

**Legal and Court Staff in the United States Judiciary**  
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Legal and court staff play an important role in the administration of justice in the United States. Whether by overseeing pretrial matters, assisting with legal research and drafting, or assuming responsibility for court operations, the contributions of assistant judges, law clerks, and court managers enable judges to focus on the demands of adjudication and thereby facilitate the efficient operation of the judicial system.

Though the U.S. has a long history of delegating responsibility for discrete aspects of the adjudicative and administrative functions to subordinate professionals, this practice is not universally followed, with judges from other countries far less comfortable relinquishing authority to assistants and clerks. However, the international trend appears to be in the direction of creating categories of professionals trained specifically to support judges. Many judiciaries around the world have recently introduced judicial assistant positions and others are expanding the scope and enhancing the professionalism of their administrative staff structures.

This paper will address the U.S. experience in this field, beginning with a brief overview of the U.S. court system and then turning to a discussion of the work performed by three categories of assistant personnel: judicial (magistrate and para-judges); legal (law clerks and staff attorneys); and administrative (clerks of court and circuit executives).

### **The U.S. Judicial System**

The subject of legal and court staff in the United States is most easily understood within the broader context of the structure and practice of the U.S. judicial system. The United States judiciary is an independent branch of government. Responsibility for adjudication rests with the judges presiding over the trial or appeal, without oversight or interference by other officials. Although funding for the courts is appropriated by the legislature and approved by the executive, primary responsibility for judicial administration lies with the judicial branch.<sup>2</sup>

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<sup>1</sup> The Federal Judicial Center is the research and education agency for the U.S. federal courts. The views expressed in this paper are those of the author not the FJC.

<sup>2</sup> Policy making for the federal courts is determined by the Judicial Conference of the United States, a body of judges, with the Chief Justice of the United States serving as its Chair. The Administrative Office of the United States, an agency within the federal judicial branch, oversees judicial administration, including establishing the judiciary's budgetary needs, compiling statistical information, and providing staff support for the Judicial Conference. Additional information about the Judicial Conference and Administrative Office can be found at [www.uscourts.gov](http://www.uscourts.gov). Many state court systems have similar policy and administrative bodies, with other states delegating responsibility for the administration of the judiciary to their supreme courts.

The United States has a federal system of government: each state has an executive, legislative and judicial branch that operates independently of the federal governmental and court systems. As a result, the U.S. has 53 separate judiciaries: the federal courts, those of each of the 50 states, and the local courts of Puerto Rico and the District of Columbia. The vast majority of legal disputes in the United States are resolved in the state and local courts, with federal jurisdiction limited to questions of U.S. constitutional interpretation, federal law, international disputes, and cases involving citizens of different states where the amount in controversy exceeds \$75,000. The tables below illustrate the contrast in the size (by number of judges and cases) of the federal and state judiciaries.

## Judges and Cases in the U.S. Federal and State Court

### Judges

	Federal (2003, judgeships, AO)	State (2001, NCSC, BJS)
Total	1,757	30,482
Appellate (Supreme & Intermediate)	188	1,216
Trial • general jurisdiction • limited jurisdiction	<ul style="list-style-type: none"> <li>• 689 (District, Int'l Trade)</li> <li>• 880 (Bankruptcy, Magistrate, Federal Claims)</li> </ul>	<ul style="list-style-type: none"> <li>• 11,323</li> <li>• 17,943</li> </ul>

### Cases

	Federal (2002, AO)	State (2001, NCSC)
Appellate	57,000	276,400
Trial • Criminal • Civil • Limited Juris	342,000 (civil & criminal) <ul style="list-style-type: none"> <li>- 67,000</li> <li>- 275,000</li> <li>- 1,548,000 (bankruptcy)</li> </ul>	20,100,000 (civil & crim) <ul style="list-style-type: none"> <li>- 4,800,000</li> <li>- 15,300,000</li> <li>- 62,400,000 (specialized cts)</li> </ul>

