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

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# SURGEONS OR SCRIBES? THE ROLE OF UNITED STATES COURT OF APPEALS LAW CLERKS IN “APPELLATE TRIAGE”

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## I. INTRODUCTION

One of the most unique aspects of the *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks* Symposium held at Marquette University Law School in April of 2014 was that the panelists did not focus their comments solely on United States Supreme Court law clerks — a common practice found in the current literature on law clerks.<sup>1</sup> Instead, symposium members discussed issues of selection,

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1. The number of books and essays on federal district and appeals court law clerks is greatly overshadowed by the recent spate of research on Supreme Court law clerks. Works on lower federal court clerks include a small number of books and articles. *See generally* PETER BARNETT, AM. JUDICATURE SOC’Y, LAW CLERKS IN THE UNITED STATES COURTS AND STATE APPELLATE COURTS (1973); JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS (1980); ROBERT J. THOMAS, CONFESSIONS OF A FEDERAL JUDGE’S LAW CLERK: A PEEK INTO THE CHAMBERS OF

utilization, and influence regarding all types of law clerks—from lower federal court clerks and state court clerks to clerks on the Canadian Supreme Court.<sup>2</sup> This conversation included a trio of judges—

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UNITED STATES DISTRICT JUDGE GEORGE BELL TIMMERMAN (2011); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125 (1973); Arthur M. Boley, *Pretrial Motions in a U.S. District Court: The Role of the Law Clerk*, 74 JUDICATURE 44 (1990); Kenneth C. Broodo & Douglas D. Holofits, *Practice in the Federal District Courts from the Law Clerk's Perspective: The Rules Behind the Rules*, 43 BAYLOR L. REV. 333 (1991); John G. Kester, *The Law Clerk Explosion*, LITIG., Spring 1983, at 20; J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321 (1988); Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385 (1990); John Bilyeu Oakley & Robert S. Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286 (1979); Todd C. Peppers, Micheal W. Giles & Bridget Tainer-Parkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623 (2008); Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007); Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIRCUIT REV. 19 (2008); Stephen L. Wasby, "Why Clerk? What Did I Get Out of It?," 56 J. LEGAL EDUC. 411 (2006); Gregory S. Fisher, *So You Are, Will Be, (or Want to Be) a Law Clerk: Some Observations*, ALASKA B. RAG, May–June 2002, at 1, 8. This list excludes tribute or in memoriam pieces written by former clerks. Many recent articles on federal court clerks involve various efforts by the federal courts to come up with a law clerk hiring plan. See, e.g., Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 132–38, 150–54 (2000); Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835, 836–38 (2006); Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, *The New Market for Federal Judicial Law Clerks*, 74 U. CHI. L. REV. 447 (2007); Edward R. Becker, Stephen G. Breyer & Guido Calabresi, *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208–21 (1994); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1719–24 (1991); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 765, 885–88 (1993); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1097–99 (1992); Mark W. Pletcher & Ludovic C. Ghesquiere, *In Restraint of Trade: The Judicial Law Clerk Hiring Plan*, 78 U. COLO. L. REV. 147, 155–62 (2007); George L. Priest, *Reexamining the Market for Judicial Clerks and Other Assortative Matching Markets*, 22 YALE J. ON REG. 123, 124–26, 199–203 (2005); Carl Tobias, *Commentary, Salvaging the 2013 Federal Law Clerk Hiring Season*, 91 WASH. U. L. REV. 243, 244–45 (2013); Carl Tobias, *Stuck Inside the Heartland with Those Coastline Clerking Blues Again*, 1995 WIS. L. REV. 919, 920–23; Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990). Finally, in 1995, *Long Term View* published a collection of articles on federal law clerks. Symposium, *Law Clerks: The Transformation of the Judiciary*, 3 LONG TERM VIEW (1995).

2. See, e.g., Panel Discussion, *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441 (2014); David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 165–72 (2014); John J. Szmer, Erin B. Kaheny & Robert K. Christensen, *Taking a Dip in the Supreme Court Clerk Pool: Gender-Based Discrepancies in Clerk Selection*, 98 MARQ. L. REV. 261, 270–82 (2014); Stephen L. Wasby, *The World of Law Clerks: Tasks, Utilization, Reliance, and Influence*, 98 MARQ. L. REV. 111, 121–29 (2014).

