

FEATURE

PATH TO THE BENCH

***D.C. JUDGES
ON WHAT TO EXPECT***

By John Murph

JUDGE JOSHUA DEAHL, D.C. Court of Appeals



Back in 2017, Judge Joshua Deahl found himself at a crossroads. He had been a practicing attorney for just over a decade and was contemplating a shift to academia when he learned about an associate judge vacancy on the D.C. Court of Appeals.

"I had argued so many times in front of judges of that court," recalls Deahl, who previously served in the appellate division of the Public Defender Service for the District of Columbia. "So, I appreciated how important it is to have good judges. Then I thought, 'You do not get to complain if there are bad judges if you are not trying yourself.'"

On January 6, 2020, Deahl was sworn in as the court's newest associate judge, but his judicial career would not have materialized had he listened to the naysayers. "I got a lot of reactions that were roughly, 'You know there is zero chance Donald Trump is going to appoint a public defender to the bench,'" Deahl says. "Well, that turned out to be wrong."

His advice to those interested in becoming a judge but hesitant to apply? "Throw your hat in the ring," Deahl says. "I say that because it is a little bit embarrassing, I think, to put your name in to be a judge. There is a certain amount of hubris in that. You can imagine some people rolling their eyes a bit [when you're applying]. And there are a million other reasons why some people might look upon you skeptically for even throwing your name in the hat," Deahl says.

Judge Bruce Mencher, who served on the D.C. Superior Court for four decades before retiring in 2015, says many attorneys consider judgeship as a natural career progression. "I think deep down in their gut most lawyers will tell you that at some point in their lives they would love to be a judge," Mencher says. "But not many lawyers will come out and say it because the chances are so very slim."

In the mid-1970s, Mencher, then a partner of six years at the law firm Wilkes Artis in Washington, D.C., was looking for a career change when his best friend, Alan Kay (who would also later become a judge), encouraged him to apply for a vacancy that had opened up on the Superior Court.

The process for appointing judges was a little different then, recalls Mencher, who was assistant corporation counsel for the District of Columbia from 1961 to 1967. "The president would just pick and send the names to the Senate," he says. "But the law changed so that you had to have three names selected by the [District of Columbia Judicial Nomination Commission], and those were sent to the president, who would pick one of those names."



JUDGE BRUCE MENCHER (Ret.), D.C. Superior Court

A TEST OF PATIENCE

Established in 1973, the Judicial Nomination Commission (JNC) is tasked with screening, selecting, and recommending to the U.S. president candidates for appointment to the District's Superior Court and Court of Appeals. To qualify for appointment, an applicant must be a U.S. citizen, a District resident for more than 90 days prior to the appointment, an active member of the D.C. Bar, and a practicing attorney for the preceding five years. Beyond the basics, those who have gone through the rigorous process say judicial hopefuls could benefit from having a better understanding of what to expect, from application to confirmation and the waiting game in between.

The JNC uses a merit-based selection process to recommend candidates for vacancies on the District's courts. The commission comprises both lawyers and nonlawyers: two are appointed by the D.C. mayor, two by the D.C. Bar Board of Governors, and one each by the D.C. Council, the chief judge of the U.S. District Court for the District of Columbia, and the president. Each commission member is appointed for a six-year term, except the member appointed by the president, who serves for five years.



JUDGE DIANE BRENNEMAN (Ret.), D.C. Superior Court

The JNC selects three applicants for each vacancy and submits those names to the president, who in turn has 60 days to nominate a candidate. The Executive Office of the President may conduct additional interviews and investigation. The nominee is subject to Senate confirmation. There is no timeline for the Senate confirmation process.

U.S. District Court for the District of Columbia Judge Emmet G. Sullivan, speaking on one of the panels at the Judicial and Bar Conference on April 23, encouraged interested attorneys to reach out to the JNC to gain more insight into the process. "Don't be tentative about reaching out to any of the commissioners," said Sullivan, current chair of the JNC. "I always encourage my colleagues to encourage lawyers who they know are interested in the application process to give me a call, or to give any of the other commissioners a call."

