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PERSONAL ASSISTANTS TO SUPREME COURT JUSTICES: THE LAW CLERKS*

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CRITICISMS of the Supreme Court of the United States have been common from the beginning of our government. The justices, their opinions, and their decisions have been subjected to continuous scrutiny. Therefore it surprises no one to find the court today the subject of intense political controversy as the result of its decisions on racial integration and individual liberties. However, certain of the current criticisms reach beyond the opinions and decisions in the controversial cases; they involve serious challenges to the processes and integrity of the Supreme Court's operations. One attack, which originally appeared as an article in the weekly news magazine U.S. NEWS & WORLD REPORT, was directed at the justices' personal assistants—the law clerks.[1] The suggestion was that the clerks exert too much influence—probably to the left—through participation in such work as opinion writing. This criticism was ably answered by Alexander M. Bickel, a former clerk to Justice Frankfurter.[2]

Entirely aside from this particular journalistic flurry, the role of the law clerks has been the subject in recent years of an accumulating body of writing. The object of most of the discussion on the subject has been to enlighten readers about judicial organization and method,

* Official records and manuscript collections were the primary sources of information for this article. The author is grateful to the following for assistance and access to materials: The National Archives, Justice and Executive Section; the United States Supreme Court Archives, stenographic-clerks appointment files (source of names and salaries of clerks); and the Library of Congress, Manuscript Division. Interviews with thirty former law clerks added information and perspective. A Social Science Research Council research-training fellowship permitted completion of the research.

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[1] *The Bright Young Men Behind the Bench,* U.S. NEWS & WORLD REPORT (July 12, 1957) pp. 45-48. This was followed by articles written by two former clerks: William H. Rehnquist, *Who Writes Decisions of the Supreme Court?, id.* (Dec. 13, 1957) pp. 74-75; William D. Rogers, *Do Law Clerks Wield Power in Supreme Court Cases?, id.* (Feb. 21, 1958) pp. 114-16; Rehnquist, *Another View: Clerks Might "Influence" Some Actions, id.* (Feb. 21, 1958) p. 116.

[2] Bickel, *The Court: An Indictment Analyzed,* N.Y. TIMES (Apr. 17, 1958) magazine section, p. 16; this article was commented on in a letter to the TIMES by Judge Samuel H. Hofstader, *id.* (May 18, 1958) magazine section, p. 4.

while respecting the traditionally confidential operations of the court. In that spirit, the purpose of this article is to give a brief history of the employment of personal assistants by the justices of the Supreme Court. The article will deal principally with the law clerks.

The justices' assistants perform vital services in the day-to-day operations of the court. It is to be expected that they should come under scrutiny, just as the clerks and operatives of the other branches of government have during the present century. This interest is in large part the result of the present recognition by practitioners and students of government that decisions are significantly affected by the manner in which they are made. This statement does not surprise us when it is made with reference to the Administration or the Congress. And, since earlier mechanistic theories have fallen from favor in jurisprudence during the past fifty years, it should not surprise us when it is made with reference to the court.

An examination of the history of the employment of personal assistants to the justices reveals that the "institution" of clerks today is in sharp contrast to the traditions of continuity that otherwise characterize the court. A quite different scheme predominated during the first fifty years of the use of clerks. The emergence of the system that is now followed was probably an important factor in the evolution of the court's present character. For that reason, the history of this development is traced in detail in this article. At the same time, since it is agreed that the assistants to the justices serve in a confidential capacity, it should be remembered that only general comments on the work of the clerks are possible.

THE GROWTH OF THE INSTITUTION

The earliest personal assistants furnished to the justices at public expense were messengers. Their employment by the marshal of the court preceded the first stipulation of their individual salaries by Congress in 1867.[3] From the beginning, apparently, the messengers have been Negro men who have remained more or less permanently with the court. It has been customary for a messenger to continue in the service of one justice and to transfer to his successor if possible.

The duties of the messengers encompass a range of services as determined by the individual justices. They have often performed as errand clerks, waiters, and chauffeurs. The work of one messenger was briefly described as follows by Vice-President David Davis in 1881 in a letter to Horace Gray, then newly appointed:

> The Justices of the Supreme Court have each a servant provided for them. Judge Clifford's servant, William H. Bruce, has been unassigned since his death. He is the best servant I ever saw and withal a good barber.

[3] 14 Stat. 433 (1867).

> Judge Clifford was much attached to him and once when in good health he requested me (should I outlive him) to speak to his successor for his retention. I am persuaded should you retain him that you will never regret it.
>
> He is a colored man of good address, good habits, a good temper . . . [4]

This description of the messenger as a devoted servant is still apt, though the relationship has not been as personal since the court moved to the present Supreme Court building in 1935.

The employment of assistants as law clerks was inaugurated by Justice Gray when he came to the court in 1882. Since at that time clerical help was not provided for the justices, Gray met the expense of salaries for his clerks from his own resources.[5]

The first official mention of clerical assistance for the Supreme Court justices was in the ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1885. After reviewing delays in the transaction of judicial business, Attorney General A. H. Garland made several recommendations to Congress for improvement of the situation. One of these was the following:

> I believe it would greatly facilitate the business of the Supreme Court if each justice was provided by law with a secretary or law clerk, to be a stenographer, to be paid an annual salary sufficient to obtain the requisite qualifications, whose duties shall be to assist in such clerical work as might be assigned to him.
>
> The labor of the judges of the court in investigating questions and preparing their opinions is immense, and while the heads of Departments and Senators have this assistance, I do not think there is any good reason that the judges of this court should not also have it, and I therefore recommend that such provisions be made.[6]

Congress acted on this recommendation in the Sundry Civil Act of August 4, 1886. The act provided "for stenographic clerk for the Chief Justice and for each associate justice of the Supreme Court, at not exceeding one thousand six hundred dollars each."[7] This provision was repeated without change in annual appropriation acts to 1919, except that the clerks' salaries were gradually increased to $2,000.

