

JUDICIAL ASSISTANTS OR JUNIOR JUDGES?

THE HIRING, UTILIZATION, AND INFLUENCE OF LAW CLERKS



Last academic year, the *Marquette Law Review* published a symposium concerning law clerks, organized by Professor Chad Oldfather of Marquette University Law School and Professor Todd Peppers of Washington and Lee University Law School and Roanoke College. The symposium brought together law professors, political scientists, judges, lawyers, and journalists. The articles, essays, and proceedings span more than 450 pages in the Law Review, which is available online. We present here, with some modifications (and no footnotes), excerpts of the symposium.

The oversized quotes sprinkled throughout the pages come not from the excerpts here but rather from a panel discussion among various judges—specifically, the Hons. David R. Stras of the Minnesota Supreme Court, Diane S. Sykes, L’84, of the U.S. Court of Appeals for the Seventh Circuit, and James A. Wynn, Jr., L’79, of the U.S. Court of Appeals for the Fourth Circuit. Like the articles excerpted below, that discussion appears in the symposium as published in the *Marquette Law Review*.

INTRODUCTION

by Chad Oldfather and Todd E. Peppers

Law clerks have been part of the American judicial system since 1882, when Supreme Court Justice Horace Gray hired a young Harvard Law School graduate named Thomas Russell to serve as his assistant. Justice Gray paid for his law clerks out of his own pocket until Congress authorized funds for the hiring of “stenographic clerks” in 1886. The Gray law clerks, however, were not mere stenographers. Justice Gray assigned them a host of legal and non-legal job duties. His clerks discussed the record and debated the attendant legal issues with Justice Gray prior to oral argument, conducted legal research, and prepared the first draft of opinions. Today all nine Justices of the United States Supreme Court follow the institutional practices established by Justice Gray. Each Justice is entitled to hire four clerks (five, in the case of the Chief Justice), most of whom are recent graduates of elite law schools and serve for a single term. What is more, the practice of hiring newly graduated attorneys to serve as clerks has spread beyond the Supreme Court to become a well-established feature throughout both the federal and state courts.

The institution of the law clerk has generally received little scholarly attention. But it also has never been entirely ignored, and at least some initial reviews of the practice were promising. In 1960, Karl Llewellyn wrote of the rise of the law clerk in almost-excited terms. After noting that Gray had started the practice and Justice Oliver Wendell Holmes, Jr., continued it, Llewellyn opined, “I should be inclined to rate it as [Justice Felix] Frankfurter’s greatest contribution to our law that his vision, energy, and persuasiveness turned this two-judge idiosyncrasy into what shows high possibility of becoming a pervasive American legal institution.” Llewellyn lauded the institution for a variety of reasons, including not only the manpower it provides but also that “the recurring and unceasing impact of a *young* junior in the task is the best medicine yet discovered by man against the hardening of a senior’s mind and imagination,” writing as follows:

“A new model every year” may have little to commend it in the matter of appliances or motorcars or appellate judges, but it has a great deal to offer in the matter of appellate judges’ clerks: there then arrives yearly in the judge’s chambers a reasonable sampling of information and opinion derived from the labors, over the three past years, of an intelligent group of men specializing in the current growth and problems of our law: the faculty which has reared the new apprentice. This is a time-cheap road to stimulus and to useful leads. ▶▶



Llewellyn also praised the impact on the clerks themselves. Having seen the process from the inside, they would be better able to craft a good appellate argument. And the clerks would go into the world knowing how the appellate courts function, and that they function well, and would as a result be able to reassure their colleagues that the process works as it should. The master, the apprentice, and the bar alike would benefit.

Llewellyn's optimism was not universally shared, and already some had suggested that law clerks might not be an unalloyed good. In 1957 a young Arizona attorney named William H. Rehnquist, a former law clerk to Justice Robert Jackson, wrote an article suggesting that ideologically liberal law clerks might be manipulating the review of petitions for certiorari and tricking their more conservative Justices into voting in a more liberal fashion. While Rehnquist backtracked in the face of public challenges raised by other former law clerks (a response orchestrated by Justice Felix Frankfurter), he had opened the door for subsequent critiques.

In the decades that followed, commentators paid increasing attention to the role of law clerks. Most of the early focus was on Supreme Court law clerks, and former clerks themselves contributed to the flurry of new articles by discussing their own clerkship experiences (although usually in the most laudatory and general terms). In subsequent years scholars began to appreciate and assess how lower federal and state courts also heavily relied on these young judicial assistants.

As much of this commentary revealed, Llewellyn's optimism turned out to be misplaced. Some of this may have been a product of larger societal and institutional shifts. Llewellyn had written in 1960, which turned out to mark the beginning of a period of dramatic and sustained growth in the caseloads of the federal courts. Not even a decade later, commentators began to lament the problems caused by swelling dockets. Paul Carrington decried the negative effects of congestion and noted the accompanying temptation for judges to cut corners. Testifying before the Commission on Revision of the Federal Court Appellate System in 1973, Ninth Circuit Judge Ben Cushing Duniway reflected on conditions when he joined that court in 1961:

When I came on the court . . . , I had time to not only read all of the briefs in every case I heard myself, which I still do, and all the motion papers in every motion that I was called upon to pass upon, which I still do, but I could also go back

to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call "thinking," which was to put my feet on the desk and look at the ceiling and scratch my head and say, "How should this thing be handled?"

Today the situation is quite different. . . .

Pressed for time, and unable to approach their job as they or their predecessors once had, judges grew to place increasing reliance on their clerks. By 1993 Anthony Kronman, whose book *The Lost Lawyer* otherwise echoed Llewellyn in its emphasis on the value of craft, decried the institution of the law clerk in terms as despairing as Llewellyn's had been hopeful. Kronman charged the rise of the law clerk with responsibility for a number of pathologies. Clerks not only facilitate an increase in the aggregate number of opinions simply by being available as a source of labor; they encourage proliferation by having an incentive to see their judge make a name for himself or herself via separate opinions. Their role as primary authors likewise changes opinions' style in a way that increases length, footnoting, reliance on jargon, and the incorporation of multifactor balancing tests, all of which Kronman characterized as a product of "the combination of hubris and self-doubt that is the mark of the culture of clerks." What is more, he suggested, these changes contribute to pernicious, tectonic shifts in the legal culture. As clerk-written opinions become the norm, judges increasingly come to regard that style of opinion as the ideal:

And as this happens, the older person's virtue of practical wisdom will lose its meaning for judges too and be replaced by other, more youthful traits such as cleverness and dialectical agility, redefining the qualities judges admire in a practitioner of their craft and in the opinions he or she writes. Subtly perhaps, but steadily and effectively, the increasing influence of law clerks and their antiprudential culture thus brings about a shift in judicial values, contributing to the decline of the lawyer-statesman ideal in the minds of judges themselves by making the beginner in the craft of judging the measure of the master's art.

Kronman's portrayal does not end there. The transformation becomes complete, he suggested, as this new sort of opinion becomes the standard fare of law-school instruction. Because those opinions no longer

“A good judicial law clerk will put you in a position to make an informed judicial choice. I don’t need to be wasting time figuring out what the standard of review is on the case. That’s my clerk’s job—to distill the important facts and summarize the black-letter law. My job is to make an informed judicial choice.”

Judge James A. Wynn, Jr.

reflect the old norms, students do not learn to value those perspectives and approaches, and the wisdom of the past largely slips away. Rather than the wisdom of experience, “[w]hat they see reflected in these opinions, therefore, is essentially an image of themselves, clothed in the trappings of authority.”

Kronman’s is perhaps the most dystopian vision of the impact of the law clerk, but he has hardly been the only critic of the clerk’s growing influence. In the last 30 years, there has been a slow but steady growth in newspaper articles, scholarly essays, and books examining the hiring and utilization of the men and women who help process the business of the courts. Overall, however, the scholarly attention paid to law clerks has been episodic, unsystematic, and primarily limited to the Supreme Court. Three books have covered Supreme Court law clerks in some depth, but beyond that, the scholarly focus has been limited largely to the stray law review article or a brief burst of attention following the publication of a book such as Edward Lazarus’s *Closed Chambers* or an article along the lines of the piece in *Vanity Fair* that followed *Bush v. Gore*. And as has been the case more generally, legal academics and social scientists have conducted their respective explorations of the institution along largely separate tracks.

