and that demonstrated his lawyering skills: "Would you reject out of hand the idea of becoming the next dean of Duke Law School?" "Well," I said, "I wouldn't reject it 'out of hand.'" "Good," he said, "then you should come here next week to meet the search committee." There was no turning back on this particular slippery slope.

Leaving the bench is not an easy decision for any judge in light of the strong emotional and professional investment a judge makes to the position. But the mechanics of leaving are particularly difficult for Article III federal judges because of the pension system, which requires that the judge stay in the position until age 65. In my case, I left in my mid-50s, well before age 65 when the lifetime salary vests. Thus, after 17 years on the bench, I left with nothing—no 401(k), no retirement account, no right of return. The financial planning that goes into such a decision is intense and uncertain. But particularly as one gets closer and closer to age 65, it would be a brave soul who would leave the bench prior to vesting.

For most federal judges, who will wait until age 65, the decision to stay or leave has two interrelated components. First, is the judge ready to leave the honor, duty, and privilege of being a judge? And second, can the judge's understandable desire to try new things be done "from the judgeship," as a senior judge, instead of "after the judgeship"? Does one retire or does one "take senior"?

Retirement means leaving the judiciary. There will be no chambers, no staff, no IT support. On the other hand, there are no restrictions on what a judge may do. The Codes of Conduct, including the financial disclosure rules, no longer apply. There is freedom in this, but it means leaving the bench. There is no turning back. One is no longer "the judge" except as a matter of courtesy. After I left the bench, I sometimes would hear from other judges who were thinking of leaving. I would ask them this question: "How important is it to your sense of self that you are a judge?" Another way to reword the question is to break it into two: "Do you view being a judge as a calling? And do you see being a judge as your only calling?"

There is no right answer, and one could easily be unsure. But there is no "leave of absence" for a judge to try on a new life and return if it was a mistake to leave. The decision is irrevocable. Perhaps this is part of the attraction of "going senior," which permits the judge to cut his or her caseload and still retain chambers, staff, and law clerks. The rules on outside income are also relaxed, and many senior judges teach and become members of law faculties. Their continuing service as judges is invaluable to busy districts and circuits.

I went the "cold turkey" route, and it worked for me. I was not looking to get out of the judiciary and happily would have served to this day. But I did have the sense that while judging was very much a calling for me, I was okay with the idea that I would no longer "be" a judge and that there were other callings that beckoned. To put this another way, I believed that by going to a law school, particularly a great law school, I could still make an important contribution to the legal system as I had tried to do as a judge. I saw and experienced continuity and, in some important sense, becoming a dean was exactly what I had been trained to do by being a judge for some 17 years.

I became dean at Duke Law on July 1, 2007. I served two five-year terms and agreed to stay on for an additional year so that a new president could select my successor. I was dean during the scary financial crisis of 2008–2009, and the subsequent disruption to endowments and legal employment. I was dean during a huge five-year fundraising campaign—"Duke Forward"—that began just as the dust was beginning to settle from the financial crisis. A dean is a problem solver and an enabler of others—students, faculty, staff, and alumni. The typical day is packed with emergencies, fundraising, hiring, encouraging, overseeing budgets, writing talks and articles, organizing and attending events, preparing for meetings and classes, selecting new initiatives, helping individual students, helping individual faculty, and engaging with the intellectual and educational mission of the school and the university. But more than anything, a dean—to paraphrase my own father, who was an iconic law dean, provost, and president at the University of Chicago—must

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What are those values? I would describe them as including open-minded, rigorous, and respectful inquiry into the truth or accuracy of whatever proposition is under scrutiny and into the improvement of the law and the legal system. Others might describe the values differently, and perhaps the emphasis changes depending on the challenges of the particular time. In my concept, a law school is not a monoculture where we all must agree, settling into comfortable consensus, but a place of constant friction and debate. Nor should an academic be a politician in academic garb. Open-minded inquiry may certainly have political or public policy applications and implications, but, in my view, political partisanship should not drive law scholarship, and to the extent that underlying political commitments may inevitably or implicitly affect scholarship and teaching, then it is important that there be a diversity of such political commitments among faculty members. This kind of diversity is difficult to achieve and preserve.

Judges are trained and suited to do well in such an environment and to embrace and further these very same values. They have lived in a system of dispute resolution based on the premise that civil adversaries can help the judge get to the truth—or at least the best decision in the circumstances. Judges are skilled—and it is a skill—at keeping an open mind. This is why I would sometimes answer the question of "what did I learn as a judge?" by saying, "not to judge." It is important not to reach conclusions prematurely or make judgments quickly but to let the process unfold. Not surprisingly for someone so involved in rulemaking, one of my personal "rules," first as judge, then as dean, and now as ALI president, has been to "trust the process." If the process is fair, nine times out of ten, the ultimate decision will be a good one no matter who the decision-maker—the judge, the jury, the dean, or the faculty.