Four of the justices—Matthews, Gray, Harlan, and Blatchford—took immediate advantage of the 1886 provision for clerks, and by 1888 each of the nine justices employed one assistant. In the latter year a question about the status of the clerks was raised. During the first two

[4] Letter from David Davis to Horace Gray, Dec. 20, 1881, Justice Horace Gray Papers, Manuscript Division, Library of Congress.

[5] According to Samuel Williston, Justice Gray had begun employing young graduates of the Harvard Law School as "secretaries" in 1875 when he was chief justice of the Massachusetts Supreme Court. Apparently clerks to judges were not supplied at public expense in Massachusetts at the time. When he came to Washington, Justice Gray continued the practice. See Williston, *Horace Gray,* in 8 GREAT AMERICAN LAWYERS 139 (Lewis ed. 1909).

[6] Page 43.

[7] 24 Stat. 254 (1886). Provision for law clerks for United States circuit-court judges was made in 1930 (46 Stat. 774) and for United States district-court judges in 1936 (49 Stat. 1140).

years following 1886 the clerks were paid by the marshal out of funds advanced to him for that purpose, but in October 1888 this method was abandoned in favor of direct payment from the Treasury. When this change was made, the clerks' salary certificates were held up by the Treasury, with the explanation that the auditor's office should be informed whether the clerks had taken the oath prescribed for officers of the United States.[8] The clerk of the Supreme Court answered in a letter that the question of an oath had been taken up in 1886 and that the justices had then concluded that "such clerk was not an officer and did not hold an office within the meaning of that section because he was not appointed by the Court, under article 2, Section 2 of the Constitution, but was by the statute the stenographic clerk of the justice who designated his employment."[9] This explanation was approved by each of the justices.[10]

In 1919 provision was made for a second clerical assistant to each justice. Some confusion existed at first about the intention of Congress in enacting this provision. In March 1919 the usual appropriation had been made for nine "stenographic clerks." Then in July 1919 provision was made for one "law clerk" for each justice at a salary not exceeding $3,600.[11] The clerk of the Supreme Court responded affirmatively to a letter from Justice Clarke asking whether the July appropriation meant that each justice might appoint both a stenographic clerk and a law clerk.[12] In a letter received by the clerk one day after his answer to Justice Clarke, Justice Van Devanter explained that the new provision was not intended to furnish two clerks to each justice. Van Devanter said: "I had a short conference before leaving with the chairman of the committee on Appropriations in the Senate and the chairman of the like committee in the House and it was then their purpose, as plainly expressed, to give each member one clerk or secretary who should be known as a law clerk and receive a compensation larger than that heretofore allowed."[13] The clerk of the court answered Justice Van Devanter with an explanation that, as passed, the two 1919 appro-

[8] Letter from E. P. Baldwin, acting first auditor, to James H. McKenney, clerk of the United States Supreme Court, Oct. 31, 1888, stenographic-clerks appointment files, United States Supreme Court Archives.

[9] Letter from James H. McKenney to E. P. Baldwin, Oct. 31, 1888, stenographic-clerks appointment files, United States Supreme Court Archives.

[10] *Ibid.* The clerk circulated the penciled draft of the letter first to Horace Gray and then to the other justices to be signed or initialed.

[11] 41 Stat. 209 (July 19, 1919).

[12] Letter from James D. Maher, clerk, to Justice John H. Clarke, July 8, 1919, stenographic-clerks appointment files, United States Supreme Court Archives. The discrepancy in the dates is due to the fact that the appropriation act was vetoed by the President because of disapproval of other provisions contained in it. It was repassed on July 19, following elimination of the objectionable provisions.

[13] Letter from Justice Willis Van Devanter to James D. Maher, clerk, July 5, 1919 (received July 9, 1919), stenographic-clerks appointment files, United States Supreme Court Archives.

priation measures provided for two clerks. Whatever confusion may have existed was settled in May 1920, when Congress expressly provided for one law clerk at $3,600 and one stenographic clerk at $2,000 for each justice.[14]

Except for a salary raise to $2,240 for stenographic clerks in 1924, the 1920 appropriation act remained the model until 1926. In that year the clerks were not mentioned, and a lump sum was appropriated for "all other officers and employees, whose compensation shall be fixed by the Court, except as provided by law."[15] This provision has formed the model for appropriations since 1926. In 1948 a provision derived from these annual appropriation acts was included in title 28 of the UNITED STATES CODE, authorizing the appointment by the justices of "law clerks and secretaries whose salaries shall be fixed by the Court."[16]

When two assistants were first authorized in 1919, most of the justices continued to employ only one person. In most cases, the former "stenographic clerks" simply resigned and were reappointed as "law clerks" at the higher salary. The appointment records of the court show only one assistant employed at public expense at any one time by Chief Justice White and by Justices Pitney, Brandeis, J. H. Clarke, Sutherland, and Sanford, although all of these justices were on the court after 1919.

When Chief Justice Taft joined the court in 1921, he employed both a "law clerk" and a "stenographic clerk." The person appointed as "stenographic clerk" was actually Taft's private secretary and did not perform the law-clerk duties usually associated with stenographic clerks prior to 1919. This marked the beginning of the employment of office assistants who were nonlawyers.

