

INSIDE JUDICIAL CHAMBERS:
HOW FEDERAL DISTRICT COURT JUDGES SELECT AND USE
THEIR LAW CLERKS

*Todd C. Peppers, Micheal W. Giles, and Bridget Tainer-Parkins**

I. INTRODUCTION

In recent decades, United States Supreme Court law clerks have not suffered from a lack of attention. From allegations that the Justices' law clerk hiring practices are riddled with gender and racial bias¹ to debates over the level of influence wielded by clerks,² legal scholars and journalists have remained intrigued with these "junior justices." Law clerks on the lower federal and state courts, however, have escaped similar scrutiny. This disinterest is particularly evident when we consider federal district court law

* Todd C. Peppers is an assistant professor in the Department of Public Affairs at Roanoke College in Salem, Virginia. Micheal W. Giles is the Goodrich C. White Professor of Political Science in the Department of Political Science at Emory University in Atlanta, Georgia. Bridget Tainer-Parkins is a second year law student at Washington and Lee University School of Law in Lexington, Virginia.

¹ See generally Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359 (1996); Tony Mauro, *More Clerks are Minorities and They're Ivy Leaguers to Boot: Inching Up in Numbers Suggest Change at "Feeder" Law Schools*, N.J.L.J., Oct. 16, 2000, at 214; Lynn K. Rhinehart, *Is There Gender Bias in the Judicial Law Clerk Selection Process?*, 83 GEO. L.J. 575 (1994); Laura Gatland, *A Clerkship for White Males Only?*, STUDENT LAW., Oct. 1999, at 34; Randall Kennedy, *The Clerkship Question and the Court*, AM. LAW., Apr. 1999, at 114; Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A; Tony Mauro, *Court Loses Ground on Minority Clerks*, RECORDER (S.F.), Oct. 30, 2001, at 1; Tony Mauro, *Only 1 New High Court Clerk Is a Minority*, USA TODAY, Sept. 10, 1998, at 09A; William Raspberry, Op-Ed, *Clerks and Color*, WASH. POST, Dec. 13, 1998, at C07; Editorial, *Some Deliberate Speed*, WASH. POST, June 12, 1979, at A18.

² See generally EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998); TODD C. PEPPERS, *COURTIFIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979); J. Daniel Mahoney, *Law Clerks: For Better or For Worse?*, 54 BROOK. L. REV. 321 (1988); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961); William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74.

clerks. With the exception of a recent flurry of articles debating when federal district court judges should begin the interviewing process,³ the majority of articles by or about federal district court law clerks in the legal literature are the now-standard “tribute pieces,” in which former law clerks extol the virtues of retired or deceased district court judges.⁴ Filled with touching or humorous stories about chambers life as well as predictions for their judges’ place in the pantheon of great jurists, these articles seldom discuss how the authors were selected or what job responsibilities they were assigned.

On one hand it is not terribly surprising to discover that lower court clerks have been largely ignored by legal scholars, social scientists, and journalists. All are interested in the exercise of political power, and no other court in the land issues opinions of such sweeping scope and salience as the Supreme Court. Thus our attention is inexorably drawn to the Supreme Court law clerks who are involved in shaping judicial decisions in such critical areas as free speech, reproductive rights, and federalism—and some would suggest—wield their own independent influence over these decisions.

We are not suggesting that Supreme Court law clerks are not worthy of study. In this Article, however, we argue the literature’s narrow focus on the Supreme Court law clerk has led to a failure to examine the important role that federal district court law clerks play in the federal judiciary. As recent caseload statistics demonstrate, the federal district court is the court of last resort for most plaintiffs and defendants; in the twelve month period ending September 30, 2006, 259,541 civil cases⁵ and 88,216 criminal cases⁶ were filed with the United States District Courts. During that same period, only 66,618 appeals were filed with the United States Courts

³ See generally Christopher Avery et al., *The Market for Judicial Law Clerks*, 68 U. CHI. L. REV. 793 (2001); George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123 (2005).

⁴ See generally Teresa L. Clark, *Judge D. Brook Bartlett—A Legacy of Civility*, 68 UMKC L. REV. 507 (2000); Marci A. Hamilton, *Chief Judge Edward R. Becker: A Truly Remarkable Judge*, 149 U. PA. L. REV. 1237 (2001); Thomas Waxter, Jr., *In Memoriam: Harrison L. Winter*, 50 MD. L. REV. 10 (1991); Susan Webber Wright, *The Judge from St. Joe*, 52 ARK. L. REV. 308 (1999).

⁵ JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006: ANNUAL REPORT OF THE DIRECTOR 56 tbl.S-7 (Sept. 30, 2006), available at <http://www.uscourts.gov/judbus2006/front/completejudicialbusiness.pdf>.

⁶ *Id.* at 214 tbl.D.

of Appeals,⁷ 15,246 of which were criminal appeals.⁸ In other words, less than twenty percent of cases filed in federal district court were appealed to the intermediate appellate courts. In 2005, the Supreme Court had only 9,608 cases on the docket and heard argument in ninety cases.⁹ Ultimately, less than one percent of all cases originally filed in federal district court were reviewed by the Supreme Court.

Admittedly, opinions issued by federal district court judges do not have the scope or impact of opinions written by Supreme Court Justices; lower court law clerks do not have the opportunity to craft legal principles which will govern a nation or resolve critical policy debates. Nevertheless, in helping process thousands of cases a year, an argument can be made that the hundreds of federal district court law clerks potentially have more day-to-day influence over individual litigants and cases than approximately three dozen Supreme Court law clerks.