Minnesota Supreme Court Justice David Stras; Judge Diane Sykes, U.S. Court of Appeals for the Seventh Circuit; and Judge James A. Wynn, Jr., U.S. Court of Appeals for the Fourth Circuit—who shared with the audience their own clerkship hiring and employment practices.<sup>3</sup>

In keeping with the broader scope of the Symposium, we offer the first comprehensive examination of the criteria used by United States courts of appeals judges to select their law clerks from the hundreds of applications that they receive each year as well as of the job duties assigned to their law clerks.<sup>4</sup> The incentives for courts of appeals judges to hire qualified law clerks have never been higher. It has been thoroughly documented that the work of the federal courts of appeals has grown at a steadily increasing, if not alarming, rate.<sup>5</sup> Professors Richman and Reynolds note that between 1960 and 2010 “the circuit courts’ caseload . . . increased by 1436 percent, a more than fourteenfold increase.”<sup>6</sup> Given the fact that the number of active federal courts of appeals judgeships has barely doubled in the same time period, today a court of appeals judge faces a caseload 600 percent larger than his predecessors in 1960.<sup>7</sup>

Richman and Reynolds write that federal courts of appeals judges have come up with a variety of different approaches (which they call “Appellate Triage”) to attack their bulging caseloads, from writing fewer published opinions to reducing the number of cases scheduled for oral argument.<sup>8</sup> Of relevance to this Essay, the authors observe that federal courts of appeals judges have also turned to an increasing number of law clerks (or “para-judges”); while courts of appeals judges in the 1940s and 1950s could only hire a single law clerk per chambers, the number rose to two in 1969 and three in 1979.<sup>9</sup> At present, courts of appeals judges are authorized to hire four law clerks per chambers (if they forgo a second secretarial position),<sup>10</sup> and these staff assistants are

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3. Panel Discussion, *supra* note 2.

4. *See, e.g.*, Aldisert et al., *supra* note 1, at 837 (discussing large number of clerkship applications).

5. The definitive work on this topic is WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* (2013).

6. *Id.* at 3 (emphasis omitted).

7. *Id.* at 5–6.

8. *Id.* at 6–7.

9. *Id.* at 97–98.

10. *Id.* at 97–98.

supplemented by approximately 500 staff attorneys spread across the federal appellate courts.<sup>11</sup> Richman and Reynolds lament the fact that “[t]here is little quantitative evidence on what the clerks do,”<sup>12</sup> a hole in the judicial institutions literature that we intend to fill.

Using original survey data, we explore how federal courts of appeals judges select and use their law clerks—a question that we answered in an earlier article about federal district court clerks.<sup>13</sup> As with that first article, we do not intend to tackle such normative issues as whether courts of appeals law clerks possess too much influence over the judicial process or whether the selection criteria used by these judges is appropriate. What we will present, however, is descriptive data on the criteria that courts of appeals judges use to pick their law clerks as well as the tasks assigned to those clerks. We believe that our findings, namely, that courts of appeals judges delegate substantial job duties to their clerks, should serve as the springboard for a future debate over the wisdom of such delegation.

## II. SURVEY DATA AND ANALYSIS

In the summer of 2013, a cover letter, a survey, and a self-addressed, stamped envelope were mailed to all active and senior courts of appeals judges (approximately 257 judges) regarding their law clerk selection and utilization practices.<sup>14</sup> In all, fifty-nine completed surveys were returned for a response rate of approximately twenty-three percent. Given the anonymous nature of the survey, follow-up surveys could not be sent to those judges who did not complete the original survey.

Historically, the norm has been for courts of appeals judges to select recently graduated law students to work in their chambers as law clerks for a limited period of time—typically one to two years.<sup>15</sup> These “short term” clerks use the clerkship for training and experience as well as a springboard to positions in the academy, government, and private practice.<sup>16</sup> Of the judges surveyed in this project, ninety-eight percent stated that they had hired law clerks for a one-year term. While it has been suggested that more federal judges are reducing the costs of

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11. *Id.* at 112.

12. *Id.* at 99.

13. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 625, 637–38.

14. *See infra* Appendix.

15. *See* Norris, *supra* note 1, at 765.

16. *See id.* at 766.

training new clerks by turning to long-term or “permanent” clerks,<sup>17</sup> we found little evidence to support such claims. While forty percent of the courts of appeals judges responding to our survey stated that they had hired permanent clerks, the majority of those (65%) had only hired one, and only one judge had hired as many as four permanent clerks.

