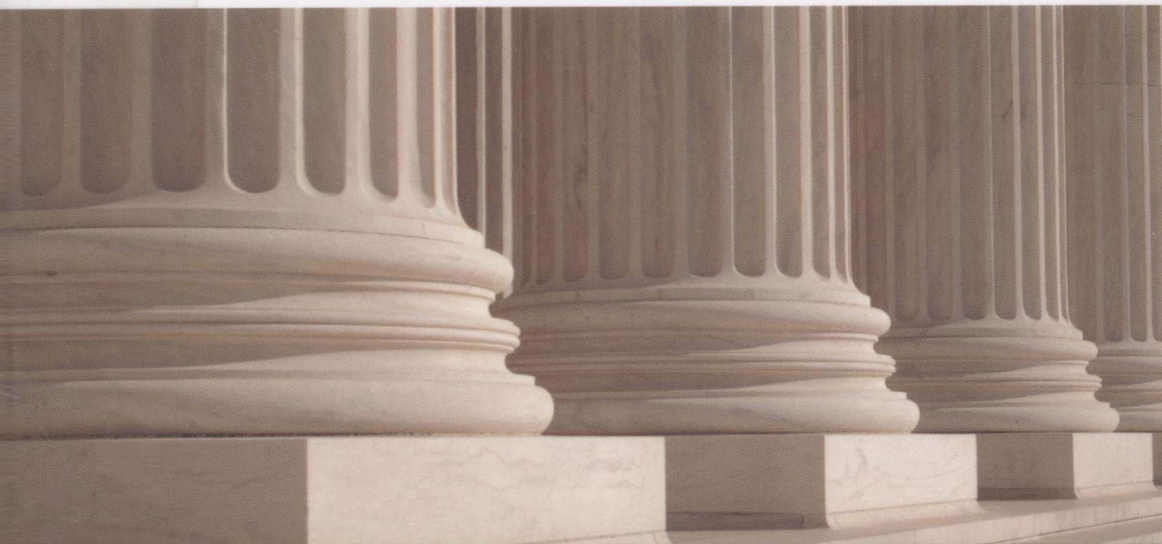




*Stories of Supreme Court Law Clerks
and Their Justices* **IN
CHAMBERS**



EDITED BY TODD C. PEPPERS AND ARTEMUS WARD

IN Stories of Supreme Court Law Clerks and Their Justices CHAMBERS

Edited by Todd C. Peppers and Artemus Ward



University of Virginia Press | Charlottesville and London

University of Virginia Press

© 2012 by the Rector and Visitors of the University of Virginia

All rights reserved

Printed in the United States of America on acid-free paper

First published 2012

First paperback edition published 2013

ISBN 978-0-8139-3401-3 (paper)

9 8 7 6 5 4 3 2 1

The Library of Congress has cataloged the hardcover edition as follows:

Library of Congress Cataloging-in-Publication Data

In chambers : stories of Supreme Court law clerks and their
justices / edited by Todd C. Peppers and Artemus Ward.

p. cm. — (Constitutionalism and democracy)

Includes bibliographical references and index.

ISBN 978-0-8139-3265-1 (cloth : alk. paper)—ISBN 978-0-8139-3266-8 (e-book)

1. Judges—United States—Biography. 2. United
States. Supreme Court—Employees—Biography.
3. Law clerks—United States—Biography. 4. United
States. Supreme Court—History. I. Peppers, Todd C.
II. Ward, Artemus, 1971–

KF8744.B44 2012

347.73'2636—dc23

[B]

2011030215

IN CHAMBERS

CONSTITUTIONALISM AND DEMOCRACY

Gregg Ivers and Kevin T. McGuire, Editors

Foreword

The Supreme Court operates as nine separate little law firms. Each justice has traditionally hired his or her own staff, consisting of a messenger, secretaries, and clerks. The relationship between justice and law clerk is complex, intense, and a perennial subject of fascination to the public. Young men and women not long out of law school provide an array of services that allows the justices to produce opinions that instantly become the law of the land. Without the clerks, the workload would not be manageable. How individual justices have deployed the brains, energy, and talent of their clerks is an intriguing subject that gives us a historical glimpse at how the justices have operated in chambers over the course of time.