This Article does not propose to determine whether federal district court law clerks wield inappropriate levels of influence. Instead, our goal is to take the important first step of understanding what criteria are used to select federal district court law clerks and what job duties are assigned to those clerks—important descriptive data that has not been previously collected. If we find that federal district court law clerks are given the most mundane of responsibilities (such as cite checking, filing, and coffee making), then the issue of influence need not be reached. If our research demonstrates, however, that federal district court law clerks are routinely involved in all aspects of judicial decision making, then heretofore unexamined questions about law clerk influence at the federal district court will become relevant.

II. LEGISLATIVE HISTORY

While United States Supreme Court Justices were authorized to hire stenographic clerks in 1886¹⁰ and law clerks in 1919,¹¹ the lower federal courts did not receive similar institutional resources

⁷ *Id.* at 102 tbl.B.

⁸ *Id.* at 103 tbl.B-1.

⁹ *Id.* at 101 tbl.A-1.

¹⁰ See Act of Aug. 4, 1886, ch. 902, 24 Stat. 253, 254 (making appropriations for sundry civil expenses of the government).

¹¹ See Act of July 19, 1919, ch. 24, 41 Stat. 209, 209 (making appropriations for sundry civil expenses of the government).

until decades later. Court of appeals judges were first authorized to hire law clerks in 1930¹² and federal district court judges were first authorized to hire law clerks in 1936.¹³ The bill authorizing law clerks for federal district court judges was introduced in 1935 by Senator Robert F. Wagner (D-NY) and by Representative Emmanuel Celler (D-NY) in the House of Representatives.¹⁴ Their motivations in introducing this legislation have been lost in the passage of history. Unlike early proposals to provide the Supreme Court Justices with legal assistants, there was little debate surrounding the proposals to provide law clerks to lower federal court judges.¹⁵ The bill was signed into law by President Franklin Delano Roosevelt on February 17, 1936.¹⁶

Originally, law clerks were not allocated to every federal district court judge. The number of clerks was limited to a total of thirty-five for all federal circuits during the first fiscal year after the passage of the Act.¹⁷ Additionally, the senior judge of the circuit court within whose jurisdiction the district court lay was required to approve the hiring of any law clerk.¹⁸ The original statute limited the salary of a clerk to \$2,750 annually,¹⁹ but in 1940 the salary of

¹² See Act of June 17, 1930, ch. 509, 46 Stat. 774.

¹³ See Act of Feb. 17, 1936, ch. 75, 49 Stat. 1140. *But see* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 140–141 (1994). Although District Court judges were not authorized to hire law clerks until 1936, as early as 1910 Judge Learned Hand was employing a stenographic clerk who performed some of the duties of the modern-day law clerk. *Id.* It is unclear whether other district court judges followed this practice.

¹⁴ 1935 S. JOUR. 122; 1935 H.R. JOUR. 325.

¹⁵ An 1850 proposal to give the nine justices a single clerk to help with stenography and legal research was met with howls of protest. Representative David K. Carter of Ohio scornfully suggested that the justices were asking Congress “that they might be furnished with auxiliary brains, to do their thinking . . . which now, God knows, they did not do.” CONG. GLOBE, 31st Cong., 1st Sess. 351 (1850).

¹⁶ 1936 H.R. JOUR. 105; 1936 H.R. JOUR. 215.

¹⁷ 49 Stat. at 1140.

¹⁸ *Id.*; *see also* H.R. REP. NO. 1399 (1935); S. REP. NO. 1235 (1935). The original text of H.R. 6376, the House of Representatives version of the district court law clerk bill, and S. 2643, the Senate version of the bill, required approval of both the senior circuit judge of each district and the Attorney General of the United States. In its report, the House of Representatives Committee on the Judiciary amended the bill to require the approval of the Judicial Council, which was comprised of the senior judges of each of the circuits and the Chief Justice of the Supreme Court. The Senate Committee on the Judiciary, in its report, recommended that the Senate pass the bill but included in its report a letter from then-Attorney General Homer Cummings explaining that Attorney General approval for law clerks was unnecessary and unfeasible, and that the approval of the senior circuit judge would be sufficient. The Senate version of the bill was ultimately the one signed into law by the President, requiring, as suggested by Attorney General Cummings, only the approval of the senior circuit judge for the hiring of district court law clerks.

¹⁹ 49 Stat. at 1140.

law clerks was lowered to a maximum of \$2,500 per year.²⁰ The 1941 appropriation statute further narrowed the hiring of law clerks by limiting each circuit to a total of three law clerks for all district court judges.²¹ The same 1941 act also established that compensation for law clerks would be set by the Director of the Administrative Office of the U.S. Courts.²²

In 1948, an act was passed to codify Title 28 of the United States Code, entitled “Judicial Code and Judiciary.”²³ Section 752 of that code allowed each district judge to appoint a law clerk if deemed necessary by the chief judge of the circuit.²⁴ While the circuit court still determined whether a district judge merited a law clerk, the number of clerks in each circuit was capped only by the number of district judges²⁵—a much more generous allocation than the previous cap of three law clerks per federal circuit.