As for the criteria used to select short-term clerks, the survey offered the respondents a list of factors and requested that the judges rank what they thought were the most relevant in selecting their clerks. These factors include the following: law school class rank, quality of law school attended, quality of undergraduate institution attended, law review membership, participation in moot court, work experience, letters of recommendation, writing sample, applicant’s political ideology, and applicant’s personality.<sup>18</sup> The results of that ranking are found in Table 1.<sup>19</sup>

The data collected from the respondents reflect the value that the judges place on “performance based” selection criteria. Not surprisingly, law school class rank is the most important factor in the selection process. Over ninety percent of the respondents stated that they considered law school rank, with sixty-six percent of those respondents reporting that it was either the most important or second most important factor that they took into account.

Placing an applicant’s class rank in the context of the quality of the law school attended was an important consideration for the respondents. Ninety-three percent of the judges reported that they took into account the quality of a candidate’s law school in selecting clerks, and fifty-eight percent of those judges stated that they ranked it first or second in importance. Given the fact that the majority of courts of appeals judges rely on their clerks to draft opinions,<sup>20</sup> it is logical to assume that these judges also place a premium on law clerks with research and writing skills — this assumption is borne out by the data. Over eighty percent of the respondents stated that they look for applicants with law review membership, and roughly thirty-six percent consider it first or second in importance. Moreover, approximately seventy-four percent of the judges responded that they weigh the quality of the writing sample — with seventeen percent ranking it as first or second in importance. In

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17. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 633.

18. *See infra* Appendix, Question 2.

19. *See infra* Table 1.

20. *See infra* note 35 and accompanying text.

short, academic success at a good law school, combined with law review membership (our “performance factors”), rank amongst the most important selection criteria for courts of appeals judges. These findings mirror the responses given by federal district court judges in our earlier research.<sup>21</sup>

Court of Appeals Judge Patricia M. Wald has written that

[t]he judge-clerk relationship is the most intense and mutually dependent one [she] know[s] of outside of marriage, parenthood, or a love affair. . . . Judges talk about it being a “good” or “bad” year, not just in terms of results they have achieved, or in the importance of matters before the court, but also in terms of teamwork and the dynamics of work within their chambers.<sup>22</sup>

Her observation is borne out in the value that judges place on the applicant’s personality. Our findings indicate that candidates are not selected merely on their academic achievements in law school, but that considerable weight is also given to an applicant’s personality. Eighty-two percent of the respondents reported that a candidate’s personality is relevant to their decision-making process, with twenty-five percent of the judges ranking it as first or second in importance; in other words, the respondents consider it almost as important as law review membership.<sup>23</sup> We found similar emphasis placed on personality in our earlier work on the selection criteria used by federal district court judges.<sup>24</sup>

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

When we surveyed federal district court judges, we were surprised to

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21. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 633–34.

22. Wald, *supra* note 1, at 153.

23. *See infra* Table 1.

24. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 633–34.

find that more emphasis was not placed on the letters of recommendation written on behalf of clerkship candidates. While sixty-nine percent of the judges in that early survey reported that they considered letters of recommendation, only eleven percent of them ranked the letters as the first or second factor of importance.<sup>25</sup> Thus, we were not startled to learn that courts of appeals judges placed similar emphasis on such letters. Seventy percent of the respondents indicated that they considered letters of recommendation when picking their clerks, but, like their lower court brethren, they did not place considerable weight on the letters (only seventeen percent of those appellate court judges who considered letters ranked them as first or second in importance).<sup>26</sup> These findings should not be interpreted as indicating that clerkship candidates should not solicit well-written letters of recommendation from law school faculty members, but rather that candidates should appreciate that the letter of recommendation is of secondary importance in the selection process when compared to performance factors and chambers fit.

In recent years, it has been argued that a clerkship applicant's ideology is an important factor considered by Supreme Court Justices, and, therefore, also by the feeder court judges who are supplying qualified applicants to the Supreme Court.<sup>27</sup> While we did not find political ideology to be an important factor in selecting district court law clerks,<sup>28</sup> we included ideology in our list of selection criteria contained in the present survey, given the role that some courts of appeals judges play in supplying law clerks to the Supreme Court. The courts of appeals judges who responded to the survey, however, stated that a candidate's political ideology was the least important factor in picking law clerks.<sup>29</sup> This finding ran counter to our expectations, and led us to speculate about the level of judicial candor reflected in our completed surveys. Simply put, we believe that there is too much ideological matching between courts of appeals judges and their law clerks to be the result of chance or applicants applying to like-minded jurists.