The first law clerk, Thomas Russell, was hired by Horace Gray in 1882. A Harvard Law School graduate, he performed various tasks for the justice, including chauffeuring him to the Court. Gray paid him out of his own pocket. Congress provided funds in 1886 for a “stenographic clerk” for each justice to help copy out opinions in the days before mimeographs or photocopiers. As the justices did their work from home offices, these clerks, who were either law school graduates or professional stenographers, had little contact with the Court or each other. They also tended to stay with the justice for many years.

The modern clerkship developed in the 1920s as the justices’ workload expanded. Clerks acted less as personal secretaries and takers of dictation and started being asked to do more legal research. In 1922 Congress appropriated funds allowing each justice to employ one law clerk, a perquisite that became permanent in 1924. After the Supreme Court got its own building in 1932 and the justices started working in chambers instead of at home, the clerks became more integrated into the institution. Yet they were now usually expected to stay for one only term.

For many decades clerks were selected in an ad hoc fashion. Nepotism was

occasionally a factor in the nineteenth century: both William Rufus Day and John Marshall Harlan hired their sons to clerk for them. Justice Gray's half-brother, John Chipman Gray, selected the best graduates from Harvard Law School, where he taught, and sent them for one-year stints to Gray and his successor, Oliver Wendell Holmes Jr. Before being appointed to the Court in 1939, Felix Frankfurter, a distinguished Harvard Law School professor, also liked to recruit his most promising students and send them to the justices he admired. Other justices chose clerks from their own alma maters. For example, Harlan Fiske Stone, as Bennett Boskey can attest in these pages, always chose clerks from Columbia Law School. The first female clerk was hired in 1944 by William O. Douglas, who was stymied by a shortage of stellar male candidates due to the war effort.

An increasing number of petitions for certiorari—petitions asking the Supreme Court to take up a case for review—prompted the justices to hire more clerks and to delegate more responsibility to them. In 1941, they were authorized to hire two clerks apiece. Now each justice is allowed four law clerks (until the 2002 term former justice John Paul Stevens preferred only three; the chief justice gets a fifth to help with administrative tasks). Most of them have graduated at the top of their class from prestigious law schools—where a justice will often have a close relationship with the dean who preselects candidates. Justices may also seek out candidates from their home state or who have clerked for particular lower court judges whose recommendations they trust. To ease the transition to the Court, a freshman justice will sometimes hire the clerk of his predecessor to show him or her the ropes.

Despite these extra pairs of hands (and eyes and legs), in the 1960s the justices felt increasingly burdened by the rising number of petitions—now numbering in the thousands—that each chamber had to read and summarize each year. In 1972 the justices decided to collectively pool their clerks and divvy up the incoming cases. Clerks in the “cert pool” began writing summary memoranda that were shared among all the justices, who then decided in conference which cases to review that term.

What are the other key duties of a Supreme Court law clerk? Once the justices have selected a list of cases to be argued that term, it is up to the clerks to research and analyze them so they can help prepare their justices for hearing oral arguments. To accomplish this, the clerks review the lower court records, research relevant precedents, and summarize the essential information. Unlike the cert pool memoranda, these “bench memoranda” are written

specifically for a clerk's own justice and are tailored to suit his or her particular interests and needs.

The next important function a clerk performs occurs in the spring, once cases have been argued. That is when the clerks assist their justices in writing opinions, be they majority, concurring, or dissenting. Clerks are deployed to help with the negotiating that goes on among chambers as a draft majority opinion circulates and undergoes revisions until at least four other justices sign on to it. According to the clerks whose memoirs make up this collection, each justice has had a unique way of using the services of the bright, extremely hard-working men and women who devote a year of their life to the Supreme Court.

Over the course of the term law clerks have usually developed intense bonds with their justices. As the following reminiscences demonstrate, clerks become a kind of extended family, meeting annually for reunions and serving as a support network for the justices long after their clerkships have ended. This intimacy is particularly strong with justices who enjoyed engaging with their clerks in extrajudicial activities. For example, Justice Hugo Black liked to recruit tennis players, John Marshall Harlan II preferred golfers, and Sandra Day O'Connor took her clerks whitewater rafting.

In the pages that follow, Todd Peppers and Artemus Ward have assembled a fascinating collection of firsthand accounts that illuminate how work has been accomplished in chambers under the auspices of different justices. Because each member of the Court has displayed a distinctive approach to tackling the workload, these memoirs are valuable to understanding the *modus operandi* of individual justices. From a historical perspective, these accounts also provide useful snapshots of the work of a Supreme Court justice at different periods in the Court's history and illustrate how the nature and format of the workload have evolved over time.