Title 28, section 752 of the U.S. Code is still the controlling legal statute regarding law clerks for district judges, though the statute has seen some amendments.²⁶ In 1959, the Code was changed to read as follows: “District judges may appoint necessary law clerks and secretaries subject to any limitation on the aggregate salaries of such employees which may be imposed by law.”²⁷ Thus, federal district court judges were no longer required to seek the permission of the chief judges of their circuits to hire clerks. In 1988, language was added to exempt law clerks from title 5, chapter 63, subchapter I of the U.S. Code, which dictates federal employee leave policies.²⁸

The current version of the statute states, in relevant part:

District judges may appoint necessary law clerks and secretaries subject to any limitation on the aggregate salaries of such employees which may be imposed by law. A law clerk appointed under this section shall be exempt from the provisions of subchapter I of chapter 63 of title 5, unless specifically included by the appointing judge or by local rule

²⁰ See Act of May 14, 1940, ch. 189, 54 Stat. 181, 209.

²¹ See Act of June 28, 1941, ch. 258, 55 Stat. 265, 301.

²² See *id.*

²³ Act of June 25, 1948, ch. 646, 62 Stat. 869.

²⁴ See 28 U.S.C. § 752 (2000).

²⁵ Compare *id.* (limiting the number of law clerks by the number of district judges), with 55 Stat. at 301 (limiting the number of law clerks for district judges to three per circuit).

²⁶ 28 U.S.C. § 752; Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1003(a)(3), 102 Stat. 4665; Act of Sept. 1, 1959, Pub. L. No. 86-221, 73 Stat. 452.

²⁷ 73 Stat. at 452 (codified as amended at 28 U.S.C. § 752).

²⁸ § 1003(a)(3), 102 Stat. at 4665.

of court.²⁹

It should be pointed out that the statute does not set a precise limit on the number and salary of district court clerks, stating that both are subject to the limits of "law."³⁰ Until 1983, this limit was established through annual appropriations,³¹ which allowed Congress to effectively limit the number of law clerks. In 1983, the policy was altered to state that "law clerks to circuit and district judges shall be appointed in such number and at such rates of compensation as may be determined by the Judicial Conference of the United States."³² The Judicial Conference continues to have the authority to dictate the number of clerks that may be hired by each judge as well as clerk salaries. Since 1991, the Judicial Conference has limited each district court judge to two law clerks and one secretary, although a judge may choose to hire a third clerk in lieu of a secretary.³³ Recent reforms passed by the Judicial Conference have further limited the district court judge's employment options, holding that in the future, district court judges can employ only one professional (or career) clerk.³⁴ According to the Administrative Office of the U.S. Courts, last year 2,075 full-time law clerks were employed by active and senior federal district court judges.³⁵

III. LITERATURE REVIEW

As noted above, there is no shortage of books and articles on Supreme Court clerks.³⁶ Scholarship focusing on law clerks on the United States Courts of Appeals is more limited, however,³⁷ and

²⁹ 28 U.S.C. § 752.

³⁰ *Id.*

³¹ See generally Act of Sept. 24, 1979, Pub. L. No. 96-68, 93 Stat. 416; Act of Oct. 10, 1978, Pub. L. No. 95-431, 92 Stat. 1021; Act of Aug. 2, 1977, Pub. L. No. 95-86, 91 Stat. 419; Act of July 14, 1976, Pub. L. No. 94-362, 90 Stat. 937; Act of Oct. 21, 1975, Pub. L. No. 94-121, 89 Stat. 611; Act of Oct. 5, 1974, Pub. L. No. 93-433, 88 Stat. 1187; Act of Nov. 27, 1973, Pub. L. No. 93-162, 87 Stat. 636.

³² Act of Nov. 28, 1983, Pub. L. No. 98-166, 97 Stat. 1071.

³³ REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 66 (1991).

³⁴ *Conference Adopts Recommendations on Law Clerks*, THE THIRD BRANCH (Admin. Office of the U.S. Cts., Wash., D.C.), Sept. 2007, at 2.

³⁵ Telephone Interview, staff member, Administrative Office of the U.S. Courts, in Wash., D.C. (Oct. 12, 2007).

³⁶ See generally LAZARUS, *supra* note 2; BRAD MELTZER, THE TENTH JUSTICE (1997); PEPPERS, *supra* note 2; WOODWARD & ARMSTRONG, *supra* note 2; Mahoney, *supra* note 2; Newland, *supra* note 2; Rehnquist, *supra* note 2.

³⁷ See generally FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994); JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT

materials regarding federal district court law clerks are generally—but not exclusively—limited to tribute pieces.³⁸

Across the clerkship literature, several different themes can be identified. One theme is the inherent value of the clerkship institution. Some authors feel that law clerks are a valuable tool to judges, or that they have become a necessity given the judiciary's continually increasing caseload.³⁹ Among those who view law clerks as a positive institutional development are judges who employ and rely on clerks, and the law clerks who found the clerkship to be an invaluable educational experience. Other authors, however, have challenged the clerkship institution on the ground that it permits law clerks to exercise too much control over the legal process.⁴⁰ Challengers to this institutional practice argue that law clerks are writing judicial opinions and wielding an inappropriate level of influence over judicial outcomes. Some authors have even challenged the notion that the clerkship is a positive element in a

ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS (2002); Norman Dorsen, *Law Clerks in Appellate Courts in the United States*, 26 MOD. L. REV. 265 (1963); Stephen L. Wasby, "Why Clerk? What Did I Get Out of It?", 56 J. LEGAL EDUC. 411 (2006); Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179 (1973).