Gradually other justices began employing a second person, either as an office assistant or as a second law clerk. For three months in 1922 Justice McReynolds employed two assistants instead of his usual one. Justice Van Devanter started employing two people assigned to law-clerk duties in 1923, and he continued the practice until 1929 when he again started employing only one. When Justice Butler came to the court in 1923, he employed two assistants, both of whom performed duties generally associated with law clerks. Justice Stone, appointed in 1925, adopted Taft's practice of employing one assistant as a law clerk and one as a secretary. The employment of one law clerk and one office assistant became the general practice by 1939 and continued as the pattern for the associate justices until 1947.

When Harlan F. Stone assumed the duties of chief justice in 1941, he increased the number of his personal assistants (not counting his messenger) to four—two law clerks and two women office assistants.

[14] 41 Stat. 686-87 (May 29, 1920).
[15] 44 Stat. 344 (April 29, 1926).
[16] 62 Stat. 919 (June 25, 1948), 28 U.S.C. sec. 675 (1958).

The increase was necessitated by the increased work load of the office. Stone kept the initial handling of petitions *in forma pauperis* in his own hands, and the number of these petitions greatly increased while he was chief justice.[17] In addition to that heavy load, the chief justice's office must perform many duties in connection with the administration of the Supreme Court and other Federal courts. From 1941 to 1946 Stone's law clerks were employed for two-year overlapping terms with an increase in salary in their second year from $3,600 to as high as $4,740. This was the origin of the practice of some justices of designating one "senior" and one "junior" law clerk.

The number of personal assistants to the chief justice was increased again in 1946 when Vinson replaced Stone. Vinson employed seven personal assistants, including his messenger. He had one senior law clerk at a salary from $5,943 to $6,974 and two junior law clerks at salaries from $5,116 to $5,175. The senior law clerk was always a carry-over junior law clerk from the preceding year. Vinson's top office employee was an "administrative assistant" or "executive secretary," with a salary from $10,000 to $12,163. This employee was able to relieve the chief justice of much of the mounting load of administrative work. A second assistant was a "secretary" or "executive secretary" with a salary from $4,410 to $9,160, and a third assistant was employed as a stenographic clerk with a salary from $3,640 to $5,116.

One year after Vinson assumed office as chief justice, many of the associate justices began employing an additional assistant, increasing their personal staffs to two law clerks and one office secretary. The law clerks were sometimes designated "senior" and "junior" with salary differentials. This remains the pattern today in the offices of all of the associate justices except Douglas. Justice Douglas employs one law clerk and two secretarial assistants, having abandoned the use of two law clerks after a one-year trial in 1950-51.

Chief Justice Warren has continued, with only slight modifications, the practice started by Chief Justice Vinson of using three law clerks and three office assistants. Warren's first law clerks were carry-overs from Vinson, and one remained an added year as senior law clerk. Warren has continued to employ a senior law clerk but does not retain clerks for two years. He simply appoints his clerks in July, August, and September of each year, with the first as senior clerk at a slightly higher salary than the salary of $6,536 earned by the junior law clerks (in 1956).

The enlargement of the personal staffs of the justices in recent years suggests one basic problem. It seems that, at some point, the proliferation of assistants may have a deadening effect upon the judicial process. The traditional image of the several justices bringing the dispassioned

[17] MASON, HARLAN FISKE STONE, PILLAR OF THE LAW 639-40, 688 (1956).

reason of law to bear on problems may be blurred by the noise of typewriters and the scurry of subordinates.

Selection and Tenure of Law Clerks

From 1886 through the October term 1957, 410 assistants had served the justices of the Supreme Court as law clerks (or stenographic clerks more or less comparable to law clerks).[18] Thirty-one of these clerks served with two justices; one with three justices; and one with four justices.[19]

The most simplified classification of law clerks—and at once the most interesting from a standpoint of the over-all practices of the Supreme Court—divides them into two groups: (1) those with indefinite and often long periods of service and (2) those with definite and brief periods of service, usually of one year and occasionally of two years. During the period from 1886 through the 1957 term, thirty justices usually employed clerks for indefinite terms, and twenty usually employed them for definite short terms.[20]

The law clerks are the only employees of the Supreme Court for whom a tradition of short-term employment has developed. The one-year terms common for clerks today are in contrast to the distinguishing concept of *continuity* that attaches to everything else about the court. It has not been uncommon for an employee to begin service with the court as a page while still a boy, and to remain in some court office for the remainder of his working life. The offices of marshal, clerk, and librarian of the court are as much wed to the tradition of continuity as are the positions of the justices. Similarly no limitations are placed on the terms of employment of employees in the Executive Office of the President and in Congressional offices. Nevertheless, today the terms of office of law clerks, while the length of employment is left to the discretion of the individual justices, are generally limited to one year.

This unique development had its beginnings with the first employment of clerks in 1882. Justice Gray, with whom the use of law clerks originated, continued the practice that he had started while chief justice of the Massachusetts Supreme Court of employing for one-year terms young honor graduates of the Harvard Law School. Some of these young men were selected for the justice by his half brother, John Chipman Gray, a Boston attorney and Harvard professor. As Samuel

[18] This total includes all of the "stenographic clerks" prior to 1919 plus those with that designation between 1919 and 1939 but whose services were similar to the duties of the law clerks. The total also includes three "secretaries" who served with Holmes after his retirement from the court.

[19] Only official appointments are included in this tabulation. Clerks who served only temporarily with various justices are not counted in the total.