Judges also have colleagues who are often quite different from themselves in background, experience, political affiliation, race, gender, age, and outlook. This is increasingly the case. And judges like it. They enjoy the interaction and the disagreements. They bridle at the charge, sometimes hurled by academics, sometimes by others, that judges are just "politicians in black robes." They know that they are not and should not be in the business of deciding cases based on their political affiliation or personal policy preferences. On a district court, judges do not normally sit together to decide cases; however, they have many opportunities to exchange ideas about the law and frequently consult one another. Where cases raise similar issues, they may exchange opinions in draft. On multimember panels, the judges welcome a good disagreement—they enjoy a good dissent and a good reply to such a dissent. They try not to take disagreements personally, and they work hard to keep this from happening through the civility of their interactions. The stakes are often high in these cases, involving important issues and significant consequences for parties. Judges who bring this experience of the rough and tumble to a law faculty, many of whom have not experienced this kind of disagreement and challenge from colleagues, can make a significant contribution to upholding the values of respectful, open-minded, and civil debate and disagreement that I have identified.

Judges also have had the experience of mentoring new lawyers. Those judges who continue to hire one- and two-year law clerks right out of law school do immeasurable good for the legal profession. And they gain a deep understanding of how law students are trained and how ready they are for law practice. They see this over time. They are both skilled law teachers themselves in this role and also one of the important audiences and consumers of the law schools' product. Again, a judge on a law faculty can make a significant contribution to discussions about legal education and what law students need to know and what skills they need to acquire in order to do well in the law.

Judges are also skilled at radiating the values of an institution, the judiciary. Anyone watching a judge run a fair courtroom

or preside over a complex jury trial or conduct a searching oral argument in a hard case senses the deep values of the judiciary and its commitment to justice, to observing the dignity of the participants, and to fair-minded decision-making.

In short, the transition of a judge to a law school is a natural one. I experienced it that way. Many others have taken this path, whether "from the judgeship" or "after the judgeship."

Now that I am no longer dean, I spend much of my time directing the Bolch Judicial Institute and serving as president of the American Law Institute. Again, I emphasize the themes of continuity and the reliance on skills developed and learned on the bench. At the Bolch Institute, we support the judiciary through educational programs for judges and through scholarship and other programs directed to the study and protection of judicial independence and the rule of law more generally. We offer an LLM in judicial studies for judges who have a desire to reconnect with the academic study of the judiciary and deepen their own knowledge of the judicial craft and role.

At the American Law Institute, a volunteer membership organization of judges, practicing lawyers, and academics, known for the various Restatements of the Law and also Model Codes, the work is intended to assist the judiciary and the legal system generally by synthesizing complex areas of the law, particularly the common law of the states. Judges have relied heavily on the work of the ALI over the almost 100 years of its existence. Some of the work seems very similar to the kind of careful drafting that occurs in the rule-making process in the federal courts. For me, a former rules committee member and chair of many years, it is a very familiar process of inquiry and refinement, with attention to black letter rules and more open-ended commentary. But it is even more similar in fully endorsing the values of civil debate and searching, unfettered discussion that characterize the best of the academy and the courtroom. The ALI prides itself, justly in my view, on the transparency and openness of its process. All members have an opportunity to speak and to comment. All members are required to leave their clients at the door and engage in the process of restating the law accurately and precisely, identifying possible choices, trends, and divisions in the case law, so that courts and others can make decisions that best serve the American people and that are consistent with the law of their respective jurisdictions. Many judges are involved in this process. When they stand to speak, like other members, they identify themselves only by last name and home state. They are not recognized as "judge." But that is not necessary. Their wonderful experience, training, and judicial skill set are more than evident. We all know when it is a judge who is speaking by the clear, fair, and measured way in which they make their points.

In a time of division and confusion, judges have so much to contribute to the law schools and to other law organizations, like the ALI, whether they leave the bench or find new ways to serve "from" the bench. Indeed, once they leave the bench, ex-judges may be in a somewhat better position than they were on the bench, because of their new freedom, to serve and protect—to advocate for—the judiciary. Transitions are never easy, but, for judges, in this time, there is such a pressing need for their skills and character, and so many opportunities for service, that the transition need not put them at a distance from their former life. It can be a homecoming. ■