Turning to court structure, the federal court system is divided into district (first instance trial) courts, intermediate circuit courts of appeals, and the Supreme Court of the United States. Litigants are entitled to one appeal (to the circuit courts) and can petition the Supreme Court for a second appeal.<sup>3</sup> Appeals in the U.S. system are limited to a review of legal issues, rather than a retrial of questions of fact. Federal courts are courts of general jurisdiction and hear both civil and criminal cases covering a broad range of legal issues, including contract disputes, civil rights claims, intellectual property, international law, drug cases and corporate crime. There is limited specialization in the federal judiciary: the bankruptcy courts (which preside within the district court system), the Courts of International Trade and Federal Claims, and the Federal Circuit, an appellate court that hears disputes related to patents and trademark as well as other specialized appeals.

<sup>3</sup> The U.S. Supreme Court receives over 7000 petitions for review (certiorari) and typically accepts only 80 – 90 cases for decision each year.

Most state judiciaries are similarly structured, with trial courts, intermediate appellate courts and supreme courts that hear appeals on a discretionary basis. However, many states make extensive use of specialized courts, including courts for domestic disputes, juvenile justice, traffic cases, and small claims.

Federal judges are appointed by the President of the United States, with the approval of the Senate, and serve with life tenure.<sup>4</sup> Judicial appointment methods in the states vary, with some state court judges selected by the governor, others by popular election, and others by merit selection commissions. Most state court judges serve for limited but renewable terms.

The United States follows the common law, adversarial tradition. Although there is extensive codification of both criminal and civil law, U.S. judges resolve disputes by looking not only to statutes but also to prior judicial decisions (precedents). For legal questions not directly addressed by statute or precedent, common law judges engage in legal reasoning and analysis, often drawing upon analogy and legal principles to arrive at their judgments. Unlike their civil law counterparts, U.S. judges do not independently investigate disputed facts in a case but rather rely upon attorneys to present relevant evidence and legal arguments during pretrial and trial proceedings. Finally, the U.S. uses the jury system for most serious criminal trials and some civil matters, with jurors chosen at random from the community.

### **Judicial Officers, Legal Assistants, and Court Managers**

The development of judicial assistance in the U.S. was born of both invention and necessity: while the tradition of using recent law graduates to assist with legal research was originally intended to provide judges with intellectual sparring partners to hone their legal reasoning, rising caseloads threatened to overwhelm the courts and strategies for alleviating the burdens on judges included developing quasi- or para-judge positions as well as greater diversification and professionalization of court personnel. This paper will discuss court and legal staff in both the state and federal courts, but the primary focus will be the evolution of these professions in the U.S. federal judiciary. It is important to note, however, that the decentralized nature of the U.S. system has allowed for considerable variation (and innovation) at the local level, with state and local courts free to create court structures and staff positions that best serve their needs.

Assistant personnel in the United States judiciary can be divided into three categories:

<b>Judicial</b>	<b>Legal</b>	<b>Administrative</b>
<ul style="list-style-type: none"><li>• Commissioner</li><li>• Magistrate Judge</li><li>• Para-judge</li></ul>	<ul style="list-style-type: none"><li>• Law Clerk</li><li>• Staff Attorney</li></ul>	<ul style="list-style-type: none"><li>• Clerk of Court</li><li>• Circuit Executive</li></ul>

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<sup>4</sup> Except: judges on the Federal Court of Claims, who serve for renewable 15 terms; bankruptcy judges, who are appointed by the courts of appeals and serve for renewable 14 year terms; and magistrate judges, who are appointed by the district courts and serve for renewable 8 year terms.

Each category of assistance plays a unique role in the courts, providing needed support to judges and alleviating case backlog by improving court efficiency.

***Judicial Assistance: Commissioners, Magistrate Judges, Para-judges***

Throughout its history, the U.S. judiciary has delegated responsibility for petty matters and pretrial proceedings to quasi-judicial officers who are selected under different criteria than judges and exercise more limited authority. Early in the evolution of the federal court system, commissioners provided assistance to judges in a variety of pretrial proceedings, including bail hearings and the supervision of witness affidavits and depositions. Commissioners were court-appointed federal officers, with their specific duties set forth by statute. Though not required to have legal training, most commissioners were lawyers and many maintained a private law practice while working in the courts. *History of the Federal Judiciary*. <http://www.fjc.gov>. Web site of the Federal Judicial Center, Washington, DC. [November 2004].