³⁸ See generally Clark, *supra* note 4; Hamilton, *supra* note 4; Waxter, *supra* note 4; Wright, *supra* note 4. But see JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 41 (1980) (discussing their survey comparing the clerkship practices of District Court judges, but limiting themselves to judges in California).

³⁹ See generally George D. Braden, *The Value of Law Clerks*, 24 MISS. L.J. 295 (1952-1953); Jonathan Cohen, *In the Shadow of the Law Clerk: Assessing the Roles of Law Clerks in the Judicial Process*, 3 LONG TERM VIEW 99 (1995); John G. Kester, *The Brighter Side of Clerkships*, 36 J. LEGAL EDUC. 140 (1986); Alex Kozinski, *Making the Case for Law Clerks*, 3 LONG TERM VIEW 55 (1995) (interview with Alex Kozinski); Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 ME. B.J. 112 (2007); Abner J. Mikva, *Judicial Clerkships: A Judge's View*, 36 J. LEGAL EDUC. 150 (1986); Abner J. Mikva, *Maintaining Control of the Judiciary*, 3 LONG TERM VIEW 9 (1995) (interview with Abner J. Mikva); John Oakley, *Defining the Limits of Delegation*, 3 LONG TERM VIEW 85 (1995); Richard A. Posner, "The Rise of the Law Clerk", 3 LONG TERM VIEW 23 (1995) (an excerpt from RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS REFORM* (1985)).

⁴⁰ See generally Phillip E. Johnson, *The Virtues of Alternatives*, 36 J. LEGAL EDUC. 138 (1986); John G. Kester, *The Law Clerk Explosion*, LITIG., Spring 1983, at 20 (explaining that the clerkships is not per se improper but that the over-reliance on clerks has become excessive); Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 3 LONG TERM VIEW 94 (1995) (stating that opinions that are written by law clerks and unedited by judges are inappropriate and lead to a lack of respect of judges); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Law Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. *1, *20 (2007) (explaining that citation to unpublished opinions should not be allowed, because an unpublished opinion was likely written by a law clerk and should not be precedent); J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1171 (1994) (stating that growth in the court system has meant more opinions are written by clerks).

clerk's legal education, claiming that a clerkship does not actually benefit the young lawyer.⁴¹

A second strand of the literature has focused on the clerk hiring process. Over the past two decades, the Judicial Conference, the body charged with determining the number of clerks that judges at each federal level may hire, has wavered between controlling the timing of clerkship hiring and allowing a free market to prevail. Criticism of the hiring process increased when the Judicial Conference allowed judges free rein in determining when to begin the hiring process,⁴² an environment described as "a frenzied 'Pamplona-like' atmosphere"⁴³ in which hiring decisions were based, at most, on only two semesters of law school grades and negligible extracurricular activities (like law review or moot court). Despite the unpopularity of a free market for clerkship hiring, each hiring plan and restriction introduced by the Judicial Conference has been similarly attacked,⁴⁴ and authors have moved beyond criticism and offered their own suggestions as to how best to perfect the hiring process.⁴⁵ While a few judges and legal commentators have expressed support for the free market clerkship hiring system, they

⁴¹ See Johnson, *supra* note 40, at 138 (arguing that law students should consider other post-graduate options that might be better learning and training experiences); William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129, 130 (1986) (arguing that clerkships do not serve the goals of student and are overvalued in the legal profession).

⁴² See generally Avery et al., *supra* note 3, at 793; Richard D. Cudahy, *Judge Clueless Hires a Law Clerk*, 60 OHIO ST. L.J. 207, 221–22 (1999); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765 (1993); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990); Marcia Chambers, *Clerk-Shopping Shows Judges at Their Worst*, NAT'L L.J., Apr. 4, 1988, at 13, 13–14.

⁴³ Ruggero J. Aldisert et al., *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 835 (2006).

⁴⁴ See Avery et al., *supra* note 3, at 806; Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 221–22 (1994); Richard D. Cudahy, *The Sweet Reasonableness of Federal Judges*, 58 OHIO ST. L.J. 519, 520–21 (1997); Richard A. Epstein, *Ending the Mad Scramble: An Experimental Matching Plan for Federal Clerkships*, 10 GREEN BAG 2D 37, 39 (2006); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 842 (1990); Mark W. Pletcher & Ludovic C. Ghesquiere, *In Restraint of Trade: The Judicial Law Clerk Hiring Plan*, 78 U. COLO. L. REV. 147, 182–83 (2007); Priest, *supra* note 3, at 123, 127–28; Carl Tobias, *Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919, 922 (1995).

⁴⁵ See generally Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129 (2000); Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749 (1995); Paul H. Edelman, *Law Clerks, Law Reviews & Some Modest Proposals*, 7 GREEN BAG 2D 335 (2004); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply To The Bad Apple*, 101 YALE L.J. 1097 (1992).

are in the minority.⁴⁶

The current clerkship hiring process is guided by a Judicial Conference policy that has been in place since 2003. Termed the “Law Clerk Hiring Plan,” the voluntary guideline specifies the dates when students can submit clerkship applications and the date when judges can give call-backs, interview, and make clerkship offers.⁴⁷ The new plan, though still in place, has not curbed discourse on the clerk hiring process. Instead, the new plan has spawned debate over its fairness and efficacy, and the likelihood that it will or should ultimately survive.⁴⁸ Of more relevance to our inquiry, none of the various hiring plans proposed for federal district court judges has dictated the selection criteria to be used by federal district court judges.