Knowing what the job entails is equally important, said Addy R. Schmitt, an attorney with Miller & Chevalier and a member of the JNC, during the April conference. "A lot of people envision what judges do, but they don't necessarily have a full perspective of the job," said Schmitt. "Maybe they think the job is the next logical step or they are looking for a career change. Those can be legitimate reasons to be interested. But the job is so critically important to the community. I always want to make sure that the person really knows what this job means and really wants to do it."

The waiting period can be frustrating for judicial hopefuls. According to the JNC, it takes roughly 15 weeks before nominations reach the White House, and depending upon a variety of circumstances, it can be months or even a year or more for a nominee to get confirmation.

Judge Deahl's nomination was pending in the Senate for two and a half years. "It's not just that you are waiting for a long time; it's the [reason] behind it being shrouded in mystery. You have no idea why your nomination is not moving. In my case, there were a handful of us — me and

some trial court judges. And the nominee before me got blocked for more than three years and never got through," he says.

Judge Diane Brenneman's name landed on the president's desk four times, each failing to reach confirmation. "Unfortunately, it was all during the Bush administration," Brenneman says. "And I did not really have many contacts in the Republican Party at that time, or now. So, I never made it. I was always a bridesmaid, never a bride." Until 2004, when Brenneman was finally sworn in as D.C. Superior Court magistrate judge.

There are multiple reasons why some nominations do not advance in the Senate, including conflicts of interest, financial debt, and damaging professional and personal records. "One of the more famous people to be blocked by the Senate had an off-the-books nanny and tax evasion problems," Deahl says. "Another famous one was Doug Ginsburg, who was up for the U.S. Supreme Court and got blocked because one of his buddies told everybody that he had smoked weed at Harvard Law School with students. That was enough to sink his nomination. So, drugs can do it, finances can do it, and clients can do it."

Judge Melvin R. Wright, who has taken senior status on the D.C. Superior Court, says it is when applicants try to hide something that major red flags go up. Both the Senate and the JNC conduct thorough background checks on all applicants, Wright points out.

"If there's anything that you have done that you haven't disclosed, that's going to create a problem for you," Wright says, citing marijuana use as an example. "Today we realize [that] more than half of the states in this country have decriminalized marijuana, and most people don't think it's a big deal. But in the '70s and '80s, it was a big deal and would almost [always] disqualify you. [If you] used it, admit it. If you're trying to hide mistakes, it impugns on your integrity."

HONESTY, INTEGRITY & EXPERIENCE

Judicial applicants should also keep in mind that the legal community is closely intertwined. Judge Wright, who has served on the Superior Court since 1998, stresses the importance of treating people with kindness and respect and having an even-keeled temperament.

"Don't talk about people negatively," he says. "Don't talk down to people. There are people who don't like you and maybe you don't like them, but you can still be cordial and respectful. This goes to integrity and principles."

Judge Anita Josey-Herring, who made history last year by becoming the first female chief judge of the D.C. Superior Court, offers similar advice. "I think you have to be mindful as a lawyer that you need to maintain a good reputation. You need to be reliable. You have to treat everyone with respect, even if the individuals you are dealing with are on the opposite side of your cases."

Attorneys interested in serving on the bench should try to get as much trial experience as possible, Josey-Herring recommends. Prior to her appointment to the Superior Court in 1997, Josey-Herring was a trial attorney and then deputy director of D.C.'s Public Defender Service. "So, from that perspective, I felt I was very prepared when I applied to be an associate judge and was confirmed, even though I was only 37 years old," she says.