IN CHAMBERS

CONTENTS

Foreword ix

CLARE CUSHMAN

Introduction 1

PART I

The Origins of the Clerkship Institution

Birth of an Institution:

Horace Gray and the Lost Law Clerks 17

TODD C. PEPPERS

The Judge as Mentor:

Oliver Wendell Holmes Jr. and His Law Clerks 42

I. SCOTT MESSINGER

Isaiah and His Young Disciples:

Justice Louis Brandeis and His Law Clerks 67

TODD C. PEPPERS

Benjamin Cardozo and His Law Clerks 88

ANDREW L. KAUFMAN

The Family of Stone Law Clerks 98

BENNETT BOSKEY

PART II

The Premodern Clerkship Institution

A Passion for Justice:

Living with and Clerking for Justice Hugo Black 111

CHARLES A. REICH

Clerking for Justice Hugo Black 125

DANIEL J. MEADOR

Half Clerk, Half Son:

Justice Felix Frankfurter and His Law Clerks 141

TODD C. PEPPERS AND BETH SEE DRIVER

William Thaddeus Coleman Jr.:

Breaking the Color Barrier at the United States Supreme Court 161

TODD C. PEPPERS

Fifty-Two Weeks of Boot Camp 179

BRUCE ALLEN MURPHY

Lucile Lomen:

The First Female United States Supreme Court Law Clerk 198

JENNIE BERRY CHANDRA

Wiley Blount Rutledge Jr. and His Law Clerks 231

JOHN M. FERREN

Strained Relations:

Justice Charles Evans Whittaker and His Law Clerks 243

CRAIG ALAN SMITH

PART III

The Modern Clerkship Institution

Clerking for Chief Justice Earl Warren 263

JESSE H. CHOPER

Charting Civil Liberties and Protecting Free Expression:

Learning from and Working with Justice William J. Brennan 284

ROBERT M. O'NEIL

Justice Arthur Goldberg and His Law Clerks 295

ALAN M. DERSHOWITZ

Shirt-Tales:

Clerking for Byron White 303

KEVIN J WORTHEN

Thurgood Marshall and His Clerks 314

DEBORAH L. RHODE

Good Old Number Three:

Harry Blackmun and His Clerks 326

RANDALL P. BEZANSON

Justice Lewis F. Powell Jr.:

A Personal View by a Former Clerk 342

J. HARVIE WILKINSON III

Making Work For Idle Hands:

William H. Rehnquist and His Law Clerks 350

ARTEMUS WARD

The Modern Clerkship:

Justice Ruth Bader Ginsburg and Her Law Clerks 391

TODD C. PEPPERS

Afterword 405

TONY MAURO

Appendix A:

Survey of Threshold Interest in Forming and Joining
an Association of Supreme Court Law Clerks 409

Appendix B:

Donald Cronson to William H. Rehnquist, December 9, 1975—
A Short Note on an Unimportant Memorandum 413

Notes on Contributors 417

Index 421

Illustrations follow page 108

Introduction

Approximately ten years ago, we each decided to study what we believed to be an important but misunderstood institutional practice of the United States Supreme Court, to wit, the hiring and utilization of law clerks. While law clerks had been featured prominently in a few newspaper articles and non-academic studies of the Supreme Court, much of what the legal academy knew about law clerks was limited to the practices of a few justices or to a specific time period and was based on rumor, unverifiable sources, and the puffery of former law clerks (who wanted to either burnish their justices' reputation or exaggerate their own role at the Court).¹

We did not know each other at the time we began our separate studies of the elusive law clerk, nor were we aware of the other's choice of research topic. Convinced that we (individually) would write the definitive work that would educate future generations of Court scholars on the historic role of the law clerk at the Supreme Court, we began to feverishly read the universe of existing literature on Supreme Court law clerks, review the personal papers of former Supreme Court justices at the Library of Congress, and interview past and present law clerks. Ironically, these two completely separate research projects crossed the finish line at virtually the same time, with Ward's book (*Sorcerers' Apprentices*, coauthored with David L. Weiden) being published two weeks before Peppers's (*Courtiers of the Marble Palace*).²

While the two books diverged slightly in the range of topics discussed, both provided a theoretical framework by which to understand the evolution of the formal and informal rules and norms that governed the hiring and utilization of Supreme Court law clerks. Additionally, both books addressed the question of whether law clerks wield inappropriate levels of influence over judicial decision making (Peppers was a bit more tentative in his finding of undue influence than was Ward).³ All in all, the books offered the reader a comprehensive picture of the various roles that law clerks have played over the last 125 years at the Court and theoretical lenses through which to understand the evolution of the clerkship institution.