As the caseload of the federal courts increased, there was growing interest enhancing the authority of commissioners, eventually leading to the enactment of the Federal Magistrates Act of 1968. Magistrate judges now play a critical role as judicial officers in the federal court system. Appointed by the district courts (with the assistance of merit selection panels), magistrate judges serve as “assistant judges,” conducting a broad variety of pretrial and case management proceedings, including oversight of the discovery process during which evidence is assembled by the parties. By the terms of the Act, magistrate judges may conduct evidentiary hearings, hear dispositive motions and submit proposed findings of fact and recommended determinations to the district judges, and may be assigned “additional duties as are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(1) - (3). Magistrate judges also may preside over misdemeanor criminal trials (if defendants waive their right to a trial by district judge) and civil trials (if the parties consent). 28 U.S.C. § 636(a)(3);(c)(1).<sup>5</sup>

In practice, there is broad regional variation as to how magistrate judges are utilized. While some courts have a tradition of delegating considerable authority to magistrate judges, including extensive motion practice and civil trials, other courts limit the use of magistrate judges to discovery, case management, and settlement conferences or mediation efforts. Regardless of how different courts employ magistrates, it is indisputable that they play a critical role in alleviating case backlog, with 540 federal magistrate positions currently authorized.

The state courts also have used quasi-judicial officials to reduce the burdens on trial court and even appellate judges. As with federal magistrate judges, para-judges in the state courts are not full judges and have limited authority, often with their decisions reviewed by judges. The titles used to describe state court para-judicial officers, their responsibilities, terms of office, and professional qualifications vary among the states. Most of the states that use para-judges do so in specialized proceedings such as family law, probate and juvenile matters. Other states have used non-judges

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<sup>5</sup> Under the Federal Rules of Civil Procedure, federal courts can enlist the services of a “master” to assist with resolving a complex question that arises during the course of pretrial or post-trial proceedings, including managing very complex discovery matters and the computation of damages. Fed.R.Civ.P. 53. Magistrate judges may also serve in this capacity.

as hearing officers or retired judges to serve as referees in fact-finding proceedings for complex cases. See National Center for State Courts, *Parajudges: their role in today's court system* (1976); Jeffrey A. Parness, American Judicature Society *The Expanding Role of the Parajudge in the United States* (1973). However, the National Center for State Courts has noted that the trend in state courts has been to restrict or reduce the use of para-judicial personnel. National Center for State Courts at 8.

The "Justice of the Peace" is another traditional quasi-judicial officer found in local courts in the United States. These officials are often given authority to preside over small civil claims and, in some cases, petty criminal offenses. In some jurisdictions, justices of the peace are appointed by the executive branch, in others they are elected by popular vote. Similarly, the professional qualifications for justices of the peace vary by jurisdiction and, as is the case with para-judges, in many states these positions have been abolished in an effort to enhance the professionalism of the judiciary.

### ***Legal Staff: Law Clerks and Staff Attorneys***

The traditional federal court law clerk is a distinguished recent graduate from a selective law school who works under the supervision of a judge, providing assistance with legal research, drafting, and other tasks related to case preparation and management. The first law clerk in the U.S. federal courts was hired by Supreme Court Justice Horace Gray in 1882. Justice Gray believed that having a young, bright lawyer on hand to act as a sounding board and editor would enhance the quality of his legal reasoning and writing. Justice Gray looked to his clerks for "inspiration and criticism," using them to debate the merits of different arguments and assist with sharpening his prose. John Bilyeu Oakley, Robert S. Thomson, *Law Clerks and the Judicial Process* 14 (1980). The Justice so valued this contribution that he paid his clerks from his own salary.