[20] Neither the appointment records of the court nor those of the Justice Department contain evidence that Chief Justice Waite (1874-1888) or Justice Woods (1881-1887) employed clerks.

Williston, Gray's second law clerk (after 1886), wrote, "it was possible to obtain those who had been the best students, for such men were glad to have for a year before beginning practice the education which necessarily went with close association with Judge Gray and with work upon the cases coming before him."[21]

While Justice Gray's system of employing recent law-school graduates for one-year terms is now the rule, it was not generally adopted until the advent of the Roosevelt court. Three years after Justice Holmes succeeded Gray in 1902, he took up the practice of employing a new honor graduate from Harvard each year. John Chipman Gray at first, and Felix Frankfurter later, selected these clerks. When Justice Brandeis joined the court in 1916, he immediately adopted Gray's plan, with which he was acquainted from association in Boston with former clerks. Justice Stone also adopted the practice six months after he joined the court in 1925, except that he selected his students from Columbia. Starting with F.D.R.'s appointees, all justices appointed to the court have employed recent law-school graduates for short terms.[22]

A variety of practices seems to have been followed in the selection of clerks by the earlier justices. Many of them relied upon recent graduates of law schools in Washington, D.C., retaining individuals for as long as possible at the salaries then provided. Clerks were sometimes older attorneys who were associated with Washington law offices. Sometimes they engaged in business enterprises on the side, as in the case of one clerk who sold photographs of the justices. Occasionally the clerks were selected by the Justice Department from among its younger employees, apparently with some understanding that they might later return to the department. The sons of the justice's friends were sometimes employed. For example, Chief Justice Fuller's first clerk was James S. Harlan, who read law in Fuller's Chicago law office from 1884 to 1888. James was the son of the first Justice Harlan. Another of Fuller's clerks was Stephen Day, the son of Justice William R. Day. Stephen Day passed the bar, apparently without benefit of law school, after his service with the chief justice. Justice John M. Harlan's first clerk was his son, John Maynard Harlan, the father of the present Justice Harlan. Two of Justice Day's sons served as clerks to their father, one of them remaining as the justice's personal secretary for several years.

At least one justice, Justice McReynolds, was plagued with troubles in locating and retaining clerks. Especially in his earlier years he insisted that his clerks remain single and refrain from the use of tobacco. Because of his strong language and asperity toward his subordinates,

[21] Williston, *supra* note 5, at 157.

[22] One of Justice Murphy's clerks served for five years, and one served for two years, but otherwise Justice Murphy also followed the one-year-appointment practice.

the atmosphere was too demeaning for some of his assistants. And, as his reputation spread, the Justice Department and acquaintances of the justice apparently found it difficult to locate clerks for him.[23]

Some justices retained the same clerk for several years. Justice McKenna, for example, kept his first clerk for twelve years, until the latter's death. McKenna had only two other clerks during his remaining fifteen years.[24] As another example, Justice Butler employed one individual, first as a "stenographic clerk" and later as a "law clerk," from 1923 until the justice's death in 1939. Butler had two clerks throughout that period. He retained most of the "second clerks" on a short-term basis; however, he retained one for ten years. Justice Roberts employed one clerk from 1930 to 1945. Like a few of the earlier clerks, this individual completed law school in Washington, D.C. while employed at the court. This law clerk's wife was also employed by Roberts as a secretary.

As mentioned above, thirty-three clerks have served with more than one justice. The most conspicuous example was a clerk who studied law at the Detroit College of Law and later served with four justices, starting with Justice Peckham in 1905 and ending with Justice Sutherland in 1924. Another example, suggestive of the difficulties of maintaining continuity of employment, is furnished by the clerk who served Justice Sanford for seven years. Upon the death of Sanford, this individual obtained temporary appointments with Justices Sutherland and Van Devanter while waiting for the appointment of a successor to Sanford. During this time he tried desperately to secure a position with the Department of Justice where he had formerly been employed for several years. When Justice Roberts was appointed to fill the vacancy created by Justice Sanford's death, the new justice arranged for other assistants, and the clerk under discussion was retained for only one month. Correspondence with the chief justice reveals the difficult plight of this ex-clerk, caught unemployed during the depression with a family, including a son in his senior year in college.[25]

Newly appointed justices have frequently retained the law clerks of their predecessors. When Charles Evans Hughes replaced Chief Justice Taft, he retained both the latter's able law clerk, Reynolds Robert-

[23] This conclusion is based on interviews with seven former clerks to Justice McReynolds and clerks to other justices, as well as on the stenographic-clerks appointment files, which show a frequent turnover of McReynolds' assistants. The former clerks interviewed varied sharply in their attitudes toward Justice McReynolds.

[24] McKenna's second clerk was involved in a "leak" of information. See section "The 1919 Leak Case" *infra*.

[25] Letters from William R. Loney to Charles Evans Hughes, April 15, 1930 and May 7, 1930, and from Charles Evans Hughes to William R. Loney, May 7, 1930, on file in Charles Evans Hughes Papers, Container 82, File K-L(1), Manuscript Division, Library of Congress.

son,[26] and his efficient personal secretary, Wendell Mischler. Robertson remained with Hughes for four years, and Mischler stayed permanently with him. Today's practice is typified by Chief Justice Warren's retention of Chief Justice Vinson's clerks for the much shorter periods for which they had originally been employed.