In the months after the publication of the two books, we continued to research and lecture on law clerks. We chatted about working on a joint project that would further our understanding of the law clerk institution. Since completing *Courtiers of the Marble Palace*, Peppers started publishing a series of articles in the *Journal of Supreme Court History* that took a closer look at the personal bonds that formed between law clerks and their justices. We were enthusiastic about these articles and agreed that there were some remarkable stories left to tell about this less-known aspect of the clerkship institution.

In point of fact, much of the feedback we received since our books were published pointed us in this direction. As noted above, our individual books focused on the rules and norms governing the hiring and utilization of law clerks. As part of that story, we spent some time discussing individual justices and their unique relationships with their clerks—but our focus was on institutional development, and we necessarily underemphasized personal relationships. Yet it was the tales we told about individuals—both justices and clerks—that most intrigued and captivated our readers.

While we eagerly embraced a new project that highlighted the personal side of the clerkship institution, we quickly appreciated that we could not analyze individual justices and clerks without an eye toward the larger institutional working relationship. By emphasizing the personal, we hope that these essays will build on our earlier works and help us understand how the private bonds between selected justices and clerks impact the clerkship institution and the Supreme Court in general. The influence of a Supreme Court law clerk does not turn solely on the job duties assigned, but on the trust placed in that clerk by the justice; alternatively, whether a law clerk follows a justice's instructions turns, in part, on a sense of loyalty and duty. And the justices' maturation process, their changing jurisprudential and political attitudes, and the degree to which they rely on clerks are affected by the relationships they form with their law clerks. Thus the private and the professional are two sides of the same coin, and both give us invaluable insight into how the Supreme Court operates.

Throughout *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, we have endeavored to pull back the thick red curtains that hang behind the Supreme Court bench and provide a rare glimpse of the bonds—some positive and enduring, some negative and fleeting—that form between justices and clerks as well as the institutional rules and norms that define these relationships. Our essayists are former law clerks, judicial biographers, practicing attorneys, and political scientists. We have asked our contributors to go beyond the standard “warm and fuzzy” tribute pieces that have routinely

appeared in law reviews and instead provide a more critical—and hopefully more balanced and objective—picture of the clerkship experience.

The book consists almost exclusively of new, unpublished essays on important justices and clerks. However, a few previously published articles are also included, as we feel that these already excellent, and arguably “hidden,” pieces will take on new life in a structured, edited volume. In general, this volume provides single essays on individual justices and their relationship with their clerks. Our goal was to have more depth than breadth. Instead of attempting to be comprehensive in terms of including every justice or even most justices—which would necessarily lead to an unwieldy volume, relatively short essays, or both—we selected a smaller number of justices so that each author could go into greater detail about the justice-clerk relationship. And because we include a range of justices over the life of the clerkship institution, readers will be able to get a comprehensive view of how the role of clerks has changed over time.

In some instances we deviate from our general structure of one essay per justice and include additional essays from a clerk who had a unique relationship with his or her justice (such as Professor Charles Reich’s essay on living and working with Hugo Black) or essays on individual clerks because of their importance to the development of the institution (for example, the essays on the first female law clerk, Lucile Lomen, and the first black law clerk, William T. Coleman Jr.). While many of the essays cast the clerkship experience in a positive light, not all law clerks found a mentor and lifelong friend in their particular justice. Nowhere are the negative aspects of a clerkship more keenly described than in essays by Dr. Bruce Allen Murphy, who analyzes the tumultuous relationship between William O. Douglas and his clerks, and by Dr. Craig Smith, who chronicles the tensions and difficulties of clerking for Charles Evans Whittaker.

We readily concede that our collection of essays are time bound. The only essays that feature justices who have served on the Supreme Court in the last ten years are Ward’s essay on Chief Justice William H. Rehnquist and his clerks and Peppers’s piece on Justice Ruth Bader Ginsburg and her clerks. Simply put, it is nearly impossible to coax either sitting justices or their clerks to talk about the clerkship institution; most of the present justices are disinterested in (or perhaps wary of) discussing their staffing practices, and the former law clerks themselves feel constrained by confidentiality concerns.