Other Supreme Court justices soon adopted Gray's practice, with Congress finally appropriating funds for Supreme Court law clerks in 1919. In 1930, Congress funded a law clerk position for each circuit court of appeals judge and a few years later did the same for district court judges (though the district court positions required certification from the senior circuit judge until 1959). *History of the Federal Judiciary*. <http://www.fjc.gov>. Web site of the Federal Judicial Center, Washington, DC. [November 2004]. The federal law clerk position is a much-coveted employment opportunity for young lawyers. Most federal law clerks serve for one or two years. Job offers with prestigious law firms, the government, or academia usually follow.

Judges work with their clerks in a variety of ways. A law clerk's responsibilities typically include reviewing the submissions of the parties; legal research and cite-checking; coordinating with the lawyers on case scheduling and related matters; and drafting memoranda for the judge summarizing the facts of the case, the litigants' arguments, and a suggested holding. Some judges ask their clerks to write a first draft of the judicial opinion; other ask their clerks to review, edit and comment on the judge's draft. Many judges, following Supreme Court Justice Gray's practice, discuss pending cases with their clerks and debate possible rulings. As one commentator stated: "All judicial clerks do the same thing, namely, whatever their judges tell them to do." Quoted in

Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, New York State Bar Journal, July/August 2004.<sup>6</sup>

Regardless of how judges choose to use their law clerks, the judge maintains control and authority over the decision making process. As is the case for federal judges, there is a code of conduct for judicial employees that applies to law clerks and clerks are expected to remain neutral when working on cases and to maintain a judge's confidences.<sup>7</sup>

With the growth of caseloads in the federal courts, the number of law clerks assigned to each judge has increased. Currently, Supreme Court justices are entitled to hire four law clerks each (though some use only three); court of appeals judges have three clerks, district court judges two, and magistrate judges are allotted one law clerk position. However, each judge is also permitted to hire a secretary or administrative assistant for chambers and some judges choose instead to use these funds for an additional law clerk, with the clerks assuming administrative tasks (such as answering the phone and scheduling conferences) in addition to legal work.

In recent years, the traditional law clerk system has undergone change. For example, a number of judges now hire young lawyers with one or more years of experience in practice rather than new law school graduates, preferring a more mature 'sparring partner' with some practical experience. Other judges retain long-term law clerks, called "career law clerks," either instead of or in combination with short-term law clerks. Career clerks may stay with a judge for many years, providing the perceived advantages of familiarity with court practice and the judge's work style and precluding the need to train new clerks each year. Many judges accept law student interns in their chambers as "assistant law clerks." These students often work on cases under the supervision of the judge's law clerks and, for chambers with career clerks, may provide the youthful perspective no longer supplied by law clerks just out of school.

Critics of the career clerk method argue that career clerks fail to bring the youth and fresh perspectives of recent-law-graduate clerks (something that cannot be replaced by part-time and very inexperienced student interns) and thereby compromise the vigor of the judge/law clerk dialectic during the preparation of cases and opinion drafting. Oakley and Thomson at 34. Another concern that has been raised is the possibility that a career law clerk may unduly influence a judge and, as the judge increasingly relies on this competent legal professional, he or she may delegate too much of the judicial function to the law clerk. In fact, some have questioned even the traditional law clerk system, arguing that many judges engage in this over-delegation, with young, inexperienced lawyers given far too much responsibility and authority for the crafting and drafting of judicial decisions. Thomas E. Baker, *The Institution of Law Clerks in the U.S. Courts of Appeals*, The Long Term View, Vol. 3, Number 1, 71 (1995).

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<sup>6</sup> For a more detailed account of the evolution of the law clerk position, see John Bilyeu Oakley, Robert Thomson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 Calif.L.Rev. 1286 (1979); and J. Daniel Mahoney, *Law Clerks for Better or For Worse*, 52 Brook.L.Rev. 321 (1988).

<sup>7</sup> The *Code of Conduct for Judicial Employees* can be found on the website of the Administrative Office at <http://www.uscourts.gov/guide/vol2/ch2.html>; *Maintaining the Public Trust*, a Federal Judicial Center publication describing the ethical responsibilities of federal judicial law clerks, can be downloaded from the Center's website at [www.fjc.gov](http://www.fjc.gov).