A third strand of the clerkship literature focuses on the types of duties and responsibilities given to clerks. Because of the confidential nature of chamber activity, as well as the varying ways in which different judges use their clerks, our knowledge of law clerk duties is somewhat limited. Nonetheless, a number of articles and books have delved into this subject.⁴⁹ Unfortunately, most scholarly works are limited to clerkship duties at either the Supreme Court or the United States Courts of Appeals. Given the different functions of these courts, it would be unwise to generalize about the duties of district court clerks from a description of appellate court duties. One duty that many judges and clerks acknowledge at all levels has been some drafting of judicial opinions or final orders, though the level of clerk participation varies widely over time as well as across chambers and different types of courts.⁵⁰

⁴⁶ See generally Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707 (1991); *Hiring Policy for Clerks Backed by U.S. Judges*, N.Y. L.J. 1 (1988).

⁴⁷ U.S. Ct. of Appeals, D.C. Circuit, *Federal Judges Law Clerk Hiring Plan*, <http://www.cadc.uscourts.gov/internet/lawclerk.nsf/Home?OpenForm> (last visited May 1 2008).

⁴⁸ See Christopher Avery et al., *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447, 451–52 (2007); Pletcher & Ghesquiere, *supra* note 38, at 191; Priest, *supra* note 3, at 125.

⁴⁹ See generally ALVIN B. RUBIN & LAURA B. BARTELL, LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES (Fed. Jud. Ctr. rev. ed. 1989); Ruggero J. Aldisert, *Duties of Law Clerks*, 26 VAND. L. REV. 1251 (1973); David Crump, *How Judges Use Their Law Clerks*, N.Y. ST. B.J., May 1986, at 43; Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 LONG TERM VIEW 77 (1995); Nicholas Johnson, *What DO Law Clerks Do?*, 22 TEX. B.J. 229 (1959); Gerald Lebovitz, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, N.Y. ST. B.J., July/Aug. 2004, at 34; Lipez, *supra* note 39, at 112; Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179 (1973).

⁵⁰ See Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell*

Beyond opinion writing, however, the literature is silent as to the job responsibilities of federal district court clerks.

In conclusion, there is little information in the existing literature regarding the selection criteria federal district court judges use in choosing their law clerks and the job duties given to clerks. Given the large number of cases heard by the federal district courts, we believe that a study of the rules and norms surrounding the “clerkship institution” is merited.

IV. SURVEY DATA AND ANALYSIS

Data on the hiring and employment practices of federal district court judges was collected through a written survey, a copy of which can be found in the Appendix. In the fall of 2006, a cover letter, the survey itself, and a self-addressed, stamped envelope were mailed to all active and senior federal district court judges (approximately 956 judges in all). In the six months following the mailing of the survey, we received 311 completed surveys (a response rate of approximately 33%). Because the survey was anonymous, we were unable to determine which federal district court judges responded to the survey and, accordingly, could not send out a second round of surveys to the 645 judges who did not respond to our first survey. All federal circuits were represented in the completed surveys (our highest response rates came from the Fifth, Ninth, and Eleventh Circuits). The respondents served an average of fifteen years on the bench and almost 19% had themselves previously served as federal law clerks.

Typically, federal district court judges follow the practice of hiring recent law school graduates who serve as clerks for one to two years before taking a job in private practice or academia (throughout the Paper we will refer to this type of clerk as the “short term” clerk). Virtually all of the judges in our survey reported hiring short term clerks. Forty-nine percent of the judges reported that they hired their clerks for one-year positions and 48% reported that they hired

Them, in JUDGING: A BOOK FOR STUDENT CLERKS (J. Sirico, Jr. ed., 2002); Thomas E. Baker, *Federal Reporter, Third Series: A Call for Opinions “Sufficient unto the Case,”* 5 SCRIBES J. LEGAL WRITING 142, 146 (1994-1995); Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1091 (2005); Crump, *supra* note 49, at 44; Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 96-98 (2006); Gerald Lebovits, *Judges' Clerks Play Varied Roles in the Opinion Drafting Process*, N.Y. ST. B.J., July/Aug. 2004, at 34, 35-36; George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1203 (1973).

their clerks for two-year positions. It has been suggested, however, that more and more federal judges—faced with the yearly burden of training new clerks—have moved toward adopting a permanent clerkship model, in which clerks are hired for longer terms of employment. We do not have the information on past hiring practices necessary to address fully the existence of such a trend, but our data suggests that if it exists, it has yet to have a major effect. While 199 of the respondents stated that they had hired permanent clerks (110 respondents reported that they had not), 80% of the respondents who employed permanent clerks had hired no more than two permanent clerks during their careers.

Regarding the selection of short term clerks, the survey provided a list of factors and asked the judges to rank what they considered to be the most important factors in the selection process. The results of that ranking are presented in Table 1 and generally confirm the importance of meritorious, performance-based criteria in the selection process. The most important factor considered by the judges in the selection of clerks is law school class rank. Over 85% of the judges indicated that they considered this factor in selecting clerks and 60% of those indicated that it was either the most important or second most important factor they considered. This is almost twice the percentage of judges ranking any other factor as first or second in importance. Seventy-six percent of the judges considered the quality of a candidate's law school in selecting clerks and 30% of those ranked it first or second in importance. Slightly over 70% of the judges considered service on a law review and roughly 20% considered it first or second in importance. Similar percentages were given to the quality of the writing sample submitted by a candidate. Clearly, doing well in law school and demonstrating good legal skills are important to the selection process.