Law Schools of the Clerks

Practically all of the 410 law clerks have been graduates of law schools. Although the personnel records of the court and the Department of Justice generally contain no information in addition to the names and salaries of the clerks, a search of directories and manuscript collections reveals schools for all but eighteeen, and two of those read law with Chief Justice Fuller. Through the 1957 term, a total of thirty-eight law schools had been represented by the clerks. More came from Harvard than any other school—148 (36 per cent). Other schools with high numbers are: Yale, 45; George Washington, 34 (including National, 12); Columbia, 29; Georgetown, 24; the University of Chicago, 14; Northwestern, 13; the University of Pennsylvania, 13; and the University of California, 10.

As has been noted, several of the justices have made a practice of selecting their clerks from particular schools. Justices Gray, Holmes, and Brandeis relied exclusively on Harvard. Justice Frankfurter has also selected practically all of his clerks from Harvard. Except for his first clerk, whom he inherited from Chief Justice White, and his last clerk, Reynolds Robertson, Chief Justice Taft took a new man selected each year by the dean of the Yale Law School.[27] Stone always employed Columbia graduates. Except for his first clerk, who was selected by Frankfurter from Harvard, Justice Murphy always chose graduates of the University of Michigan Law School. Other justices have relied heavily, although not exclusively, on particular schools. For example, Butler chose half of his eight clerks from the University of Minnesota. Vinson selected half of his eighteen clerks from Northwestern. And Minton relied on the University of Indiana for half of his fourteen clerks.

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[26] Robertson was employed in the clerk's office before he became law clerk to Chief Justice Taft in 1929. He was the author of one book on Supreme Court practice and procedure and the coauthor of a book on the jurisdiction of the court. Another law clerk, who served with Justice Sutherland and succeeded Robertson with Hughes, was the other coauthor of the book on jurisdiction. See Robertson, Practice and Procedure in the Supreme Court of the United States (1928) and Kirkham & Robertson, Jurisdiction of the Supreme Court of the United States (1936).

[27] Dean Clark of the Yale Law School wrote to Chief Justice Hughes in 1930 suggesting that he would be pleased to supply clerks to him, but Hughes answered that he hoped to keep Reynolds Robertson "for a long time to come." Letters from Charles E. Clark to Charles Evans Hughes, Nov. 28, 1930, and from Charles Evans Hughes to Charles E. Clark, Dec. 1, 1930, on file in Charles Evans Hughes Papers, Container 80, File C, Manuscript Division, Library of Congress.

Some justices have made their selections from the geographical regions from which they themselves were appointed, without restricting their choices to particular schools. Douglas' clerks have generally been from the West Coast. Justice Black has often selected southerners, generally graduates however of national law schools like Yale or Harvard. Justice Whittaker has selected clerks from the Midwest. One woman served as a clerk to Justice Douglas during World War II, and one Negro has served as a clerk to Justice Frankfurter.

As already noted, the earlier justices generally relied on Washington, D.C. law-school students. In some cases the clerks were still attending school while employed at the court. Today, however, the practice originated by Justice Gray has become the rule, and it is customary to employ only top graduates of law schools.

Subsequent Achievements of Law Clerks

As might be expected from the caliber and background of many of the individuals selected by the justices, numerous former law clerks have established distinguished records in legal practice, government service, business, and law-school teaching and research. Sixty-two former clerks (15 per cent) have been listed in WHO'S WHO IN AMERICA, with those who served with Justices Gray (5), Holmes (18), Brandeis (15), and Stone (7) most numerous.

Search of directories shows that at least fifty-five former clerks have later taught in law schools, with the greatest number, fifteen, at Harvard. Yale, Stanford, Chicago, Columbia, Northwestern, and Indiana have each had four or more ex-clerks on their teaching staffs. Included in the list of teachers are many such outstanding names as James M. Landis, formerly dean of the Harvard Law School.

The law firm that has employed the greatest number of clerks is Covington and Burling in Washington, D.C. (at least eighteen). Besides Washington, the cities that have attracted most of the clerks who have gone into private practice are New York, Chicago, and Boston. Many former clerks are now among the nation's most prominent lawyers and business executives.

Approximately forty former clerks have spent considerable portions of their subsequent careers in the Justice Department or in other Federal employment. One of Justice Holmes's clerks, Francis Biddle, later became Attorney General of the United States and another, Laurence Curtis, became a Congressman. One of Chief Justice Fuller's clerks, Stephen Day, also served in Congress. One of Justice Brandeis' clerks, Dean Acheson, achieved eminence as Secretary of State; another Brandeis clerk, Calvert Magruder, became a prominent circuit judge.[28]

[28] To detract from this generally illustrious record, critics have pointed to the employment of Alger Hiss as Holmes's clerk in 1929-30.

THE 1919 LEAK CASE

Only once in the Supreme Court's history has a "leak" occurred involving legal action. A clerk who had served with Justice McKenna nearly nine years was indicted in connection with a leak in 1919 of information regarding unannounced decisions of the court.[29] According to the indictment, the clerk arranged to communicate information on decisions to coconspirators, who then engaged in speculations upon the New York Stock Exchange and other stock markets. It was charged that, on the basis of advance information regarding one case, *United States v. Southern Pac. R.R.*,[30] the group cleared a profit of $1,412.50. The leaks were confidentially brought to the attention of Chief Justice White in November 1919 by Merlon E. Pew, manager of the International News Service. Pew discovered the matter through an informant who had been approached by the conspirators. The chief justice and Justice McKenna immediately consulted the assistant to the Attorney General, Judge C. B. Ames, who launched a confidential investigation. The facts concerning the "leak case" were released to the press on December 16, 1919, but without fanfare. Justice McKenna's clerk resigned on the day when the facts were made public.[31] At the time he was engaged in a prospering bakery business, in addition to his other activities, and he gave as his reason for resigning his growing business responsibilities. Justice McKenna accepted the resignation "with regrets for the necessity."[32] After a failure to have the indictment dismissed on demurrer, the clerk denied the charges. The case was later dropped.