Only twenty-three of the respondents reported that they hired

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25. *Id.* at 634.

26. *See infra* Table 1.

27. *See* Corey Ditslear & Lawrence Baum, Research Note, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POL. 869, 882–83 (2001); Adam Liptak, *A Sign of Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sept. 7, 2010, at A1.

28. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 634.

29. *See infra* Table 1.



professional clerks; thus, any information gathered from the surveys regarding variations in selection criteria for long-term clerks (as opposed to short-term clerks) must be treated with caution. Of those courts of appeals judges who hired professional clerks, the greatest emphasis was placed on prior work experience (fifty-seven percent of respondents ranked work experience as important, with almost half of those respondents ranking it as first or second in importance), the applicant's writing sample, and personality. Performance factors carried less weight for the judges selecting professional clerks; law school rank and law review experience were rated as first or second in importance by seventeen and thirteen percent of the judges, respectively. There was no indication that political ideology played any role in the selection of long-term clerks.

Given the high work load in the courts of appeals and the increasing number of appellate law clerks,<sup>30</sup> we were very curious to see what job duties are delegated to law clerks. Modern Supreme Court law clerks are involved in all aspects of processing the business of the High Court, from preparing memoranda regarding petitions for certiorari to drafting bench memos and opinions,<sup>31</sup> and our previous survey of federal district court judges confirmed that they relied heavily on their clerks.<sup>32</sup> Accordingly, we wanted to see what delegation practices were followed by court of appeals judges. After consulting with several former courts of appeals law clerks regarding their clerkships, we crafted a survey question that listed a wide range of possible job duties and asked the respondents to state which duties were delegated to their law clerks. The duties included the following: performing legal research, maintaining chamber files, preparing bench memoranda (memos written prior to oral argument), drafting opinions, meeting with the judge and fellow law clerks to discuss opinion drafting, reviewing drafts prepared by other law clerks or chambers, and preparing non-legal materials (such as helping write speeches).<sup>33</sup>

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30. See *supra* notes 5–10 and accompanying text.

31. See generally IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES (Todd C. Peppers & Artemus Ward eds., 2012) [hereinafter IN CHAMBERS]; TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006).

32. Peppers, Giles & Tainer-Parkins, *supra* note 1, at 635–36.

33. See *infra* Appendix, Question 13.

Our expectation that appellate court clerks would be involved in all aspects of chambers work was supported by the data. Almost all respondents stated they required clerks to prepare opinion drafts, and that they individually met with the clerks regarding their specific opinion assignments.<sup>34</sup> Less than half of the judges, however, reported that they met with their entire staff of law clerks to discuss a specific opinion draft.

The law clerk's role in opinion writing extends to (1) opinions drafted by other law clerks within the judge's chambers, and (2) opinions circulated by other chambers.<sup>35</sup> Eighty-five percent of the judges reported that they required their clerks to review the opinions drafted in other chambers, while sixty-nine percent stated that they asked their clerks to review opinions drafted within their own chambers. Thus, as at the Supreme Court, courts of appeals law clerks have taken on a large role in the drafting and vetting of court opinions. Given these findings, those who study and model the decision making process in the federal appellate courts need to consider the role and impact of law clerk involvement in the resolution of appeals.

We were also curious about judicial attitudes toward the use of law clerks, and we asked the respondents (1) if they agreed with the statement that "federal appeals court judges are too dependent upon their law clerks," and (2) how many law clerks the respondents believed should be allocated to courts of appeals judges.<sup>36</sup> Of the forty-five respondents who answered the first question, only seventeen percent agreed with the statement. The majority of the judges also stated that they thought the current number of clerks—four—was adequate given the present workload of the courts. If there is concern about judges delegating too much responsibility to law clerks, it does not appear to be shared by our respondents.

In the last two decades, a debate over the duty of confidentiality owed by law clerks has emerged<sup>37</sup>—sparked, in part, by a book, written

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34. See *infra* Table 2.