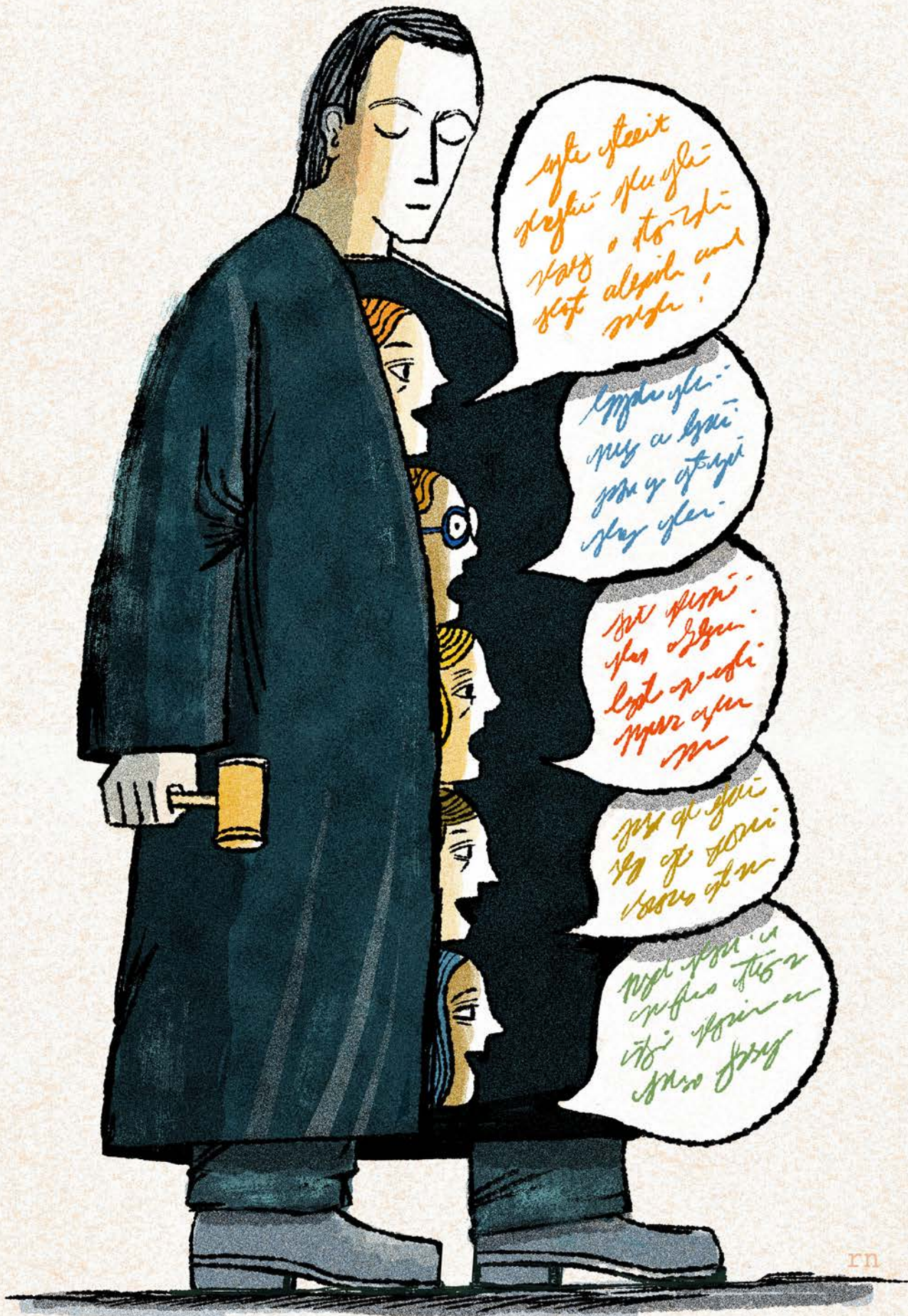
This absence of sustained attention is somewhat striking given that law clerks are, arguably, the elephant in many of the rooms inhabited by lawyers and legal academics. Concerns such as those Kronman raised deserve systematic examination. Should it matter to us, as teachers, that the opinions we ask our students to pay such close attention to may not, in some meaningful sense, be the product of the jurists whose names are attached to them? If part of being an effective lawyer is to know one’s audience, then are we doing our students a disservice by failing to make explicit the fact that clerks are an important part of their audience? As lawyers, how should the role of clerks factor into our reading of

and reliance upon opinions? As academics attempting to understand the characteristics and capabilities of the judiciary, how should we account for the likely opacity of the window that opinions provide into the workings of the courts? Is there a point at which delegation of responsibility to clerks crosses the line from undesirable to unconstitutional? How much do we actually understand about the role of clerks?

Despite the growing interest in law clerks, to our knowledge not a single academic conference has been devoted to the institution of the judicial clerk—until now. In April 2014, Marquette University Law School sponsored a conference in which journalists, state and federal court judges, legal scholars, and social scientists gave formal presentations and participated in informal conversations revolving around such fundamental issues as how law clerks are selected, “who” law clerks are, what job duties law clerks are assigned, and whether law clerks exercise inappropriate levels of influence over the judicial decision-making process. And participants discussed the challenges related to studying law clerks given existing clerkship codes of confidentiality.

What emerged from the conference was not only a rich and diverse dialogue about the evolution of the institutional structures undergirding the hiring and use of law clerks but also a variety of normative questions as to how clerks should be used in a judicial system that has struggled with a dramatic increase in its caseload over the last 50 years. In short, the ultimate question facing the symposium participants was this: Is it a wise practice to allow unelectable and unaccountable men and women largely selected from a small group of elite law schools to wield influence not only over the outcomes of trials and appeals but also over the selection of the doctrines and principles that support the legal justification for these outcomes?

We are delighted to present excerpts from the symposium as published. ▶▶



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EXCERPTS FROM THE SYMPOSIUM

**Advice from the Bench (Memo):
Clerk Influence on Supreme Court
Oral Arguments***by Timothy R. Johnson, David R. Stras, and Ryan C. Black*

So far, the data establish that Justice Harry Blackmun generally acted on the advice of his clerks during oral arguments. This alone indicates clerks can directly influence the actions their Justices take. In fact, it may be the best evidence to date, given the timing of the process and the sheer number of suggested questions used by Justice Blackmun. Of course, we cannot make a direct causal claim until we control for other factors that may have affected his behavior.

The next step is to determine if there is any connection among the types of questions Justice Blackmun asked and whether the answers to those questions influenced his opinions. With respect to the types of questions, we analyzed the 94 clerk-written questions Justice Blackmun asked based on Timothy Johnson's taxonomy of possible question types. It allowed us to test whether Justice Blackmun's clerk focused on the type of questions that we would expect a policy-minded, strategic Justice to ask. Justices who exhibit these tendencies tend to ask questions about policy issues, applicable precedents (the key institutional rule Justices follow), and the views of external actors. Justice Blackmun asked the types of questions we would expect a strategic, policy-minded Justice to ask. In fact, more than half of the questions in the sample were about matters of policy (51 of the 94 questions he asked), while just over 10 percent focused on precedent (12 of the 94 questions). Interestingly, he asked many fewer questions about the views of external actors (only 2 questions), but the pattern is similar to what Johnson found for other policy-minded and strategic Justices. The bottom line is that Justice Blackmun's clerks sensed that Justice Blackmun should think about the public policy involved in a case as well as about how a case fit within existing precedent. Justice Blackmun, in turn, asked these types of questions at oral argument.

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**Revisiting the Influence of Law
Clerks on the U.S. Supreme Court's
Agenda-Setting Process***by Ryan C. Black, Christina L. Boyd, and Amanda Bryan*

To summarize, we find a substantial level of agreement between what law clerks recommend in the pool memos and how Justices ultimately vote. Indeed, roughly 75 percent of the more than 9,500 votes in our data follow the recommendation made by the law clerk. The influence of law clerks on Justices is neither constant nor random, however. Rather, our analysis suggests that Justices compare the law clerk's recommendation with their own prior belief about a petition's certworthiness. Recommendations that are consistent with those beliefs are substantially more likely to be followed than those that challenge them. Additionally, in the event that a pool clerk recommends granting a petition—an event that occurs about 31 percent of the time in our data—a voting Justice also considers the ideology of the clerk's supervising Justice. When a Justice is ideologically proximate to a clerk's employing Justice, we find that the voting Justice is more than twice as likely to follow that recommendation than when the Justice is ideologically distant. Taken together with the findings from our original study, these results provide strong evidence of the conditional influence that law clerks can have in the Court's agenda-setting process. These clerks are not just spending a lot of time reviewing cert petitions, something that we estimated above to be approximately one-third of their workload, but they are wielding potential influence on their own employing Justices and other Justices while doing so. ▶▶

“To the extent that the proposition is that judges rely too heavily on their law clerks to draft the opinions—that, it seems to me, is a genie we’re not going to put back in the bottle. The caseload is too large and our decisions have to be explained in writing, and no single judge can do it all himself or herself, unless you are in the league of Judge Posner and Judge Easterbrook. The rest of us are mere mortals, and we have to rely on our legal staffs to assist us. The measure of whether that’s a good thing or a bad thing is simply the quality of the work product.”

Judge Diane S. Sykes

Our present findings, coupled with those previously obtained by Black and Boyd, provide what may be very important normative implications of the existence of the institutionalized cert pool. Recall that, from its inception in 1972, the cert pool implored law clerks to author “objective” memos. While our research confirms the standardization of the memos’ formatting, it paints a very different picture regarding the content of the memos, particularly with regard to the conclusions drawn. As we summarize above, grant recommendations are treated differently when coming from a clerk who hails from an ideological ally as opposed to a foe. This may not be surprising, especially given what we know about the strength of the principal–agent relationship between a Justice and his hired clerk.

It does, however, call into question whether the cert pool was, just over a decade after its inception, serving its intended goals. To the extent bias exists in the recommendations, a pool Justice needs to devote additional effort to detect and correct for that bias before she can cast her agenda-setting vote. If this work is being delegated to a Justice’s law clerk, which seems very likely, then we must ask, how much of an efficiency gain is there over simply having one’s own law clerks do an independent review? Interestingly, our results suggest that the answer to this question will depend upon the ideological composition of the Court and, in particular, a Justice’s location on the Court. If a Justice is one of the more extreme members of the Court, then grant recommendations from either proximate or distant chambers are informative—you follow those from allies and do the opposite of those coming from ideologically distant chambers. Paradoxically, however, a Justice in the middle stands to gain far less from either end of the spectrum and, as a result, would likely need to invest

more of her clerk’s time to determine what the most appropriate vote would be. This newly revealed nuance thus opens the door for more empirical and normative scholarship assessing the value and efficiency of the cert pool for all participating members of the Court.