Josey-Herring also gained invaluable experience clerking for D.C. Superior Court Judge Herbert B. Dixon Jr. "I had a great opportunity to



CHIEF JUDGE ANITA JOSEY-HERRING, *D.C. Superior Court*

observe lawyers in court," she recalls. "I had a wonderful exchange of ideas with the judge and could understand really how important it was for lawyers to present in a way that advanced their client's interests, whether they were on the side of the government or the defense. So, once I practiced for a number of years in the Public Defender Service and was in management there, I realized that I should be thinking about my next [professional] chapter."

Judge Brenneman's initial career goals did not include serving on the court, but her winding path — working with the Peace Corps, running the Family Law Clinic at the Antioch School of Law (now the University of the District of Columbia's David A. Clarke School of Law), serving as co-chair of the D.C. Bar's Family Law Section (now the Family Law Community), and being actively involved in the Women's Bar Association — allowed her to accumulate vast experience to prepare her for judgeship.

"Despite my expertise in family law, [Superior Court] Judge Rufus King wanted me to apply as an associate judge as a generalist because he knew he could plug and play me in a variety of places because of my experience as a criminal investigator, as a teacher, and as a private practitioner," she says.

"My sensibility as a judge was to be sure that the court is not putting up barriers for people to access the tools that they need to adjust their social status, which is what the civil law is all about," Brenneman says. "Somebody harms you; you want to get recompense from them. It should not be that hard to bring a claim and prove your case."

For Judge Deahl, thoughtfulness is a defining quality of good judges. "There are brilliant people in this job and there are not so brilliant people in this job," Deahl says. "Sometimes you can't tell [the difference] just by reading what they write or how they come out, generally speaking. But you can always tell who is thoughtful, who is not just giving their knee-jerk reactions in a given case and following their intuitive sense of what they think the law ought to be."

"You need to have a certain degree of empathy [to] understand where people are coming from. And I do not mean the most disadvantaged; I mean the most 'vantaged,' too," Deahl adds.

There is no such thing as an unimportant case, says Judge Mencher. "Cases are not fungible; people are not fungible. [Effective] judges pretty much approach every case on its merits and are dispassionate. They have no bias, they have no prejudice, and they come up with what they think is the correct answer without being pressured by anybody to come to that answer."

Being a judge often means lonely work, which judicial aspirants must be prepared for. "The nature of your relationships with both friends and colleagues, who might ultimately appear before you, has to be different," Josey-Herring says. "So, you really are more isolated in the sense of you are not as free to interact with people that you had prior relationships



JUDGE MELVIN R. WRIGHT, *D.C. Superior Court*

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with, or you have to be very careful about perceptions that people may have about who you socialize with in terms of whether those individuals are practicing [law] before the court.”

Having strong, nurturing relationships outside of the legal profession can help mitigate the isolation. “I am more extroverted,” Deahl says. “I think it is fair to say than I am not the typical appellate judge. I like human interaction, and sometimes this job is not super conducive to it. It is mostly isolated work. So, for me, it’s important to have a good community outside the legal sphere.”

Mencher advises new judges to adopt a positive mindset: “You’ve got to have a sense of humor or a sense of balance because it is going to get a little rough some days in there as a judge.”

For attorneys considering a career on the bench, Deahl has this to say: “Don’t self-select yourself out.” There will be people who will try to dissuade you from applying, Deahl says, but don’t let them dictate what you are going to do. “If you think you are ready, try it. There are screening processes to weed you out if you are not. Some people make those decisions. Do not be the one to work against yourself.”

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HELP EVALUATE D.C. COURT JUDGES

The D.C. Bar Judicial Evaluation Committee will conduct its 2021-22 annual survey of the performance of selected judges from the D.C. Court of Appeals and D.C. Superior Court.

Attorneys who have appeared before the selected judges during the survey period will receive an email and postcard in **mid-November** informing them of their eligibility to take this important survey.

The survey is conducted online only. **All responses are confidential.** The evaluations assist the chief judges of the D.C. Courts to address concerns about a judge’s performance and provide vital feedback to the judges. Survey results also are provided to the D.C. Commission on Judicial Disabilities and Tenure.



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