The importance that the judges attribute to a candidate's personality, however, suggests that a strong legal resume may not be sufficient to assure selection. The candidate's personality rivals law school performance in terms of the percentage of judges who considered this factor (85.3%) and exceeds all factors, save law school performance, in terms of the percentage of judges ranking it first or second in importance for selection (32.4%) in importance of the status of the law school s/he attended. Given that an assessment of personality is likely to be determined at the interview stage, the importance of personality versus performance-based

criteria may be stage specific. Performance-based criteria like law school rank may be of great importance in selecting the subset of candidates to be interviewed. The personality of the candidates then comes to prominence after the interview in the final selection of clerks. Clearly, the fit of a candidate's personality with that of the judge and the chamber's work group is of significant importance to most judges. The respondents reported that the most important factor was law school class rank, followed by the quality of the law school attended, the personality of the applicant, law review experience, writing sample submitted, prior work experience, and letters of recommendation.

The fact that letters of recommendation were not ranked higher was unanticipated. Sixty-nine percent of the judges considered letters of recommendation in their selection process, but only 11.3% ranked letters as first or second in importance in their selection process. Some law school professors and former law clerks for judges undoubtedly can be an influential voice in promoting a candidate. What our results suggest is that in terms of a systematic effect, a letter of recommendation may help a candidate get noticed or might serve as a "tie-breaker" among equally matched high quality candidates for a clerkship, but performance-based factors and candidate personality are the most important factors controlling selection for most district court judges.

Of special interest to us was the role of political ideology in hiring decisions. Some political scientists have hypothesized that the political ideology of Supreme Court law clerks is relevant to the hiring process,⁵¹ and we included applicant ideology in the aforementioned list of factors. The respondents, however, ranked political ideology as the *least important* factor to the selection process. Besides providing the survey respondents with a set list of factors, we also asked the judges to list other selection criteria that they considered. Other factors mentioned by the respondents included prior work and volunteering experience (8%), and past, present, or future ties with the state or region in which the federal court sat (7%).

The rankings assigned to these selection factors changed significantly when the survey asked about professional rather than short-term clerks. When considering an applicant for a permanent

⁵¹ See, e.g., Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 870-72 (2001).

position, judges ranked prior work experience as the most important factor. Approximately 77% of the judges indicated that prior work experience was important and 33.8% ranked it as first or second in importance. Work experience was followed in importance by candidate personality, which was ranked by 78% of the judges as important and as first or second in importance by 23% of the judges. Only 20% of the judges ranked law school class rank as first or second in importance and only 8% considered law school quality as first or second in importance. Writing sample and law review membership were deemed as first or second in importance by even lower percentages of the judges. As with short term clerks, the judges indicated a clear disinterest with the political ideology of the applicants for permanent positions. When asked to list other factors relevant to the hiring of permanent clerks, judges pointed to the applicant's prior clerkship experience with either the respondent or a fellow judge. In short, in hiring permanent clerks, judges give greater weight to post-law school professional experience and the personality of the applicant than they do law school-based criteria that are so important in the selection of short term clerks.

One of the most important questions that we posed on the survey addressed the job duties assigned to the law clerks. The fact that Supreme Court law clerks have been given substantive job duties—including the drafting of opinions—has caused concern in the legal community and has triggered a long debate over influence. One of the main purposes of this study was to determine whether federal district court law clerks have been given similar duties; if such a finding was made, it should strongly suggest that lower court clerks merit further study and possible inclusion in formal models of judicial decision making. In our survey, we provided a specific list of job tasks and asked the judges to indicate which duties they assigned their clerks. While we expected that some judges would state that they assigned substantive job duties (such as opinion writing) to their clerks, we anticipated that there would be wide variation across chambers. Our expectations, however, were not supported by the data.

As shown in Table 2, 97% of the respondents stated that their law clerks review the relevant briefs and draft memoranda and orders regarding dispositive motions. In other words, 303 of the 311 respondents assigned their law clerks the responsibility of drafting the legal opinions which disposed of a civil or criminal dispute pending before the federal district court (such as a motion to dismiss

based on an illegal search and seizure or a motion for summary judgment). Moreover, 86% of the respondents added that their law clerks reviewed briefs related to non-dispositive motions and then drafted orders regarding the same. Examples of such non-dispositive motions might include motions in limine. Our survey questions did not ask the judges to state whether they provided their law clerks with an outline of the memoranda or order to be drafted, the controlling legal statutes and precedent, or the preferred outcome of the case, and we assume, in many instances, the law clerks are provided with just such specific instructions. Nevertheless, these findings regarding the delegation of opinion writing are unanticipated.