As we have already argued, the activities of law clerks during the U.S. Supreme Court’s agenda-setting process provide an excellent setting for systematically and empirically testing for advisor influence. Although we recognize that Supreme Court law clerks are not precisely analogous to advisors in the executive and legislative branches of the federal government, we believe that, in many ways, the similarities between these staffers outweigh the differences, particularly when examining the existence and conditionality of their influence. These similarities range across the education and experience of the people who fill the jobs, the motivations that drive the employees, and the tasks that they are asked to perform while serving in their staff positions.

Law clerks are regarded as being among the brightest and most talented young legal minds. Modern clerks typically come from the top of their class at an elite law school and often have experience clerking for a federal trial or appellate judge. Similar language has also been used to describe congressional advisors. White House staffers, particularly those who serve close to the President, tend to be more experienced (and older) than congressional and court advisors, but the positions held by all three groups are highly coveted and can lead to uncountable future opportunities—both inside and outside of Washington.

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The World of Law Clerks: Tasks, Utilization, Reliance, and Influence

by Stephen L. Wasby

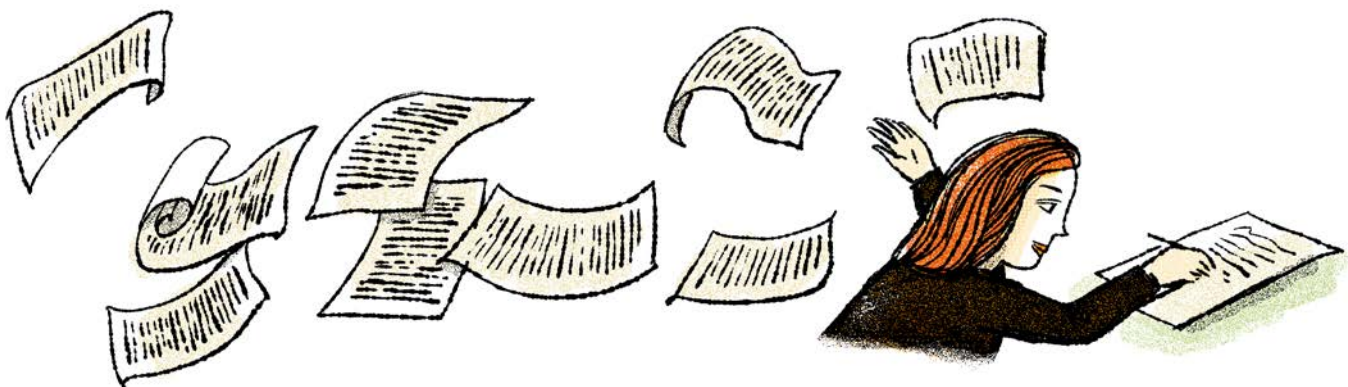
What do we mean by *influence*? The toughest test is that Person *A* exerts influence over another (*B*) only when *A* is able to get *B* to do what *B* would not otherwise have done. One does find instances in which a judge, having decided to vote a certain way in a case, is persuaded by a law clerk to change positions. However, those instances are rare. Judge Goodwin talks of “one case each year” when a clerk’s view prevails over his—when the clerk presses the judge to adopt a position different from the one to which he was initially inclined. And it would appear that the judge may be open to allowing that to happen, in one case a year, but that shows even further that the judge is in control. Perhaps more often, the judge, not being sure how to decide, asks the law clerk which way to move from dead center; in such situations, the law clerk’s influence, if used cautiously, can be determinative. Thus, in a drug case involving a car search that led to a house search, Judge Goodwin wrote to his clerk, “I’m at a crossroad here” as to whether to hold the car search bad and apply the “fruit of the poisonous tree” doctrine or to say the car search was good and probable cause to arrest thus existed.

While there are instances in which the clerk’s view prevails, there are many more instances in which the “recommendation is left in the dust”; after all, the judge is the boss and is fully capable of saying “No” even if saying it more diplomatically. This is part of the larger matter that a law clerk’s submitting work to a judge doesn’t mean the judge will use it. And it must also be remembered that to talk about law clerks’ influence is to assume that law clerks have positions and have recommended their adoption. While certainly some law clerks are quite brash and too certain of their views, more generally law clerks tend to be too deferential. Particularly early in their tenure, they may be reticent to make recommendations, although they become less so toward the end of their clerkship. Indeed, it has

been suggested that law clerks are less valuable to a judge in the early months of a clerkship. They may not come forth with recommendations even when instructed by their judge to do so. Or they may be unable to arrive at a recommendation, as we see when one law clerk admitted to vacillating, writing of the clerk’s shift between alternative positions several times, at which point he “decided to pass the buck to you” while offering opinions on both sides of the issue. It would be interesting to see if clerks who have worked for a few years before their clerkship—an increasing phenomenon, at least at the U.S. Supreme Court—are more sure of themselves and thus more likely to make recommendations than those who clerk under the older “standard model” in which a clerkship directly follows law school. The effects might be similar if someone had served in multiple clerkships, as when someone takes a clerkship on a federal court of appeals after clerking in a state appellate court or a federal district court.

However, if clerks seldom “turn the judge around,” are clerks without influence when they don’t write opinions? The most basic aspect of a clerk’s “influence”—better, the clerk’s *effect*—is that all information provided to the judge is important, and the clerk is having an effect through providing that information, if only by undertaking research assigned by the judge (and not slanting it toward a particular result). And it has already been noted that a bench memo, whether sent to the entire panel or written only for the clerk’s judge, serves to frame issues in a case, certainly an important effect. And it has also been noted that a law clerk’s comments on another panel member’s opinion may have an effect. When a law clerk is charged with drafting an opinion on the basis of the judge’s known position and instructions, the clerk doesn’t determine the result but may be able to persuade the judge to adopt a certain way of reaching the judge’s preferred outcome, and this is particularly important in precedential opinions. ▶▶

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“I don’t place a lot of emphasis on writing samples because I feel like law clerks, when they come in, are going to have some work to do on their writing, and I feel like we can work on that. I’d rather have somebody who’s intellectually curious, who spends a lot of time taking hard classes, who has performed well in law school. If they have those attributes, I feel like I can work with their writing, particularly because I rewrite a lot of their work anyway.”

Justice David R. Stras

Law Clerks as Advisors: A Look at the Blackmun Papers

by Zachary Wallander and Sara C. Benesh

We find that it is, in fact, the case that the Justices use the advice provided to them by the law clerks in the cert pool memos. Indeed, even after controlling for all other known determinants of cert (as measured, for the most part, via the cert pool memo), the recommendation to grant cert by the memo clerk influences the Court to grant a petition. Clerks are hand-picked by the Justices and are able advisors. It would be odd if the Justices did not consider their clerks’ input in their decision making. And our measurement strategy of focusing on the cert pool memo to code the known determinants of cert means that what the clerks write matters as well. When the clerks deem a conflict to be real, the Justices are more likely to grant cert. When they discuss the amici and their arguments in the memo, the Court takes more notice of the petition. The clerks learn the types of information desired by the Court, and when they provide it in the memos, it matters. Indeed, it would be odd if the content of the memos did not matter to the Court as well.

But in an addition to the literature, we find that, just as H. W. Perry, Jr., asserted years ago after conducting interviews with Justices and clerks, the Justices are, at least in part, driven by the readiness of a case to be heard by the Court as well. We find, for the first time of which we are aware, some empirical evidence that percolation matters to the Court in that the Court is more likely to grant cert on a petition for which the cert pool memo discusses many lower court judges and the reasoning they used in their cases. In addition, Perry spoke of a desire by the Court to consider a case reasoned well below, and our analysis lends empirical credence to that supposition as well. The more the clerks mention feeder judges who reasoned the case or decided similar cases below, the

more attractive the petition is to the Court, keen as it is on borrowing the reasoning of those lower court judges.

Of course, we need to know more. It might be the case that the Justices obtain information outside the pool memos that we do not consider here. Indeed, it would be unreasonable to think the pool memos are the Justices’ only source of information when making a decision on cert. Lawyers and amici provide briefs making arguments about whether a case should be granted or denied cert, and we expect that the Justices read at least some of them. However, much of this information is summarized in pool memos written by law clerks, and we would not expect the Justices to request them unless they were useful.

....

The Justices of the Supreme Court cannot make decisions alone, nor would it be wise for them to do so. The important and consequential decisions they make to grant cert in the tiny percentage of all cases that are presented to them is necessarily limited by time and resource constraints. Thus, they need information and advice to help them decide which cases are certworthy. Law clerks do this directly by giving recommendations and information, and the institution of the law clerk was designed explicitly with this role in mind. While some may be uncomfortable to find that what the clerks tell the Justices influences the Justices’ decision making, we argue that discomfort should only arise when the carefully and thoughtfully constructed recommendations made by the able law clerk advisor are no longer considered, for that may mean that the Justices use some other, less substantively based shortcut like, perhaps, an ideological reaction to the lower court’s decision. Is not law clerk influence preferable to that?

Wallander is an associate lecturer, and Benesh is an associate professor, both at the University of Wisconsin–Milwaukee.

Law Clerks and the Institutional Design of the Federal Judiciary

by Albert Yoon

If federal judges are indeed relying more on their clerks when writing opinions, there are two possible responses. The bolder response is to ameliorate or reverse this reliance. The second, more modest, response is to accept this reliance as given but propose steps to mitigate any adverse effects.

If the goal is to reduce judges' reliance on clerks, one solution is to promote a culture where judges collectively take a more-active role in writing opinions. Using writing variability as a proxy, some modern-day jurists exhibit this quality: recently retired Justice John Paul Stevens and Judges Richard Posner and Frank Easterbrook, to name a few. Changing this culture, however, may prove difficult, if not impossible. The Constitution does not mandate how judges perform their role (or even the existence of clerks). Not surprisingly, judges do not report or disclose the process by which they write their opinions. Congress or the Chief Justice could provide guidelines for the proper reliance on clerks, but they would merely be advisory. Given their response to proposed changes regarding clerkship hiring, judges may be reluctant to follow recommendations on their use of clerks.