35. See *infra* Table 2.

36. See *infra* Appendix, Questions 23 & 24.

37. See, e.g., David Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863, 874–76 (2005); Erwin Chemerinsky, *Opening Closed Chambers*, Current Development, 108 YALE L.J. 1087, 1090–1104 (1999) (book review); Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 211–14 (2000) (book review); Alex Kozinski, *Conduct Unbecoming*, 108 YALE

by a former law clerk to Supreme Court Justice Harry Blackmun, which arguably violated the Court's confidentiality rules.<sup>38</sup> While an ethical code of conduct for judicial employees, including law clerks for federal district court and courts of appeals judges, has been adopted by the Judicial Conference of the United States,<sup>39</sup> and this code of conduct includes a discussion of the duty of confidentiality,<sup>40</sup> we were still interested to see if courts of appeals judges met with their clerks to discuss the duty of confidentiality. Of the judges surveyed, eighty-five percent stated that they have a "formal meeting" with their law clerks to go over rules of confidentiality. The majority of the courts of appeals judges (fifty percent) who discuss confidentiality rules tell their law clerks that *everything* that takes place in chambers is confidential. Twenty-one percent reported adopting a less sweeping standard, namely, "don't discuss cases outside of chambers," while eighteen percent of the respondents simply indicated that they followed "standard" or "model" rules regarding law clerk confidentiality.

Social scientists who study decision making at the United States Supreme Court often discuss the "clerk network," namely, the discussions that take place amongst law clerks from different chambers, which allows the justices to gather intelligence about the attitudes of their fellow justices and thereby more efficiently form coalitions.<sup>41</sup> Of

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L.J. 835, 836-49 (1999) (book review); Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430 (1999) (book review).

38. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).

39. U.S. COURTS, *GUIDE TO JUDICIARY POLICY*, at ch.3 (2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02A-Ch03.pdf?page=1>, archived at <http://perma.cc/6XHZ-LY2R>.

40. Canon 3(D) states:

A judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee's direction and control. This proscription does not extend to public statements made in the course of official duties or to the explanation of court procedures. A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties, nor should a judicial employee employ such information for personal gain. A former judicial employee should observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

*Id.*

41. WARD & WEIDEN, *supra* note 31, at 159-70. For further discussion of the Supreme Court law clerk, see Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and His Clerks*, in *IN CHAMBERS*, *supra* note 31, at 326, 334; Todd C. Peppers & Beth See Driver,

course, a clerk network at the court of appeals level is more difficult for the simple fact that the three judges involved in a specific case—and their law clerks—could be in different cities, courthouses, and states. Nevertheless, if the majority of courts of appeals judges have truly adopted the rule that their clerks cannot discuss pending appeals outside of individual chambers, it calls into question whether clerk networks efficiently operate at the court of appeals level.

Law clerk firings, while rare, have been known to occur in the history of the Supreme Court,<sup>42</sup> and we were curious if courts of appeals judges had fired clerks and, if so, why. Of the fifty-nine judges surveyed, approximately fourteen percent indicated that they had terminated a law clerk's employment. The judges indicated that the firings stemmed from "poor work ethic/poor work product" (thirty-eight percent of all firings) as well as personality conflict and incompatibility (thirteen percent). None of the responding judges, however, indicated that a clerk had been dismissed due to a violation of their rules of confidentiality.

### III. CONCLUSION

While the lucky few who have clerked at the United States Supreme Court have caught the attention of legal scholars and social scientists, less time has been spent studying courts of appeals law clerks.<sup>43</sup> We hope that the empirical data presented in this Essay will convince judicial scholars that courts of appeals law clerks are worthy of investigation. Like their Supreme Court peers, courts of appeals law clerks are assigned a wide range of substantive tasks—including the drafting of appellate opinions. Yet courts of appeals law clerks are involved in thousands of more cases than Supreme Court law clerks, and

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*Half Clerk, Half Son: Justice Felix Frankfurter and His Law Clerks*, in IN CHAMBERS, *supra* note 31, at 141, 151–52; Artemus Ward, *Making Work for Idle Hands: William H. Rehnquist and His Law Clerks*, in IN CHAMBERS, *supra* note 31, at 350, 369–71.

42. Justice James Clark McReynolds, however, accounts for the vast majority of known law clerk firings, which had to do less with the quality of his law clerks and more to do with Justice McReynolds's nasty disposition. See PEPPERS, *supra* note 31, at 116; see generally THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT LAW CLERK IN FDR'S WASHINGTON, at xix–xxi (Dennis J. Hutchinson & David J. Garrow eds., 2002). While Justice William O. Douglas also fired a number of clerks, he never followed through on the firings and the clerks—usually shaken—would remain in chambers. Bruce Allen Murphy, *Fifty-Two Weeks of Boot Camp*, in IN CHAMBERS, *supra* note 31, at 179, 187–89.