Although some state courts have adopted traditional or career law clerk systems similar to that of the federal judiciary (often using the term “law secretary” instead of law clerk), most states courts, especially appellate courts, utilize a staff attorney system. Staff attorneys are experienced lawyers who are assigned to the court as a whole, rather than a single judge, and work on cases much in the same way as traditional law clerks. State court staff attorneys are assigned cases to review and prepare memoranda for the judges and, in some cases, draft proposed orders and opinions. The Supreme Court of California has adopted a combination system, with each justice supported by a judicial assistant and five staff attorneys. The court divides its legal staff into three categories: a criminal central staff, civil central staff, and capital staff (for death penalty cases). *The Supreme Court of California* (2003), available at <http://www.courtinfo.ca.gov/courts/supreme/iopp.htm>.

Appellate staff attorneys work for the court, not a particular judge, under the supervision of a senior attorney, and are available to all or the judges. They perform a broad variety of tasks, depending upon the preferred practice of their court, including:

- Oversight of the briefing and filing process;
- Case management;
- Prehearing assistance;
- Conducting settlement conferences;
- Legal research;
- Drafting of memoranda, orders, and opinions.

As is the case with law clerks, staff attorney work is subject to judicial supervision. See Hanson, Flango, Hansen, *The Work of Appellate Court Legal Staff*, National Center for State Courts (2000).

Central staff attorneys now also play an integral role in the federal courts of appeals, with this practice developing in an effort to cope with extremely burdensome caseloads.<sup>8</sup> Staff attorneys are used by the various courts of appeals in a number of different ways. Some courts use staff attorneys to screen and make preliminary determinations, including on pro se (self-represented) submissions, prisoner petitions, and sentencing appeals. Staff attorneys are often asked to review cases for jurisdictional issues or to assess which cases are appropriate for oral argument and full decision on the merits, versus those that can be disposed of on the papers. Some staff attorneys also assist with the preparation of written opinions. See Federal Judicial Center, *Case Management Procedures in the Federal Courts of Appeals* (2000); Hanson, Flango, Hansen, *The Work of Appellate Court Legal Staff*, National Center for State Courts 59 (2000).

As is the case with the use of law clerks, critics have expressed concern that judges delegate too much responsibility to central staff attorneys, resulting in the over-bureaucratization of the judicial process and a dilution of judicial authority. Baker at 75.

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<sup>8</sup> The Administrative Office of the U.S. Courts has developed a formula for determining the number of central staff attorneys needed in a circuit, based upon the number of judges and case filings.

### ***Administrative Staff: The Clerk of Court and Circuit Executive***

Although judges retain the ultimate authority for judicial administration, the tasks associated with daily court management are delegated to staff. In the federal court system, the Chief Judge<sup>9</sup> (Court President) is formally responsible for determining court policy and delegates to the Clerk of Court the task of implementing this policy and overseeing daily court operations. The Clerk is the chief administrative officer of the court and serves at the pleasure of the Chief Judge. This position originated in the English and colonial court systems, with judges relying on clerks to serve as the court's "liaison" with attorneys and litigants and to screen legal papers for compliance with local rules. Federal Judicial Center, *Order in the Courts: A History of the Federal Court Clerk's Office* (2002).

As the business of the U.S. courts evolved, the responsibilities of clerks of court have expanded considerably. These responsibilities are numerous and can be broken down into five general categories:

- Case Processing
- Management (of court records, budget, equipment, and personnel)
- Automation
- Statistics (collecting and reporting court statistical information)
- Courtroom Services

Clerks of court also oversee the court's interaction with the community, including insuring that court services are delivered in a courteous and efficient manner and providing public education about the courts to schools and citizens. Clerks also supply information to the news media, keeping reporters informed about the business of the courts and providing access to public records and information. Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol.III, Sec.A, Ch.5, Part B, Section 1.

As the responsibilities of the clerk's office have become more demanding, there has been increased diversification and professionalization of court staff in both the district and appellate courts. Clerks of court are assisted by deputy clerks, docket clerks, case managers, automation specialists and others (the precise number of which is based on a calculation made by the Administrative Office that takes into consideration the number of judges and court caseload).<sup>10</sup> The clerk of court remains the primary administrative liaison between the judges and a court's administrative infrastructure and, while a law or management degree is not a professional prerequisite for this position, a growing number of clerks of court are attorneys or have advanced degrees in business or court management.