Another solution that may reduce reliance on clerks is to increase what federal judges earn. . . .

The recent trend in judicial salaries actually understates the broader gap between judges and other elite areas of the law. Judicial salaries were once comparable to those of partners at most elite law firms. Over time, the disparity has grown. In 2013, partners at the top 100 law firms—based on *The American Lawyer*—on average earned profits of nearly \$1.5 million. The relative decline in judicial salaries is exacerbated by an even greater decline relative to the elite private bar, prompting alarm from the corporate bar, the American Bar Association, and legal academics. Some scholars, however, are skeptical that judicial pay bears any relation to the quality of judicial decision making.

A third alternative solution to reduce reliance on clerks, one that assumes that judges respond to external factors, is to reduce their caseload demands. The sheer number of cases has compelled the federal judiciary to adopt ways of triaging the docket by relegating more work to court clerks, non-Article III judges, mediation, telephonic hearings, etc. Scholars have characterized this trend as a bureaucratization of the judiciary, which “weaken[s] the judge’s individual sense of responsibility.”

A smaller caseload would allow judges more time for each case, which in turn would allow more time for deliberation and, more importantly, opinion writing.

As a remedial response, the President and Congress could work together to reduce the number of judicial vacancies. As of October 2014, there were 53 vacancies on the district courts and 7 vacancies on the courts of appeals. This current number of vacancies, however troubling, is certainly a well-established phenomenon and actually represents an improvement over prior years, when the number of vacancies in a given year exceeded 100.

Thinking more prospectively, Congress could increase the number of authorized Article III judges, which has lagged behind the growth in federal cases. It may be that identifying judicial understaffing based on case filings understates the problem to the extent that the growing docket discourages prospective litigants from filing suit. The Senate recently considered the Federal Judgeship Act of 2013, which would have created 70 new judgeships (65 district, 5 circuit), recommended by the Judicial Council, but the legislation stalled in the Senate Judiciary Committee without a vote.

Based on recent history, the chances of an increase in judgeships are unlikely. . . .

If it is not possible to change how judges rely on clerks, either through changing judicial culture or by easing the judges' workload demands, then an alternative is to encourage judges to adopt a more-diverse hiring approach. Rather than rely predominantly on the most recent cohort of law graduates, they could hire clerks who have practiced for a few years, or longer, in government, public interest, or the private sector. Older law clerks bring a potentially broader perspective to chambers, informed by their own legal experiences. They may also bring more maturity to chambers, both professionally and personally. ▶▶

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Secret Agents: Using Law Clerks Effectively

by David Stras (Keynote Address)

Where do the law clerks come from? This has changed. In the 1970s, 1980s, and even into the 1990s, the Justices would occasionally take a law clerk from a state supreme court justice, or even from a federal district court judge. That is no longer the case. Usually, a candidate will have clerked for a federal circuit court. And so, the hiring practices have changed. But there are two aspects of law-clerk hiring that I think are particularly interesting. One is the dominance of the elite schools—and you will be blown away by the table that I’m going to display shortly—and the other is the importance of feeder judges. With respect to the dominance of elite law schools, the numbers in Table 1 are from October Term 2003 to October Term 2013, and these are Brian Leiter’s statistics from his website. One hundred and one law clerks came from Harvard, 89 from Yale; the next highest is Stanford, going all the way down to Boalt and Northwestern at 9 apiece. And then there were a number of very good law schools that had 0 or 1.

These law schools—the elite law schools—dominate law clerk hiring. It’s something that you might expect, but these numbers were a surprise to me. I did not think that the elite four, five, or six law schools were this dominant in Supreme Court hiring until I put together this table. It really is striking.

TABLE 1
U.S. Supreme Court Law Clerk Hiring by School
October Term 2003 to October Term 2013

LAW SCHOOL	# OF CLERKS	RATE (% OF GRADS)
Harvard	101	1.7%
Yale	89	4.5%
Stanford	33	1.9%
University of Chicago	25	1.3%
University of Virginia	25	0.7%
Columbia	16	0.4%
NYU	14	0.4%
Michigan	11	0.3%
Georgetown	10	0.1%
Northwestern	9	0.3%
Boalt	9	0.3%

TABLE 2
Top Feeder Judges to the U.S. Supreme Court
1962 to 2002

JUDGE	PERIOD	# OF CLERKS	PER TERM AVERAGE
J. Skelly Wright	1962–1988	31	1.15
J. Michael Luttig	1991–2002	30	2.73
Laurence Silberman	1985–2002	30	1.76
Harry T. Edwards	1980–2002	28	1.27
Alex Kozinski	1985–2002	28	1.59
James L. Oakes	1971–2002	26	0.84
Abner J. Mikva	1979–1994	26	1.50
Stephen F. Williams	1986–2002	21	1.31
J. Harvie Wilkinson	1984–2002	21	1.11
Patricia Wald	1979–1999	19	0.90
Guido Calabresi	1994–2002	17	2.13

Feeder judges—this comes from the Ward and Weiden book, *Sorcerer’s Apprentices*, in which they looked at feeder judges from 1962 to 2002. The dominance of feeder judges has only increased over time. These numbers are also striking. J. Skelly Wright, over 26 years, placed 31 clerks, but that is nothing compared to how well feeder judges have done over the past 20 or so years. Really, feeder judges have become more, not less, important to Supreme Court clerk hiring. But then, maybe in an improper delegation to my law clerk, my law clerk looked at these tables and said to me, “You know what? These numbers on the previous table are really old. They’re like 15 years old—almost 15 years old. So, why don’t you come up with some new numbers?” And so, he went to *Above the Law*, which tracks some of these things, and, without any approval from me, went ahead and put together this table. [laughter] You can see how things happen in my chambers. But I was happy to have the help, because this is a terrific table.

Brett Kavanaugh, J. Harvie Wilkinson, and Merrick Garland are absolutely dominant in sending their clerks to U.S. Supreme Court Justices. And when you look at the per-term average, that's unbelievable. A lot of these judges hire four law clerks, and more often than not, at least three of their law clerks go to the Supreme Court—out of the four that they hire. And sometimes all four do. In one recent term, Tom Griffith had five clerks, including one from a previous year, who clerked at the Supreme Court during a particular term. So these are really, really—compared to the numbers in Table 2—these are striking. And these numbers are from a five-year period. Remember, J. Skelly Wright's numbers were compiled over 26 years; this is happening over a five-year period, and these numbers are almost half as high as the numbers that we saw in the previous table. ▶▶

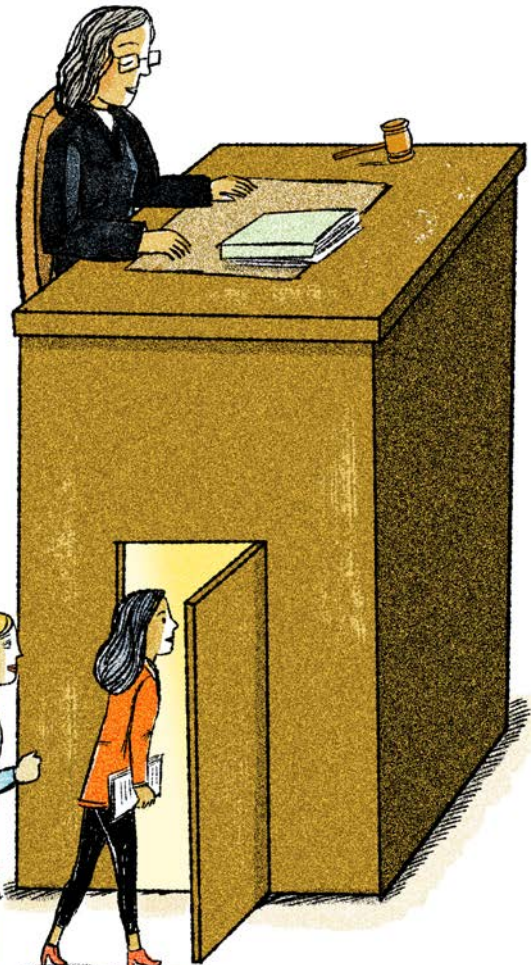
Stras is associate justice of the Minnesota Supreme Court.

“I’m looking to put together a good chambers team each year, and that requires all personality types. There’s a balance to be struck, a kind of interpersonal chemistry. I’m looking for a diversity of background and experience when I assemble my team every term.”

Judge Diane S. Sykes

TABLE 3
Top Feeder Judges to the U.S. Supreme Court
 October Term 2009 to October Term 2013

JUDGE	# OF CLERKS	PER TERM AVERAGE
Brett M. Kavanaugh	16	3.2
J. Harvie Wilkinson	16	3.2
Merrick B. Garland	16	3.2
Jeffrey Sutton	10	2
Alex Kozinski	9	1.8
Robert A. Katzmann	9	1.8
David S. Tatel	8	1.6
Diarmuid O’Scannlain	7	1.4
Thomas B. Griffith	7	1.4
Douglas H. Ginsburg	6	1.2
Neil Gorsuch	6	1.2
Stephen Reinhardt	6	1.2
William A. Fletcher	6	1.2



The Future of Federal Law Clerk Hiring

by Aaron Nielson

The perennial issue of what a law clerk's role ought to be is not going away anytime soon. The more interesting question, however, may not be *what* clerks do but, rather, *how* they are hired. In particular, the market for federal judicial law clerks has been upended. In 2003, the Federal Judges Law Clerk Hiring Plan (the Plan) was instituted to regulate clerkship hiring. The Plan's purpose was to push interviewing back until the fall of a student's 3L year. This was no small goal. Groups of judges for decades have bemoaned the unregulated clerkship market and strove for something better. The Plan—designed to address “market failures”—represented the long-awaited fruit of that striving.