Justice McKenna was careful to impress upon his next assistant the requirements of secrecy in the court's work.[33] Today, the confidential and nonpublic nature of that portion of a justice's work that transpires outside the public courtroom is evident to the clerks from the beginning of their service. After the court moved into its present building, a printing shop was established in the basement, and now all preliminary drafts of opinions, memoranda, and other documents circulated among the justices are printed there. Today the heavy brass gates barring access to the corridors to the justices' chambers, impress even visitors with the nonpublic nature of most of the court's work.

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[29] Several papers from Justice Department files in the matter are deposited in the National Archives, Justice and Executive Section. See United States v. Ashton F. Embry, Criminal No. 36363 (Sup. Ct. D.C.) (indictment filed, Apr. 1, 1920; nolle prosequi entered, Nov. 20, 1929).

[30] 251 U.S. 1 (1919).

[31] Letter from Ashton F. Embry to Justice McKenna, Dec. 16, 1919, stenographic-clerks appointment files, United States Supreme Court Archives.

[32] *Ibid.*

[33] Interview with Robert F. Cogswell, Washington, D.C., Jan. 29, 1959.

DUTIES OF THE LAW CLERKS

Descriptions of the roles of the law clerks sometimes portray them, at one extreme, as "second justices"[34] and, at another, as youthful companions chosen simply to impart an atmosphere of vigor to a justice's surroundings.[35] While both of these portrayals apparently do violence to the general situation, their conflict correctly emphasizes the differences in the duties of the individual clerks at various times and with different justices. One characteristic common to the work of the clerks has apparently been that their duties have been determined entirely by their individual justices. While other generalizations are possible, they must be hedged about with warnings that they are based upon severely limited information concerning a traditionally confidential position.[36]

Before the authorization of additional assistance in 1919, the duties of the stenographic clerks included numerous personal chores that the law clerks now escape. The early clerks usually served as stenographers and typists while also disposing of such personal matters as the payment of bills for their justices. At the same time these men possessed legal training and were expected to assist with such legal work as their justices might require. Prior to the move to the present Supreme Court building in 1935, when the justices were provided with public office space for the first time, the clerks usually performed their services at the homes of the individual justices. Sometimes the clerks also lived at the homes of their respective justices, a fact that accounts in part for the performance of more personal services during the earlier years.

[34] See articles cited note 1 *supra*.

[35] This latter description is correct, of course, with respect to the three young men who served with Holmes following his retirement, but they were not on the court's pay roll and were not clerks in the usual sense. Francis Biddle has described the close relationship between Justice Holmes and his clerks. See BIDDLE, MR. JUSTICE HOLMES 10-12, 82, 137, 145, 147, 148 (1942).

[36] Because of the confidential nature of the court's inner operations, it is impossible to describe the duties of the clerks in exacting detail. Variations in the methods of the different justices are great, and generally the clerks' knowledge about the procedures followed in offices other than their own is based only on hearsay. This was especially the case before 1935 when some of the justices first occupied offices in the present Supreme Court building. The extent to which the clerks are expected to act as *confidential* assistants is reflected in Louis L. Jaffe's comment about his work with Justice Brandeis: "He once told me that I was never to let anyone know what we were working on, not even the secretaries of the other Justices. He added, 'Of course you can listen to what they tell you about their Justices.'" Jaffe, *An Impression of Mr. Justice Brandeis*, 8 HARV. L. SCHOOL BULL. 10-11 (1957). Enough has been written in scattered publications, however, to indicate the general nature of the clerks' duties. In addition to sources cited *supra*, see Roderick M. Hills, *A Law Clerk at the Supreme Court of the United States*, 33 LOS ANGELES B. BULL. 333 (1958); Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710 (1946); Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5 (1949); Bennett Boskey, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1200 (1946).

The responsibilities of some of the earlier clerks who remained for several years with one justice were often greater, apparently, than those of most of the less-experienced short-term clerks. One of Justice Butler's clerks, for example, who remained with the justice for sixteen years, wrote first drafts of many opinions, expressing the justice's views so accurately that the drafts often required few changes.[37] Like most of the law clerks, this able personal assistant was also expected to devote much of his time to the certiorari petitions. Butler expected his clerks to be prepared to summarize these orally in preparation for the Saturday conferences. The justice did not want to hear disagreement from his clerks, although he did encourage criticism and suggestions. This was true in opinion writing as well as in other chores. The work proceeded in accordance with the justice's well-defined views, with the clerk serving strictly in the capacity of a confidential assistant in research, writing, and the drudgery of proofreading and similar routine but important tasks.

In contrast to this situation in which the clerk was sometimes expected to formulate his justice's views in drafts of opinions, even the long-term clerks to some other justices were asked to do little or no writing that would appear in opinions. Justice McKenna, for example, disliked having so much as a sentence of his opinions changed by a clerk, although he permitted suggestions for changes.[38] Justice Lurton's clerk, who lived at the justice's home during Lurton's four years on the court (and who was enrolled as a student at Georgetown Law School for three of the years) had practically nothing to do with the opinions until they reached the proofreading stage.[39] Lurton's clerk also did little with the certiorari petitions. His duties were confined largely to typing, proofreading, checking citations, and handling personal matters for the justice.