For the majority of the respondents, their law clerks had responsibilities in addition to drafting memoranda and orders regarding non-dispositive and dispositive motions. Approximately 72% of the judges reported that their law clerks assisted in the preparing of jury instructions, while 60% of the judges required their clerks to review “reports and recommendations” prepared by federal magistrate judges and prepare orders accepting or rejecting the same. Not surprisingly, almost all of the respondents stated that their clerks did legal research (99%), attended attorney conferences (68%), and attended court proceedings (89%). Our survey also asked the respondents to list other job duties that their clerks were routinely assigned. Some of the respondents indicated that law clerks were pressed into more mundane job duties, from assisting with chambers management (15%) to supervising externs/interns (6%) and assisting with preparing coffee and food (2%). Finally, a few judges (3%) indicated that they used their law clerks as sounding boards for legal arguments.

Given the intimate nature of the judge-clerk relationship, and the substantive job duties given to the law clerks, we were curious as to whether judges formally discussed rules of confidentiality with the clerks. Of the judges surveyed, 88% reported having such discussions with their clerks. The majority of the judges who formally discussed confidentiality rules indicated that they adopted the sweeping rule that “what goes on in the chambers stays in the chambers,” while a minority of the respondents (11%) stated that they followed boilerplate or model clerkship confidentiality rules. Occasionally, a breach of the rules of confidentiality led to law clerk firings. Of the 311 judges surveyed, approximately 20% indicated that they had terminated a law clerk’s employment. The judges

indicated that the firings stemmed from poor work ethic or work product (62% of all firings), personality conflict and incompatibility (5%), and breach of chamber confidentiality rules (5%).

One common reason often cited for pursuing a federal clerkship is the educational and mentoring opportunities it provides. Many former law clerks have pointed to the close bonds that form between judge and clerk, and we were interested to see whether federal court judges believed that mentoring was part of their job description. Approximately 71% of the respondents stated that it was “very important” for judges to serve as mentors, and another 12% of the respondents stated that it was “important.” Only 3% of the respondents believed that mentoring was not an important aspect of the law clerk-judge relationship. These findings support our expectations, namely, that judges view law clerks not only as important subordinates but as fledging lawyers to whom a duty was owed to mentor and educate.

Finally, we were interested in measuring judicial attitudes toward the federal judiciary’s reliance on law clerks. The majority of the respondents (81%) stated that federal district court judges were not overly dependent upon their clerks, although the respondents were much less willing to state whether their brethren in the federal appellate courts leaned too heavily on their clerks. Of the 311 judges who completed the survey, approximately one-half stated that two law clerks per chamber was the appropriate number given the judiciary’s current workload (although 44% of the judges stated that they believed each federal district court judge should be allocated three clerks per year).

V. CONCLUSION

While Supreme Court law clerks have received considerable attention from scholars and journalists, very little attention has been paid to law clerks serving in the United States District Courts. Relying on an original survey of federal district court judges, this study has taken an important first step in filling that gap in our knowledge. The results confirm the importance of performance-based factors, such as law school class ranking, in the selection process for short-term clerks. They also highlight the considerable importance of candidate personality in the selection process. The results also suggest a very qualified effect for letters of recommendation. Letters may get an otherwise well-qualified applicant noticed, but there appear to be few “clerk makers” among

the legal professoriate. The results also indicate that the weight of factors is markedly different for the selection of professional clerks. In this selection process the work experience since law school clearly takes precedent over performance in law school, while the personality of the candidate continues to be of prominent importance.

Our findings regarding the tasks performed by federal district court law clerks suggest that they are important actors and worthy of future study. If almost all law clerks employed by federal district court judges are drafting memoranda and orders that dispose of cases pending before the courts, then some institutional conditions already exist for the exercise of influence by these clerks. While undoubtedly many federal district court judges maintain a close watch on their young assistants, it is possible, given a lack of oversight, that the law clerks have an independent influence over how cases are resolved in the lower courts. For decades, legal scholars have debated whether Supreme Court law clerks merit the title of "junior justices." Based on the original data presented in this Paper, a new dialogue should begin over whether federal district court law clerks warrant the label "junior judges."

2008]

Inside Judicial Chambers

639

APPENDIX A

Table 1: Factors Considered by Judges in Selection of District Court Law Clerks

	Percent of Respondents Ranking the Factor	Percent of Respondents Ranking the Factor as 1 or 2
Law school class rank	85.3	60.2
Personality	85.3	32.4
Law Review	72.2	21.2
Work experience	72.9	14.8
Writing sample	73.9	18.3
Quality of law school attended	76.3	30.6
Quality of undergraduate school attended	48.2	2.9
Participation in moot court	30.1	1.6
Letters of recommendation	69.2	11.3
Applicant's political ideology	15.1	.3
N=299		

Table 2: Duties Assigned to Law Clerks

	Frequency of Task Mentioned (valid n=311)	Percent Mentioning Task
13A – legal research	309	99.4
13B – review non dispositive motions	265	85.2
13C – review briefs filed with non-dispositive motions	270	86.8
13D – draft orders regarding non dispositive motions	268	86.2
13E – review presentence reports	54	17.4
13F – prepare sentencing note books	26	8.4
13G – attend attorney conference	210	67.5
13H – review magistrate report and recommendation	219	70.4
13I – prepare jury instructions	225	72.3
13J – maintain chamber files	93	29.9
13K – review dispositive motions	300	96.5
13L – review briefs filed with dispositive motions	303	97.4
13M – draft memoranda and orders for dispositive motions	303	97.4
13N – prepare sentencing notebooks or scripts	37	11.9
13O – prepare trial notebooks	85	27.3
13P – attend court hearings/trials	276	88.7
13Q – draft memorandum and order regarding magistrate R&R	187	60.1
13R – prepare non legal materials, such as speeches.	45	14.5

APPENDIX B: SURVEY

Survey on Law Clerks Selection and Utilization Practices

Please note: the survey questions below distinguish between two different types of law clerks: (1) the “short-term” law clerk, who has just graduated from law school and plans on clerking for no more than 1-2 years prior to taking a job in private practice or academia, and (2) the “professional” law clerk, who often has prior legal experience and plans to be a long-term or permanent part of your staff.