The Plan, however, has fallen apart. Last year, the U.S. Court of Appeals for the D.C. Circuit withdrew from the Plan and began openly interviewing 2L students. After that, everything unraveled quickly, with judges across the country following the D.C. Circuit's lead—that is, if they were not already hiring 2Ls, as many were. Then, on November 4, 2013, the Plan formally collapsed. That day, the federal judiciary's website announced that 2Ls could submit applications through the Online System for Clerkship Application and Review (OSCAR). In short, the unregulated market is back.

For many, this regulatory failure is frustrating. But it was no surprise. Every hiring season it became increasingly obvious that the problems of the unregulated market were reemerging in the “regulated” market, but with a particularly cruel twist. Not only did the unregulated market reassert itself, it did so under cover of darkness, creating real unfairness. To get a clerkship, students were well-served by applying early,

notwithstanding the Plan's rules to the contrary. Naive applicants were often out of luck. No one thought *that* was a good thing. The Plan, accordingly, was abandoned. After all, if there can't be order, there can at least be transparency.

Now that the Plan is gone, what does the future hold? To answer that question, it is essential to understand why the Plan collapsed. This article addresses the Plan's fatal flaw: maintaining collective action is difficult. This key insight of antitrust economics is especially true where large numbers of heterogeneous participants compete against each other in an opaque marketplace—in other words, in a market like the federal judiciary. In such markets, a powerful enforcement mechanism is necessary to preserve collective action, but powerful enforcement mechanisms are not cheap. The Plan failed because its enforcement mechanisms—primarily OSCAR's automated application process, augmented by buy-in from law schools and the anchoring role of the D.C. Circuit—were not sturdy enough to withstand the competitive pressures put on them. And it was no accident that a more-powerful enforcement mechanism was not in place. More powerful mechanisms have been proposed, but they have not been adopted because, from the perspective of judges, they cost too much relative to their benefits.

After explaining this structural reality of the clerkship marketplace, this article sets forth the current state of clerkship hiring and considers the future. Given just how much it would take to create and maintain an effective enforcement mechanism, the prospects of a new plan—and certainly a *successful* new plan—are grim. In particular, to justify the steep cost of an enforcement mechanism that could actually work, the benefits of a new plan would have to go much deeper than simply

“I really believe that law clerk influence depends more on the idiosyncrasies of the judge, and how the judge approaches his or her job, than it does on the law clerk him or herself. There are judges who allow their law clerks to do more of the things that we traditionally think of as things that a judge should do. I don't know how you could possibly measure that, but any sort of study of law clerk influence has to take into account the differences among judge practices because I really think that is the most important variable, even more than reasonable differences among courts—how the judge thinks of his or her role as a judge and what the judge should be doing.”

Justice David R. Stras

bringing order to the market. Those benefits have already been weighed and found wanting.

But there might be other benefits of regulation that have not yet been considered. For example, some data—albeit inconclusive—suggest that women law students on average do less well during the first year of law school but that the divergence dissipates as school continues. If so, then making clerk hiring more dependent on 1L grades will have an asymmetric impact on the gender of clerks—an obvious problem. Similarly, the unregulated market may disproportionately benefit more-prestigious law schools; the earlier hiring occurs, the less data a judge has about an individual applicant, making the “brand” value of the applicant’s school a weightier signal of quality. This, too, may have systemic effects: for instance, if graduates of higher-ranked law schools produce different substantive outcomes as clerks than graduates of lower-ranked schools, which seems implausible, or, perhaps more likely, if it means that clerks are less likely to continue their careers in the communities where they clerk.

Nevertheless, even if these potential unexplored benefits are real, it still would not necessarily follow that a new plan should be created. There may be alternatives to regulation that achieve the same benefits at a lower cost. For instance, the modern trend of hiring more graduates as clerks—as opposed to current students—may solve or at least mitigate the problem of hiring clerks too early. At the same time, modern technology may make the market more transparent, thus discouraging distasteful hiring behavior.

Nielson is associate professor at the J. Reuben Clark Law School, Brigham Young University.

Bonus Babies Escape Golden Handcuffs: How Money Has Transformed the Career Paths of Supreme Court Law Clerks

by Artemus Ward, Christina Dwyer, and Kiranjit Gill

The career paths of former Supreme Court law clerks have been radically transformed in recent years. In 1986, the “Natural Sorting Regime”—where clerks chose among private and public positions with relatively similar salaries—gave way to the “Bonus Baby Regime” characterized by escalating signing bonuses, ramped-up recruiting by select firms, and the rise of specialized appellate and Supreme Court practices. Clerks have flocked to private practice in unprecedented numbers due to both lucrative signing bonuses and a more conservative clerking corps. Taking a position with one of the elite firms that recruit clerks has become the rule, and working in academia, government, or public interest is the rare exception. But the vast majority of clerks leave their first jobs within the first few years after they leave the Court. Those who initially choose private practice leave in equal numbers for another private practice position, a government job, or academia.

At the same time, the job choices of clerks also reflect ideological considerations. Clerks who work for conservative Justices are more likely to enter private practice than are clerks for liberal Justices. Similarly, clerks for liberal Justices are more likely to enter government or public interest jobs. The firms that heavily recruit former clerks do so on partisan lines, with some firms dominated by clerks who worked for conservative Justices and others populated by clerks for liberal Justices. Thus, the new generation of Supreme Court law clerks is composed of liberal and conservative bonus babies eager to don the golden handcuffs of private practice for a couple years before thinking about their next short-term posts either in another firm, government, or the academy. When compared to the humble beginning of the clerkship institution—or even the institution as it existed for most of the past century—the power and status of Supreme Court law clerks have never been higher. ▶▶

Ward is professor of political science at Northern Illinois University (NIU). At the time of the symposium, Dwyer was a law student at William & Mary Law School, and Gill was an undergraduate at NIU.



Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection

by John J. Szmer, Erin B. Kabeny, and Robert K. Christensen

Following the lead of Justice Horace Gray, the first U.S. Supreme Court law clerks were hired in the 1880s. However, it would take more than 60 years until Justice William Douglas hired Lucile Lomen, the first female law clerk, to serve during the 1944–1945 Term. Even then, it took the combination of several factors to crack the glass ceiling. While he outwardly denied it, Justice Douglas’s personal papers indicated he only considered female candidates because World War II decimated the pool of potential male clerks. Lomen also was an ideal candidate. First, Justice Douglas only hired clerks from the Ninth Circuit, and Lomen graduated from the University of Washington. She distinguished herself as the vice president of the law review, the only Honor Graduate and member of the Order of the Coif, and the author of a well-received note on the Privileges and Immunities Clause. Second, she impressed the right people, including her law school dean as well as two trusted acquaintances of Justice Douglas: Charles Maxey, her undergraduate thesis adviser and the Justice’s fraternity brother, and Vern Countryman, a former Douglas clerk who was in his third year at Washington during Lomen’s first year.

Justice Douglas described Lomen as “very able and very conscientious,” and he apparently considered hiring a woman to serve as a combination law clerk/legal secretary when the Justices were authorized to hire a second clerk in 1950. However, more than two decades passed before Justice Hugo Black hired the second female clerk in 1966. During the interim, a young Ruth Bader Ginsburg was recommended to Justice Felix Frankfurter by a former law professor. Ginsburg had excelled at Harvard Law School, where she made law review, before transferring to Columbia Law School to accommodate her husband’s legal career. There she tied for first in her class. Even with her sterling credentials and a recommendation from a professor known to select clerks for the Justice, Frankfurter still refused to hire Ginsburg. Some suggest he was hesitant to hire a woman with a five-year-old child, while others suggest he was “worried she might wear pants instead of dresses.”

Margaret Corcoran, a graduate of Harvard Law School, was the second female U.S. Supreme Court clerk and was selected by Justice Hugo Black. She was

also the daughter of a former clerk to Justice Oliver Wendell Holmes, Tommy “The Cork” Corcoran. The elder Corcoran was a veteran of the New Deal and a powerful political fixer who even allegedly lobbied Supreme Court Justices *ex parte*. According to Justice Black’s wife, Elizabeth, as well as the accounts of another Black clerk serving that Term, Margaret was more interested in socializing than performing her duties as a law clerk. Stephen Susman, her co-clerk, claimed in an interview to have done all of Margaret’s work in exchange for the “wonderful” social opportunities she provided. Tommy Corcoran was apparently aware of his daughter’s work habits and may have helped her with her brief writing.

Two years later, Martha Alschuler (later Martha Field) clerked for Justice Abe Fortas. Field, now a prominent law professor, was followed by Barbara Underwood, a Thurgood Marshall clerk, in 1971. Underwood later blazed another trail when she was named the Acting U.S. Solicitor General in 2001, the first woman to serve in this capacity.