The work of the younger law clerks, selected in the tradition of Justice Gray, has also varied, but, except for the fact that they no longer perform personal services, the duties of most of the clerks today are probably not much different in effect from those of their forerunners. The description of a law clerk's work that was written in 1909 by Gray's second clerk, Samuel Williston, still furnishes an adequate view, except for the contrast in environment between the private working quarters of the earlier justices and the elaborate chambers now provided for the members of the court. Williston's description also contains answers to the charges of influence exerted by clerks. He wrote:

> The records and briefs of the cases as they were daily submitted to the court were handed by the Judge to his secretary [law clerk], generally without any indication from him of his own view of the case. It was then the duty of the secre-

[37] Interview with John Francis Cotter, Washington, D.C., Feb. 5, 1959.
[38] Interview with Robert F. Cogswell, Washington, D.C., Jan. 29, 1959.
[39] Interview with Harvey D. Jacob, Washington, D.C., Jan. 14. 1959.

tary to study the papers submitted to him and to form such opinion as he could. . . . [Before the Saturday morning conferences,] Judge Gray would take up the week's budget of cases with his secretary, whose duty it was to have given them the study requisite for a mastery of the essential facts and of the authorities cited in the briefs. . . . Often he would ask his secretary to write opinions in . . . [the cases assigned to Gray], and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavor. . . . Yet all this was simply to provide his own mind with food and stimulus. He never accepted anything at second-hand either in the way of authorities, or of ideas, or of the expression of them. The fact that his secretary had looked up decisions and digested them did not prevent him from looking them up himself and carefully examining them. . . . He was a careful man, and it may have been a source of satisfaction to him to know that some one else, even though a youth, had been over the same ground and found no pitfall. This possible satisfaction is all that he can have got from much of his secretary's work.[40]

Today the duties of the clerks generally include the preparation of memoranda on certiorari petitions and assistance with opinions. In some instances the clerks also handle a part of the correspondence, assist in the preparation of speeches, and prepare "bench memos" summarizing cases before argument. While the following account briefly explains the current roles of the clerks, it also contains this observer's opinions about the propriety of their work in the light of recent objections to the use of personal assistants by the justices. The most prominent criticisms, those that were publicized in U.S. NEWS & WORLD REPORT, referred to supposed "ghost writers"; "men who handle much of the detailed work of the Court"; "workers . . . not subject to the usual security or loyalty checks"; clerks who "exercise an influence upon the Justices that is reflected in the opinions handed down by the Supreme Court"; "the 'second team' on the U.S. Supreme Court."[41]

Work on the approximately 1,500 petitions for certiorari that are filed each year occupies a vast proportion of the time of most clerks. Every justice must be prepared to pass on each petition in conference. Most of the petitions lack merit, a few should clearly be granted, and a few others are questionable, as would be expected. Except for Justice Frankfurter, who generally handles the "certs" without assistance, each justice usually requires his law clerks to prepare a short memo on every case. These "cert memos" generally state the facts, the opinions below, the issues, and the arguments of the attorneys. The clerks also indicate their recommendations in most cases. The justices then go over the memos and petitions, and in some instances they discuss the cases with their clerks before the conferences. In this process it appears to the writer that it would not be possible for a clerk so to disguise the elements of cases as seriously to mislead his superior for long. Furthermore, since a justice's tentative views on the "certs" must be subjected

[40] Williston, *supra* note 5, at 158-60.

[41] U.S. NEWS & WORLD REPORT (July 12, 1957) pp. 45-48.

to the scrutiny of his able brothers in the conferences, possible errors would, in all probability, be detected before decisions to grant or deny become final. Four affirmative votes are required for the granting of a petition for certiorari, and no one is permitted to attend the conferences except the justices.

After 1947, when the associate justices started employing an additional law clerk, "bench memos" came into use. Apparently Justice Burton required these in each case, and a few other justices have utilized them in varying degrees. The bench memos are summaries, usually of several pages, of the cases to be argued before the court. These memos are prepared by the law clerks as an aid in preparation for the oral arguments. They are supplementary to the records and briefs supplied for the cases. In some instances, the original "cert memos" may be used for this purpose.

Assistance with opinions consumes much of the remaining time of the clerks. In the light of criticisms in recent years of possible ghost-writing, it is essential to emphasize at once that opinion writing in the Supreme Court is very much an institutional process, in which a majority opinion must represent the views of the court and not just of the member assigned the primary responsibility for writing the opinion. In addition, although the opinions involve vital choices of policy, the justices are by no means free agents who may ignore the weighty body of existing law and the critical eyes of the legal profession and the larger public. This is not to deny the obvious distinctions between the opinions and decisions of the various justices. However, in the opinion of this observer, the process clearly leaves little room for misapprehension by even a weak justice as to the full meaning of his finished opinions. And it is apparently these final products that are the real source of the dissatisfaction behind recent criticisms of the court.

The law clerks do contribute quite meaningfully to the opinions, but apparently their most common influence is through the careful examination of the written products of their justices, an examination that may involve penetrating criticisms and careful research of every detail.