In short, we hope that this volume will help fill a gap in Supreme Court studies generally and research on law clerks specifically. While there are numerous

empirical studies of the Court, many of them important and widely read, there are very few that provide the kind of “thick description” or narrative format that delves more deeply into the institution and its actors. To be sure, traditional judicial biographies are steadily produced. But these more historical or qualitative narratives focus on one justice at the expense of their colleagues and the institution as a whole. This book helps to fill a niche between the empirical and biographical approaches by analyzing multiple justices and their clerks over time. In this sense, the essays demonstrate how the Court, and specifically a Supreme Court clerkship, has been fundamentally transformed. By delving into the personal as well as the working relationships between justices and clerks, the volume paints a highly readable and accessible portrait of the institution that we hope will be of interest to both scholars and lay readers alike.

In order to assist the reader in placing the essays about individual justices and their law clerks in the appropriate historical and institutional context, a brief tutorial on the history of the clerkship institution is necessary. We begin by charting how the clerkship institution developed. We then turn to how clerks have been selected and detail how their job duties have dramatically expanded over time. No longer simply the personal assistants of the justices, “modern” law clerks have become the engine without which the Court could not function. They review certiorari petitions, write bench memoranda, make recommendations on pending cases, draft opinions, and negotiate across chambers, and we briefly discuss the clerks’ role in each of these processes. Finally we say a word about the secrecy surrounding clerk-justice interactions and how the contributions in this volume shed new light on what is largely a hidden relationship.

Historical Development

Throughout their early history, Supreme Court justices were assisted by a small number of support personnel—including the clerk of the Supreme Court, the official court reporter, the marshal of the Court, and personal messengers. The Court’s workload grew dramatically in the decades following the Civil War, however, and by the 1880s the justices were begging Congress for money to hire judicial assistants. One justice, however, didn’t wait for Congress to act. When he began his tenure on the U.S. Supreme Court in 1882, Justice Horace Gray started the practice of employing law clerks by hiring Harvard Law School graduate Thomas Russell and paying his young assistant out of his own pocket.

Gray first hired clerks in his previous position as chief judge of the Massachusetts Supreme Judicial Court from 1873 to 1882 (one of his law clerks on the state court was future Supreme Court justice Louis D. Brandeis), and he simply continued the employment practice upon his elevation to the Supreme Court. Gray's half-brother, Harvard Law School Professor John Chipman Gray, selected the law students—thus beginning the dual traditions of the justices (1) relying on a few elite law schools for talented law clerks, and (2) depending on law professors and deans to make the selections.

In 1886 Congress authorized funds for the hiring of a “stenographic clerk” for each of the justices, and soon all nine justices had hired clerks. In the first decades of the clerkship institution, the justices varied in the types of substantive and nonsubstantive job duties assigned to the clerks; some assistants performed legal research, while others were literally stenographers. Moreover, the tenure of the clerkship varied in these early years. Though Gray's clerks served for only one or two years, some justices employed long-term clerks. For example, Frederick J. Haig clerked for Justice David J. Brewer from 1893 to 1909, while Detroit College of Law graduate S. Edward Widdifield clerked for four different justices over a span of twenty-one years. Long-serving clerks were relatively rare, however, and the single-term clerkships—before departing for positions in academia, government, and private practice—soon became the norm.

Though clerkships were born out—at least in part—of the apprentice model of legal education, the expansion of clerks at all levels of courts has largely been due to workload pressures: as courts have handled a greater number of cases, the numbers of both judges and clerks have expanded over time. Yet their responsibilities have not always developed purely as a result of workload, and seemingly nonrelated institutional changes in the way that courts conduct their business have given rise to increasing clerk responsibility and influence. Within fifty years the position had evolved into what we recognize as the modern law clerk, and today each associate Supreme Court justice is permitted to hire four clerks (the chief justice can hire five clerks) to assist with the Court's voluminous work.

Selection of Law Clerks

As a general rule, the most desirable and prestigious clerkships have been held by the top graduates of such elite law schools as Harvard, Yale, Chicago, Columbia, Stanford, Virginia, and Michigan. Historically, clerkships have been