During the 1972 Term, two women worked as law clerks—the first time more than one woman served in that capacity in the same Term. That year, Justice Douglas set another first when he hired two female clerks—Carol Bruch and Janet Meik. While there were several cracks in the glass ceiling by the early 1970s, not all Justices were comfortable hiring women at that point. Justice William Brennan, a powerful advocate for gender equality under the Constitution, refused to hire Alison Grey as a clerk despite recommendations from two law professors—both former Brennan clerks. Justice Brennan apparently rejected Grey, who had finished first in her class at the University of California Berkeley School of Law, solely because of her sex. In 1973, one of the former Brennan clerks who had recommended Grey tried to convince the Justice to hire Marsha Berzon for the 1974–1975 Term. Again, Justice Brennan categorically refused to hire a woman. This time, however, Stephen Barnett wrote an impassioned letter to Justice Brennan asking him to reconsider. Barnett pointed out that Justice Brennan’s decision not to hire Berzon on account of her sex likely violated the Constitution—in large part due to an interpretation of the Fourteenth Amendment championed by Justice Brennan. Barnett’s arguments persuaded the Justice to hire Berzon. However, he would not hire another female clerk for seven Terms.

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Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court

by Christopher D. Kromphardt

While we can neither sit in on meetings between a Justice and his clerks nor probe his brain as he considers his strategies, we can analyze how he assembles the team of clerks on which he relies. The makeup of these teams reveals clues about what information he seeks to aid his decision making. Some Justices desire information from disparate and competing sources, pursuing the logic that the fruits of many minds often produce the best answer. Other Justices seek information of a particular ideological nature; this information helps justify voting in their preferred ideological direction and may provide ammunition for persuading other Justices and defusing attacks. Studying the team a Justice assembles provides scholars with a rare glimpse into how he does his work.

This is not the first study on clerk selection, but to my knowledge it is the first to treat selection as the assembly of a team rather than the hiring of individuals. My subject of interest is the team a Justice assembles. Specifically, I will analyze patterns in the ideological characteristics of the Justices' teams from 1969 to 2007. I discuss two theoretical perspectives on clerk hiring—one in which clerks are agents to the Justice as principal and one in which clerks are tapped as sources of information—and derive implications from each perspective that will facilitate interpretation of data on Justice and clerk ideological preferences. These patterns reveal a great deal about the teams of clerks the Justices assemble to accomplish their goals. In general, the

analysis uncovers variance across the Justices and over the Justices' tenures. In particular, the results undermine the notions that a Justice's ideology completely determines the information he seeks and that clerks' ideologies always match those of their Justices.

This study should be of interest beyond the narrow question of how clerks influence their Justices. As I mention above, the teams a Justice assembles provide clues about how he does his work. Information about their clerks should join the Justices' comments and released papers as important sources for learning about the day-to-day job of being a Supreme Court Justice. The study treats Justices as performing an additional role. Scholars are used to looking at Justices as role-players, such as members of a collegial group, yet are unaccustomed to treating them in the role of personnel managers. Finally, the study also serves to illuminate a case of how elites engage in personnel management.

Kromphardt is a Ph.D. candidate in the department of political science at the University of Alabama.

Surgeons or Scribes? The Role of United States Court of Appeals Law Clerks in "Appellate Triage"

by Todd C. Peppers, Michael W. Giles, and
Bridget Tainer-Parkins

Not surprisingly, law school class rank is the most important factor in the selection process. Over 90 percent of the respondents among federal court of appeals judges stated that they considered law school rank, with 66 percent of those respondents reporting that it was either the most important or second most important factor that they took into account. ▶▶

Placing an applicant's class rank in the context of the quality of the law school attended was an important consideration for the respondents. Ninety-three percent of the judges reported that they took into account the quality of a candidate's law school in selecting clerks, and 58 percent of those judges stated that they ranked it first or second in importance. Given the fact that the majority of courts of appeals judges rely on their clerks to draft opinions, it is logical to assume that these judges also place a premium on law clerks with research and writing skills—this assumption is borne out by the data. Over 80 percent of the respondents stated that they look for applicants with law review membership, and roughly 36 percent consider it first or second in importance. Moreover, approximately 74 percent of the judges responded that they weigh the quality of the writing sample—with 17 percent ranking it as first or second in importance. In short, academic success at a good law school, combined with law review membership (our “performance factors”), ranks amongst the most important selection criteria for courts of appeals judges. These findings mirror the responses given by federal district court judges in our earlier research.

Court of Appeals Judge Patricia M. Wald has written as follows:

The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair. . . . Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers.

Her observation is borne out in the value that judges place on the applicant's personality. Our findings indicate that candidates are not selected merely on their academic achievements in law school, but that considerable weight is also given to an applicant's personality. Eighty-two percent of the respondents reported that a candidate's personality is relevant to their decision-making process, with 25 percent of the judges ranking it as first or second in importance; in other words, the respondents consider it almost as important as law review membership. We found similar emphasis placed on personality in our earlier work on the selection criteria used by federal district court judges.

Of course, it is likely that an applicant's personality is not assessed by a judge until he or she interviews a candidate (although considerations of personality may be addressed in letters of recommendation). If judges, however, do not have direct or indirect measures of an applicant's personality until the interview, then an argument could be made that class rank, quality of law school, and writing skills may be the most important criteria in determining which applicants will be given interviews, and the importance of personality (or “chamber fit”) is more critical when the judge makes his or her final selections for the short list of candidates. Accordingly, the wise candidate should recognize that a glittering résumé may not be sufficient in seizing the brass ring of a federal clerkship.

When we surveyed federal district court judges, we were surprised to find that more emphasis was not placed on the letters of recommendation written on behalf of clerkship candidates. While 69 percent of the judges in that early survey reported that they considered letters of recommendation, only 11 percent of them ranked the letters as the first or second factor of importance. . . .

In recent years, it has been argued that a clerkship applicant's ideology is an important factor considered by Supreme Court Justices, and, therefore, also by the feeder court judges who are supplying qualified applicants to the Supreme Court. While we did not find political ideology to be an important factor in selecting district court law clerks, we included ideology in our list of selection criteria contained in the present survey, given the role that some courts of appeals judges play in supplying law clerks to the Supreme Court. The courts of appeals judges who responded to the survey, however, stated that a candidate's political ideology was the least important factor in picking law clerks. This finding ran counter to our expectations and led us to speculate about the level of judicial candor reflected in our completed surveys. Simply put, we believe that there is too much ideological matching between courts of appeals judges and their law clerks to be the result of chance or applicants applying to like-minded jurists.

Peppers is visiting professor at Washington and Lee University Law School and the Henry H. and Trudye H. Fowler Associate Professor of Public Affairs at Roanoke College, Giles is the Fuller E. Callaway Professor of Political Science at Emory University, and Tainer-Parkins is a member of the Virginia bar.

“I’m in a private building in Raleigh. There are no other federal employees around me, so most of my day-to-day contact is with my clerks and my staff. That means my clerk needs to be the kind of person who can get along with the other folks in my chambers. They have to be able to smile, and have a good personality, or they won’t work for me. I’m not going to be in an environment with a bunch of people that don’t talk to each other.”

Judge James A. Wynn, Jr.

Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices

by Lawrence Baum

Why did Supreme Court Justices become more inclined to draw their law clerks from judges who shared the Justices’ general ideological positions in the 1990s, and why have they maintained that stronger inclination since then? The most intriguing possibility is the growth in ideological polarization among political elites in the United States.

The term *polarization* has been used to refer to multiple phenomena. One is “sorting,” in which ideological differences become more fully aligned with other differences between people, especially political party identifications and affiliations. Considerable sorting of liberals into the Democratic Party and conservatives into the Republican Party has taken place in the mass public, and a great deal of sorting has occurred among people in government and other people who are involved in politics. In Congress, the sorting began in the 1950s and 1960s, and it is now complete: in the Congresses of 2009–2010 and 2011–2012, in both the House and Senate, every Democrat had a more liberal voting record than every Republican. Similarly, since the retirement of Justice John Paul Stevens in 2010, the Supreme Court for the first time has had ideological blocs that follow party lines (based on the party of the appointing president) perfectly. To the extent that partisan divisions reinforce ideological divisions, the Court’s liberal and conservative Justices are separated from each other to a greater extent than in the past.

In itself, partisan sorting could not explain the strengthened ideological linkage between judges and Justices in the selection of law clerks. More relevant is another type of polarization: growth in the strength of people’s identifications with one ideological side and in their antipathy toward the other side. This second type has been called “affective polarization.”

It is uncertain whether affective ideological polarization has occurred in the mass public, but there are clear signs of it among political elites. One reason is that, with the two parties more ideologically distinct, partisan loyalties and interests reinforce ideological disagreements. In any event, there is now an extraordinary degree of enmity and distrust between conservatives and liberals. Justice Antonin Scalia has described one result:

It’s a nasty time. When I was first in Washington, and even in my early years on this Court, I used to go to a lot of dinner parties at which there were people from both sides. Democrats, Republicans. Katharine Graham used to have dinner parties that really were quite representative of Washington. It doesn’t happen anymore.

This development is reflected in, and reinforced by, the establishment of new ideologically based institutions. In the mass media, television networks and websites cater separately to liberals and conservatives. In the legal profession, the Federalist Society and (more recently) the American Constitution Society provide separate homes for conservative and liberal law students, lawyers, and even judges.

If the thinking of Justices, judges, and prospective law clerks has changed as a result of affective polarization, the result would be to strengthen the ideological linkage between judges and Justices in the selection of law clerks in multiple ways. For one thing, law students who have stronger identifications with one ideological side would give greater weight to the ideological positions of lower court judges when they seek clerkships. Justices would also have reason to worry more about the danger of hiring clerks who seek to advance their own ideological agendas, so they would have a stronger incentive to seek clerks who share the Justices’ own views.

Further, if judges have stronger ideological identities than they did in the past, they too give greater weight to ideology in the selection of clerks. In combination with clerks’ own choices about where to apply for clerkships, ▶▶

this change in behavior makes a judge's identity a better indicator of clerks' ideological positions for Justices who care about those positions.