1. Have you ever hired recently graduated law school students to serve as short-term law clerks (as opposed to professional clerks)?
_____Yes _____No

(If your answer is no, then please skip to Question No. 6)

2. If your answer to Question No. 1 is yes, then please rank the following factors by their importance to your hiring decision. Rank the most important factor “1”, the second most important factor “2”, etc. and leave blank those factors that you do not consider.
- _____ Law school class rank
 - _____ Quality of law school attended
 - _____ Personality
 - _____ Quality of undergraduate institution
 - _____ Law Review
 - _____ Participation in moot court
 - _____ Work experience
 - _____ Letters of recommendation
 - _____ Writing sample
 - _____ Applicant’s political ideology
3. Are there additional factors that you consider that are not listed above? If yes, then please list below and indicate their importance to your decision:
-

4. Do you typically hire recently graduated law school students for a one or two year clerkship?

____ One year ____ Two year ____ Other

5. Regarding your answer to Question No. 4, what factors influence the length of clerkship that you offer?

6. Have you also hired "professional" law clerks (*namely, attorneys who consider the position to be a long-term or permanent employment position*) to work in your chambers?

____ Yes ____ No

7. If your answer to Question No. 6 is yes, then please rank the following factors by their importance to your hiring decision. Rank the most important factor "1", the second most important factor "2", etc. and leave blank those factors that you do not consider.

____ Law school class rank
____ Quality of law school attended
____ Personality
____ Quality of undergraduate institution
____ Law Review
____ Participation in moot court
____ Work experience
____ Letters of recommendation
____ Writing sample
____ Applicant's political ideology

8. Are there additional factors that you consider in selecting professional clerks that are not listed above? If yes, then please list below and indicate their importance to your decision:

2008]

Inside Judicial Chambers

643

9. If you have hired both recently-graduated, short-term law clerks and professional law clerks, then which type of clerk do you prefer to hire and why?

10. During your tenure on the bench, approximately how many short-term law clerks versus professional law clerks have you hired? (indicate the number of each below)

____ Short-term clerks ____ Professional clerks

11. At the start of the clerkship, do you have a formal discussion with your law clerks as to their duty of confidentiality?

____ Yes ____ No

12. If your answer to Question No. 11 is yes, then what are the basic requirements of that duty of confidentiality?

13. Which of the following job duties do your law clerks perform?

Check as many as apply.

- ____ Legal research
- ____ Maintain chamber files
- ____ Review non-dispositive motions
- ____ Review dispositive motions
- ____ Review briefs filed with non-dispositive motions
- ____ Review briefs filed with dispositive motions
- ____ Drafts orders regarding for non-dispositive motions
- ____ Draft memoranda and orders for dispositive motions
- ____ Review pre-sentence reports
- ____ Prepare sentencing notebooks or “scripts”
- ____ Prepare sentencing notebooks
- ____ Prepare trial notebooks
- ____ Attend attorney conferences
- ____ Attend court hearings/trials
- ____ Review magistrate report and recommendations

regarding magistrate report

☐ Draft memoranda and orders

☐ Prepare jury instructions

☐ Prepare non-legal materials, such as speeches

14. Are there other law clerk job duties that are not listed above?
If yes, then please list below:

15. If you have employed both short-term and professional clerks, then do their job duties vary?

☐ Yes

☐ No

☐ Not applicable

16. Have you ever fired a law clerk?

☐ Yes

☐ No

17. If your answer to Question No. 16 is yes, then please explain why.

18. Have your selection and employment practices changed over time?

☐ Yes

☐ No

19. If your answer to Question No. 18 is yes, then how have your employment practices changed over time?

20. How important do you think it is for judges to serve as mentors to their law clerks?

21. Some have suggested that federal district court judges are

2008]

Inside Judicial Chambers

645

too dependent upon their law clerks. Do you agree with that assessment?

☐ Yes ☐ No ☐ Don't know

22. Some have suggested that federal appeals court judges are too dependent upon their law clerks. Do you agree with that assessment?

☐ Yes ☐ No ☐ Don't know

23. Some have suggested that United States Supreme Court justices are too dependent upon their law clerks. Do you agree with that assessment?

☐ Yes ☐ No ☐ Don't know

24. Given the current workload of the federal judiciary, how many law clerks do you believe that federal district court judges should be allocated per year?

☐ 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6

25. In what federal circuit do you sit?

26. How many years have you been on the federal bench?

27. Did you ever work as a law clerk for a federal judge?

☐ Yes ☐ No

28. Would you be willing to discuss your clerkship hiring and utilization practices in an on-the-record, follow-up telephone conversation? *(note that your answers to the survey questions above will remain confidential even if you provide contact information)*

☐ Yes ☐ No

29. If your answer to Question No. 28 is yes, then please provide contact information below:

Thank you for completing this survey!!!