43. See *supra* note 1 and accompanying text.

the courts of appeals are the courts of final resort for the vast majority of those cases.<sup>44</sup> While there is no evidence that courts of appeals judges have delegated decision-making authority to their clerks in terms of the winners and losers of appeals, substantial influence lies in how these law clerks shape legal doctrine and craft judicial opinions. In other words, they are essential players in the appellate triage performed in courts of appeals across the country and, therefore, must be incorporated in future studies on appellate court decision making.

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44. For example, in 2012 the Supreme Court had 8,806 cases on its docket and issued signed opinions in 76 cases. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2013 ANNUAL REPORT OF THE DIRECTOR, at tbl.A-1, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf>, archived at <http://perma.cc/M4U6-MX9S>. From September 30, 2012 to September 30, 2013, the U.S. Courts of Appeals had over 43,000 pending cases and had 37,820 terminations on the merits of the case. ADMIN. OFFICE OF THE U.S. COURTS, *supra*, at tbl.B-1, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B01Sep13.pdf>, archived at <http://perma.cc/5H7V-MB26>.

**Table 1**  
**Factors Considered by Courts of Appeals Judges in Selecting Law Clerks**

	<b>Percent of Respondents Ranking the Factor</b>	<b>Percent of Respondents Ranking the Factor as 1 or 2</b>
Law School Class Rank	91.2	66.1
Personality	82.5	25.4
Law Review	82.5	35.6
Work Experience	66.7	13.6
Writing Sample	73.7	17.0
Quality of Law School Attended	93.0	57.6
Quality of Undergraduate School Attended	43.9	5.1
Participation in Moot Court	31.6	1.7
Letters of Recommendation	70.2	17.0
Applicant's Political Ideology	15.8	1.7
N=	57	59

**Table 2**  
**Duties Assigned to Courts of Appeals Law Clerks**

	<b>Frequency of Task Mentioned (valid n=59)</b>	<b>Percent Mentioning Task</b>
13A – legal research	58	98.3
13B – prepare bench memos	52	88.1
13C – meet with judge to discuss drafting opinion	55	93.2
13D – review drafts prepared by other in-chamber clerks	41	69.5
13E – meet with clerks to discuss case	48	81.4
13F – prepare non-legal materials, like speeches	17	29.3
13G – maintain chamber files	10	17.0
13H – draft opinions	56	94.9
13I – meet with judge & other clerks to discuss drafting opinion	26	44.8
13J – review draft opinions prepared by other chambers	50	84.8
13K – meet with clerks to discuss drafting/editing opinion	27	45.8
13L – prepare questions for oral argument	26	44.1

## APPENDIX

Survey on Law Clerks Selection and Utilization Practices  
in the United States Courts of Appeals

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:

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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?

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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:

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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?

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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?

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13. Which of the following job duties do your law clerks perform? **Check as many as apply.**

- |  |   |
|--|---|
| <input type="checkbox"/> Legal research                                | <input type="checkbox"/> Maintain chamber files   |
| <input type="checkbox"/> Prepare bench memos                           | <input type="checkbox"/> Draft opinions   |
| <input type="checkbox"/> Meet with you to discuss drafting of opinion  | <input type="checkbox"/> Meet with you <b>AND</b> fellow clerks to discussing drafting of opinion |
| <input type="checkbox"/> Review drafts prepared by your other clerks   | <input type="checkbox"/> Review drafts prepared by other chambers                                 |
| <input type="checkbox"/> Meet with clerks to discuss cases             | <input type="checkbox"/> Meet with all clerks to discuss opinion drafting/editing                 |
| <input type="checkbox"/> Prepare non-legal materials, such as speeches | <input type="checkbox"/> Have clerks prepare questions for oral argument                          |

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

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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.

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

\_\_\_\_\_ Yes    \_\_\_\_\_ No

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

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20. Do you ever rely upon staff attorneys (attorneys located in a central office and available to all judges)?

\_\_\_\_\_ Yes    \_\_\_\_\_ No

21. If your answer to question No. 20 is yes, then under what circumstances do you use staff attorneys rather than your own law clerks?

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

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23. 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
24. Given the current workload of the federal judiciary, how many law clerks do you believe that federal court of appeals judges should be allocated per year?
- 0     1     2     3     4     5     6
25. How many years have you been on the federal bench?
- 
26. Did you ever work as a law clerk for a federal judge?
- Yes     No
27. Do your law clerks hold routine reunions?
- Yes     No