Research for the justices' opinions entails both routine examination of records, briefs, and citations, and ancillary study of matters handled inadequately in briefs and arguments. Since the development in this century of footnoted opinions as the result of the growing impact of scholarship on American law, the fruits of the research by the justices and their assistants are sometimes easily recognized. Justice Brandeis' opinions marked the way of the new technique, and that justice's law clerks were apparently expected to labor diligently to uncover desired information. Dean Acheson described the result in one case as follows:

> [Justice Brandeis] wrote the opinion; I wrote the footnotes. My footnotes up to that time were the Mount Everest of footnotes. Today, Justices of the Supreme

Court write textbooks as marginal annotations of their opinions, but up to that time I had written the greatest footnotes, fifteen pages of footnotes.[42]

Harlan F. Stone's clerks also enjoyed the pleasure of seeing some of their hard work result in footnotes, as Alpheus T. Mason has reported.[43] The marginal annotations in Justice Rutledge's lengthy opinions most nearly approached the montane proportions described by Acheson, and it is understood that his clerks' contributions appeared in part in that form.[44]

While the footnotes are not generally viewed as integral parts of opinions, they provide a useful indication of the thinking behind an opinion. They are not simply a courteous device for recognizing scholarship; they perform a vital instructional role. Except for cases, the sources cited in most opinions are items not mentioned in the briefs of counsel. Of over 1,500 references to periodical writing in opinions of the fifteen Supreme Court justices who most often cited such materials from the 1916 through the 1957 October terms, 74 per cent were to sources not cited in briefs.[45]

While written evidence is lacking, rumors persist that in a very few instances the duties of the law clerks in the preparation of opinions have exceeded what is normally expected of them. As John P. Frank, one of Justice Black's former clerks, wrote recently, "the most notorious rumors concern Chief Justice Vinson, who is said to have done all his 'writing' with his hands in his pockets, outlining to his clerks generally what he wanted, and then criticizing this bit or that in a clerk's draft and making suggestions for revision."[46] More isolated rumors have also circulated from time to time about the clerks to Justices Murphy[47] and Burton; and when they first joined the court, gossip spread that Justices Black[48] and Clark relied too much on their law

[42] Dean Acheson, *Recollections of Service with the Federal Supreme Court,* 18 ALA. LAWYER 355 (1957). The case referred to is Ruppert v. Caffey, 251 U.S. 264 (1920).

[43] Mason wrote: "It was not unusual for Stone to allow his law clerks to use footnotes as trial balloons for meritorious ideas." *Op. cit. supra* note 17, at 513.

[44] A general view of their duties is provided in an article by two of Rutledge's clerks: Victor Brudney and Richard F. Wolfson, *Mr. Justice Rutledge—Law Clerks' Reflections,* 25 IND. L.J. 455 (1950).

[45] See Newland, *Legal Periodicals and the United States Supreme Court,* 3 MIDWEST J. of POL. SCI. 58 (1959) and *Innovation in Judicial Technique: The Brandeis Opinion,* 42 SW. SOC. SCI. Q. 22 (1961).

[46] JOHN P. FRANK, MARBLE PALACE 117-18 (1958). For a view by Vinson's clerks (collectively written by clerks from Northwestern University), see *Chief Justice Vinson and His Law Clerks,* 49 NW. U.L. REV. 26 (1954).

[47] John P. Roche has summarized the criticisms of Justice Murphy. See *The Utopian Pilgrimage of Mr. Justice Murphy,* 10 VAND. L. REV. 369 (1957). A brief comment has been written by the three clerks who served Murphy longest: John H. Pickering, Eugene Gressman, T. L. Tolan, Jr., *Mr. Justice Murphy—A Note of Appreciation,* 48 MICH. L. REV. 742 (1950).

[48] CHARLOTTE WILLIAMS, HUGO L. BLACK 82-83 (1950).

clerks or some other assistants. Since reliable evidence to support or contradict these rumors is lacking, it is sufficient here simply to note them, with two additional comments.

First, the criticism encountered by this writer that the duties of the clerks of particular justices have exceeded the bounds of propriety has emanated from individuals who often disagreed with the opinions of the justices in question. For example, those in agreement with Murphy's policy views tend to defend that justice while harboring suspicions about the competence of more "conservative" justices, and vice versa.

Second, it is probably impossible to devise a method for determining the limits beyond which work by clerks to particular justices exceeds what is desirable. If the persistence of rumors is to be given weight, John P. Frank's statement is correct, that "sometimes clerks are allowed to do the bulk of the serious writing for the Justice."[49] However that may be, it has never been even remotely suggested by responsible critics that the responsibility for the final opinions of the court has been delegated to any others than the justices. If the final products are thought to be incorrect or shabby, they may be criticized freely and the justices are expected to shoulder the blame. With this heavy responsibility—which no justice has sought to escape—should also go the credits for sound work.

CONCLUSIONS

As Attorney General Garland recognized in his recommendation to Congress in 1885, personal assistants to the justices are essential to the proper fulfillment of the court's function. Also as stated in that first recommendation, the assistance must reach to the immense labor of investigating questions and preparing opinions. But the "institution" of law clerks as assistants might have developed in a quite different direction from that which prevails today. As this survey of the history shows, the early practice was very largely against the emergence of the law clerks as a constantly changing group of inexperienced but bright and well-trained young law-school graduates. The tradition of continuity that attaches to the other positions at the court is also against it. If continuity had become the rule as applied to the law clerks, then today's queries about "improper influence" by the assistants might make sense.

In the opinion of this observer, it is to the good that the method of Justice Gray has prevailed in the selection of law clerks to Supreme Court justices. The result has been to put the justices in intimate contact with bright young men recently graduated from many of our finest law schools. And in recent years the tendency has been to broaden the selection. While the continual shifts in personnel result in a loss of ex-

[49] FRANK, *op. cit. supra* note 46, at 117.

perience, the system supplies a contingent of clerks with mental and physical vigor. The greatest influence of these clerks, by and large, has been the rare but desirable one of relentless scholarship.