Especially intriguing is the possibility that Justices' own perspectives have changed. If Justices have become more conscious of ideology, they have stronger incentives to choose law clerks who share their ideological positions. In turn, they have more reason to draw clerks from the lower court judges whose own ideological positions provide information about clerks' positions. Former U.S. Court of Appeals Judge J. Michael Luttig has argued that these changes have indeed occurred, ascribing them to what he calls politicization of the courts. Justices would also have more interest in rewarding ideologically similar lower court judges by choosing their clerks. Finally, the Justices might be more likely to develop acquaintanceships with judges and accord respect to them on the basis of ideological compatibility.

Baum is professor emeritus of political science, The Ohio State University.

Diversity and Supreme Court Law Clerks

by Tony Mauro

I have embarked on an updated survey of the demographics of the law clerks of the Roberts Court. At the time of the publication deadline for this issue of *Marquette Law Review*, I had not finished the tally.

I can report some general findings, however, from looking at the clerks for the last few years.

The percentage of clerks who are women has gone from about one-quarter to one-third. Of the 342 law clerks employed by the Justices of the Roberts Court, 111 were female. Fifty-seven percent of the clerks hired by the four female Justices who served during the Roberts Court were male, while 72 percent of the clerks hired by male Justices were male.

But the number of minority clerks, especially those who are not of Asian heritage, still appears to be low.

Another trend of interest: an uptick in the hiring of

clerks who have had law firm, executive branch, and other experiences before coming to the Court. The typical sequence had been law school, followed by an appeals court clerkship, and then followed immediately by clerking at the Supreme Court, without any work experience in between.

Ever since the 1998 articles, members of Congress have routinely asked about the demographics of the law clerks during annual or nearly annual Supreme Court budget hearings.

The reflexive answer from the Justices has typically been some variation of "I can't afford to take a risk. My clerks need to hit the ground running." That somehow is supposed to explain why the Justices draw from the ranks of white males from Harvard or Yale when hiring clerks. It implies, inappropriately, that hiring minorities is risky business.

Even if one were to credit the "risky business" excuse, the books about Supreme Court clerks through history by Todd Peppers and Artemus Ward have shown that Justices have taken risks with white males for a long time. Southern Justices often favored graduates of Southern law schools, and some Justices would hire sons of friends, sight unseen. Sometimes they worked out; sometimes not. But the Court did not crumble, and the Justices were able to do their work.

It could be argued that the job of Supreme Court law clerk has become more important and more intense in recent decades, even though the Court's caseload has significantly decreased. So the "hit the ground running" factor may well be more prominent in the minds of current Justices than in the more relaxed past.

But again, it is hard to view that as a credible reason for not hiring minority law clerks. I still believe that Justices could set the tone and set the criteria in such a way that their feeder judges and friends would seek out and find a much broader palette of candidates who could be highly effective clerks and bring new perspectives and backgrounds to the important tasks that face them.

Mauro is Supreme Court correspondent for the *National Law Journal*.

"Probably much to the chagrin of Judge Posner, I greatly value having a career clerk. Maybe that comes from my military background, but I just believe in having an 'Executive Officer' in the office—somebody with institutional knowledge whom I can count on."

Judge James A. Wynn, Jr.

Justice Brennan and His Law Clerks

by Stephen Wermiel

Justice Brennan always considered his law clerks to be his strategic partners in the Court in a number of important ways. Throughout his tenure, Justice Brennan took a pragmatic approach to the job of Justice, believing that the goal was to try to work with his colleagues to get a majority for an opinion, preferably one that reflected his view. This approach led to the famous story of how Justice Brennan would meet with his clerks for the first time and taunt them by asking what the most important principle of constitutional law was. When they seemed stumped, he would hold up his hand with five fingers and say, “It takes five votes to do anything around here. That is the most important principle of constitutional law.” Clerks for Justice Brennan got to experience this side of their Justice and the Court in different ways. It was Justice Brennan’s longstanding practice to encourage his clerks to interact with those of other Justices and to serve as his emissaries. When Justice Brennan found himself with a narrow five–four or six–three decision to write, where it was essential in his view to ascertain the common ground that would hold that majority together, he would often dispatch his law clerks to chambers of the swing or deciding Justice to determine what that colleague’s concerns were. The law clerks gained valuable lessons in investigation and negotiation, both important skills for lawyers. They would determine what concerns another Justice had about a case and then, whenever possible, steer Justice Brennan’s opinion in that direction to retain a majority. This was not always an easy task, but it was a talent for which the Brennan law clerks became well known over the years, and one that was not part of the experience of many other clerks to other Justices.

The Brennan office manual also suggests that by the 1980s, the Brennan law clerks joined him in strategic thinking about opinion assignments. Under the Court’s procedures, the Chief Justice assigns who will write the majority opinion when he is in the majority, but if the Chief Justice is in dissent, then the most senior Justice in the majority makes the assignment. Beginning in 1976, after Justice William O. Douglas retired, Brennan was the most senior Justice until he retired in 1990. As the leader of a liberal wing on a Court that grew increasingly conservative during that period, he often found himself in dissent, but when he was in the majority in a five–four case, the opinion assignment would often be his. “WJB relies a great deal on clerks to make the ‘correct’ assignments,” the manual written by the law clerks asserts.

The manual described different factors the clerks should consider, such as sharing good opinion assignments with the other liberal Justices and combating Justice Brennan’s tendency to want to keep the best opinions for himself.

Wermiel is professor of practice in constitutional law, American University Washington College of Law.

Supreme Court Clerks as Judicial Actors and as Sources

by Scott Armstrong

If the day ever returns where a President can appoint Justices with broader interests and more creative decision-making processes, I hope that future clerks can make the kind of contributions to their Justices that *The Brethren* clerks made during their service. Indeed, I would hope that they would also take seriously the need to clarify the past two decades of the Court’s inner workings. There have been no detailed accounts of the dynamics that produced the cases which chose the 43rd President of the United States, abolished limits on campaign contributions, restricted the ability of cities to control handguns, permitted same-sex marriage, upheld national health care, broadened religious freedom to include corporations, diluted the Justice Department’s ability to enforce election law fairness, struck down a ban on protests near abortion clinics, let stand Texas restrictions on voting without IDs, and other important issues.

Without candid firsthand accounts that thoughtfully explain the Court’s recent Terms, the public is left with the shallowest of partisan portrayals. When *The Brethren* explained the Court’s handling of the Nixon tapes case, many readers were shocked by the secret infighting that had produced the decision. Today’s college students who read *The Brethren* as their first exposure to the Court’s internal deliberations have a much different reaction. They marvel at how principled the *Brethren* Court seems compared to the contemporary Supreme Court’s presumed raw political wrangling. The public view of the individual Justices is once again as poorly informed as it has ever been, relying most often on caricatures based on their political backgrounds, their religions, their voting patterns, or superficial courtroom patterns of conduct.

It is my hope that once again Justices and their clerks will find that they, too, have an obligation to assure that the Court’s processes and dynamics are better understood, and that they will once again share that information in a candid and serious manner. ▶▶

Armstrong is a journalist and coauthor, with Bob Woodward, of *The Brethren: Inside the Supreme Court* (1979).



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A Truth About Career Law Clerks

by Joseph D. Kearney

I want to begin by thanking my colleague, Chad Oldfather, and also Todd Peppers, for organizing this conference. It is an impressive feat, and I would be grateful, as dean, even if it did not present me an opportunity to unburden myself of a point that has been bothering me for some time.

Let me begin that unburdening with an apology of sorts—or a refusal to give one, depending on how you look at it. It is best presented, perhaps, in a brief story. A number of years ago, one of my friends, a nationally acclaimed law professor, asked me, “If you were a Supreme Court Justice, how would you select your law clerks?” My response was that, whatever else might be the case, I would not hand the matter over, even for screening purposes, to some panel of former clerks, professors, or judges. I may have briefly elaborated on the basis for my view, which included that judges were, after all, appointed to make decisions. My colleague was a bit taken aback, as I recall; he expressed surprise that my answer had included a moralistic component of sorts, whereas his interest in asking the question was to figure out the most *efficient* way of going about the matter. I made no apology for relying, in part, on values other than efficiency.

The same is true today. My interest in the topic of law clerk selection has scarcely lessened during the intervening 20 years. To be sure, it has become less personal or at any rate less self-interested, as somewhere soon after that conversation I received a Supreme Court clerkship, and I would never again be in the business of seeking a clerkship. At the same time, as a law professor and, for more than a decade now, dean of a law school, I have had an intense interest in helping our students secure clerkships. And I admit to being frustrated at times because it seems to me that judges are placing too high a premium on efficiency.

Let me be more specific. The rise in the incidence of career law clerks—or even just long-term ones—is one that troubles me and, I respectfully submit, *should* trouble

others in the profession, including judges. I say this with some embarrassment, not because I was ever a career law clerk, but because I have known both some very good judges with career law clerks and some very good career law clerks. In fact, I benefited personally, some 25 years ago, as a one-year law clerk for a judge of the U.S. Court of Appeals for the Ninth Circuit, from the counsel and assistance that I sought and received from a career law clerk to another Ninth Circuit judge in the same building. He was quite helpful to me during the year.