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<sup>9</sup> The position of Chief Judge is a seven-year term and is assigned to the most senior judge on the court who is under 65, has served as a judge for at least one year, and has not had a previous term as chief judge. A chief judge may not serve beyond the age of 70. The Chief Judge supervises the administration the court but has no authority over the cases of other judges.

<sup>10</sup> However, it should be noted that the U.S. judiciary is now experiencing significant budgetary pressures, leading courts to begin consolidating staff positions. Few federal courts are now filling vacant staff positions; with some courts confronting staff lay offs and others considering the sharing of administrative services among appellate, district, and bankruptcy courts. See Marcia Coyle, *Courts on the Edge of Financial Crisis* The National Law Journal, November 12, 2004.



On the appellate level, the circuit executive is an administrator tasked with coordinating the non-judicial activities of the circuit. (Most courts of appeals also have a clerk of court who retains responsibility for managing court operations.) The circuit executive is appointed by the circuit's judicial council<sup>11</sup> and works closely with the chief judge of the circuit. The circuit executive's responsibilities vary among the circuits and may include overseeing the circuit's budget, personnel, and information technology, collecting statistics, and conducting studies on the work of the courts. The circuit executive serves as the circuit's liaison with the public and arranges circuit judicial council conference meetings. See Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. III, Ch. 5, Part B, Sec.6. There are also district court executives who perform similar duties on four of the largest federal district courts (in New York (Manhattan and Brooklyn), Georgia, and Florida).

One final administrative position in the U.S. federal courts should be mentioned: the Administrative Assistant to the Chief Justice of the United States. This position was authorized in 1972. The Administrative Assistant is selected by the Chief Justice and performs duties "as may be assigned" by the Chief. 28 U.S.C. §677(a). Such duties usually include assisting with the Chief Justice's statutory responsibilities relating to judicial administration (including serving as presiding officer of the Judicial Conference and Chair of the board of the Federal Judicial Center) and undertaking research for the Chief's public statements. *History of the Federal Judiciary*. <http://www.fjc.gov>. Web site of the Federal Judicial Center, Washington, DC. [November 2004].

The state judiciaries also have extensive administrative staff structures in their trial and appellate courts. State clerks of court perform duties very similar to their federal counterparts, though methods for their appointment may vary and include appointment by the state supreme court (for supreme court administrators) and partisan election (for trial court clerks). See Bureau of Labor Statistics, *State Court Organization* Parts IV and V (1998).

## **Conclusion**

As this discussion illustrates, there are a variety of professionals who provide support to judges in the federal and state courts of the United States, their assistance ranging from handling case-related proceedings (assistant judges), to engaging in legal research and drafting (law clerks and court staff), and overseeing court management and operations (court administrators). The work of this personnel in the federal courts is supported by the educational programs and materials of the Federal Judicial Center, the education and research agency for the federal courts. The Center coordinates training programs for judges, magistrate judges, and court staff, publishes educational materials, and develops distance education resources for the court community, including law clerks. Most state judiciaries have similar educational programs for their staff.

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<sup>11</sup> The federal judiciary is divided into 12 regional circuits that define the boundaries of the circuit courts of appeals and also include the district courts within each regional circuit. For example, the Second Circuit includes the Court of Appeals for the Second Circuit and the district courts of three states: New York, Connecticut, and Vermont. Each circuit has a judicial council, which oversees the administration of the courts within its circuit, ensuring that they operate efficiently. The judicial council may also take action on a matter that the chief judge or local court cannot resolve on its own. Administrative Office of the U.S. Courts, *The Federal Court System in the United States* 38 (2001).

However, although the use of assistant personnel is now well established in the U.S. courts, the pressures of growing caseloads and limited judiciary budgets continue. In response, the courts have been moving to consolidate staff positions and experiment with new case management techniques and court technologies, suggesting that while increased use of judicial, legal, and administrative assistants may provide some relief for judges, the process of reforming the judiciary is an ongoing one.