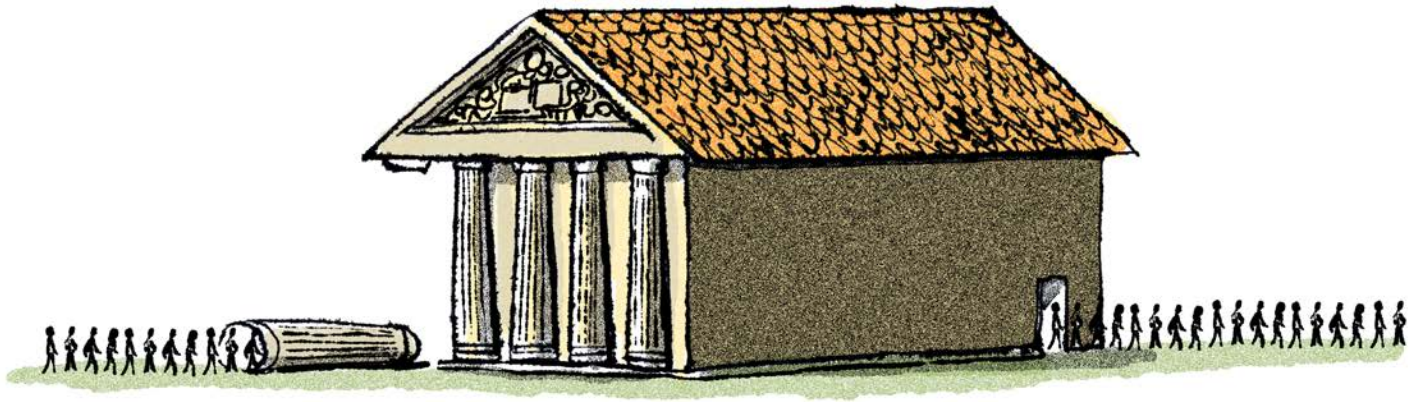
So perhaps my remarks will come off even as hypocritical, given this experience of mine (and my disclosure of it), but I do not think so. After all, I have never been a judge and never hired career law clerks. Thus, the more likely problem for my assessment is that it will seem naive or inexperienced. I am willing to run that risk. After all, I served as a law clerk for two different judges, I have worked as an appellate lawyer, and my work as a law professor has included study of the courts. I do not include my work as dean in that catalogue because I appreciate that it does not add much on this particular experience or expertise front. In all events, I do not claim here to have, with respect to career law clerks, “the Truth” (with a definite article and a capital *T*), but I do offer something that seems to me “a truth.”

And that small-*t* truth, in my estimation, is that the profession and the larger society are not receiving a net benefit from the rise in the incidence of career law clerks, as my impression is (in fact, I have no doubt concerning the general incidence, even though I do not have precise data). Or, at a minimum, the truth is that the cost side of the cost/benefit equation of this phenomenon is significant. We can stipulate that an experienced clerk enables a judge to discharge his or her work more efficiently. We can agree as well that in some important respects a law clerk early in a clerkship is less valuable to the judge than at some later point.

Yet none of this seems to me enough. To the latter point: It is possible to gain the benefits of some experience without hiring people for an indefinite term. My impression long was that federal appellate judges typically would hire law clerks for a one-year term but ►►

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federal trial judges would appoint clerks to serve *two* years. The sorts of things that a district court law clerk does, it has seemed to me, resemble somewhat less the work of a student in law school than do the duties of the appellate clerk, so the difference helps justify the varying approaches.

Some of my unhappiness has to do with the awkwardness of the matter. I recall a few years ago attending a bar association event here in Milwaukee. The longtime law clerk to a longtime federal judge was receiving an award. I had no objection to the award (and little standing even if I had had one)—about which I am glad because the same organization gave me an award the day before this conference. Nor did the award on its face seem embarrassing from my perspective. Organizations give awards for any variety of reasons, and bar associations surely do well to include less-prominent individuals in their bestowal. Yet it was, well, awkward when, in accepting the award, the law clerk commended the judge—itself an appropriate thing—not just for hiring the clerk or being a great boss generally but also, more specifically, for getting out of the way so that the clerk and others in the chambers could get the work done. My concern was not that the statement was untrue; my concern was that it was *true*—both that the judge had so proceeded and that the law clerk thought this to be an appropriate and praiseworthy approach.

Yet my concern encompasses more than embarrassment for others. In my estimation, there is a professional service aspect of a judge's work with law clerks that necessarily suffers to the extent that a judge works with a career law clerk. Indeed, to *that* extent, this aspect of the work ceases to exist, by definition. The career law clerk is not being groomed for some other service to the society; he or she will represent no clients in that court or any other; such clerks will do nothing *as lawyers* except to serve as law clerks. By contrast, the clerk who has worked at the judge's elbow for a

year or two will take that training to the next position in the legal profession, likely as a practicing lawyer and sometimes eventually as a judge. The profession and the common good will be advanced.

This is not the totality of the contribution that limiting the length of tenure of law clerks can make. There is such a thing as new learning in the law—new techniques, new decisions, even new laws. One would rather imagine that at least the best students coming from at least some law schools are at least exposed to such newness—not that they have become experts in the process. This seems to me another reason that a failure to make room for new law school graduates reduces the social good. We cannot doubt, at any rate, that the views of the longtime law clerk and the judge will converge over the course of time, a phenomenon that itself has costs.

I do not wish to suggest that judges can serve the purpose of developing new lawyers only by hiring new law graduates as clerks. I certainly have appreciated the value of judicial internship programs, both generally and in the case of Marquette Law School. Indeed, I am seeking to be especially careful here because, while I am disappointed by the law clerk hiring practices of some judges in Wisconsin, some of these same judges are among the many who contribute to Marquette University Law School and the future of the legal profession by accepting into their chambers and their professional lives—and the lives of their law clerks—one or more Marquette law students each semester doing a part-time internship. For all this, I am very grateful.

On the career law clerk front, I may have the bottom line wrong, and I have already suggested that I am not in possession of “the Truth” on this point. Nor have I indulged myself in some of the broader musings possible. For example, when I think about the whole judicial staff phenomenon, I recall the early-nineteenth-century judges and Justices who rode a circuit, slept in a tavern, and held court wherever they could find

the space (also sometimes in a tavern). They ran their courts and did justice, in the process requiring the presence only of a clerk of court, as I understand it (because the presence of a clerk helps turn the “judge” into the “court”). I am not sure that we’ve gotten more or better justice proportionate to the increased expense and bother since those days. Yet this would not be a good point for me to make, or at least to dwell upon. The typical law school dean—even one, such as I, who continues to teach—has enough assistant and associate deans that he is glad not to find himself ever face-to-face with the comparatively lonely law school dean of a century ago. More generally, the growth of administrative apparatus has scarcely been confined to the judiciary or the academy. More personally yet, there is also the fact that I am hardly confident that I would have secured a Supreme Court clerkship if the Justices were not entitled to *four* law clerks. (One of my co-clerks for Justice Antonin Scalia and I used to contend with one another for the ironic honor of claiming to have been the “fourth clerk”—the last one hired.)

To continue with points that I avoid, but to return to my specific topic of career law clerks, I also do not offer some of the stronger criticism occasionally leveled at the use of these clerks—such as that the phenomenon amounts in some instances at the federal level to an improper delegation of Article III power or that, similarly at the state level, over-empowered law clerks can be said to be exercising an authority that the people did not confer on them, by election or otherwise. I think such criticism to be fair commentary, but I do not know how persuasive it is, and I do not adopt it here. And no doubt there is more nuance to the situation than I have been able to sketch out: for example, in the event that a secretarial position has been replaced by an additional law clerk (as is the case in some judicial chambers of the past 20 years), some of my critique is inapposite (though not all of it).

I appreciate as well that, at the federal level, the problem already has been addressed, *to an extent*, by the 2007 policy change that prohibits federal judges from having more than one career law clerk (subject to grandfathering) and that limits term clerks to serving no more than four years. The “to an extent” phrase, however, is an important qualifier, not only because there are many judges outside the federal system but also because even one career law clerk per federal judge would seem a system posing many—though not all—of the problems that prompt my concern and remarks.

I note as well that the policy change, as I understand it, was driven by budgetary concerns—another point that I do not adopt for myself.

At the same time, I do not wish to be *too* agreeable here. Thus, I want to withdraw my earlier stipulation that an experienced clerk enables a judge to discharge his or her work more efficiently. Certainly, that *can* be the case. Yet it seems to me that the culture of the chambers of a judge with career law clerks suffers from not having the hunger or energy that a newly minted lawyer can bring. In this regard, career law clerks can introduce *inefficiency*.

Nonetheless, at the end of the day, my purpose is not to criticize but perhaps to engender some self-reflection or even further conversation. I have, so far as I can recall, never criticized a single judge for a specific law clerk hiring decision—i.e., the decision to hire or not to hire a particular person—and, if I ever have, I was wrong to do so. The question as to who is a good fit with a particular judge is an individual one, even idiosyncratic in its nature, and it is committed to someone other than me. I appreciate as well that there may be more to be said in defense of the phenomenon of career law clerks. For example, such clerks may be especially helpful to federal judges who have assumed senior status and who nonetheless perform valuable judicial work. Of course, to say this is not to say that these benefits outweigh the costs, some of which this essay has identified.

In all events, I think that we should worry about a system in which a law clerk serves for a judge’s career (or even much of it). At the trial level, this seems to me to reflect the “judge as case manager” philosophy that has affected other aspects of our judicial system, often negatively. I have previously spoken to that in critiquing the “culture of default” that I think to have begun to develop in the Wisconsin courts in recent decades—that is, the culture in which trial judges have been more willing to enter default judgments and less willing to vacate them than is appropriate in a system favoring resolution of cases on the merits. Judges are more than managers: they are teachers, for both the larger world and those who work with them, and many of them are missing out on important teaching opportunities by excessive reliance on law clerks who will be, outside of the judges’ chambers, for the duration of their careers mute and inglorious. In my respectful estimation, our legal system is the poorer for it. ■

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