

# Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward

Mark C. Miller

- PEPPERS, TODD C., and ARTEMUS WARD, eds. 2012. *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*. Charlottesville: University of Virginia Press. Pp. 472. \$34.95 cloth; \$22.50 paper; \$22.50 e-book.
- PEPPERS, TODD C. 2006. *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. Stanford, CA: Stanford University Press. Pp. 328. \$24.95 paper.
- WARD, ARTEMUS, and DAVID L. WEIDEN. 2006. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. New York: New York University Press. Pp. 338. \$70.00 cloth; \$25.00 paper.

*There has been a fair amount of recent scholarly attention to the role and influence of law clerks at the Supreme Court of the United States. This new wave of systematic research began when Todd C. Peppers (2006) published Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk at almost exactly the same time as Artemus Ward and David L. Weiden's (2006) Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court. Then Peppers and Ward (2012) teamed up to produce an edited volume, In Chambers: Stories of Supreme Court Law Clerks and Their Justices, in which each chapter focuses on the relationship of a specific justice and his or her clerks. Together these three works raise interesting questions about how one properly studies the role and power of law clerks at the US Supreme Court. How does one measure the influence of these temporary assistants to the justices? Should sociolegal scholars trust them to help us understand the approaches and behavior of the justices today or in the past or do they have an unrealistic and inflated view of their own contributions? This essay offers a broad overview of what scholars and journalists currently know about the role of clerks at the Supreme Court.*

## INTRODUCTION

There has been a fair amount of recent scholarly attention to the role and influence of law clerks at the Supreme Court of the United States. This new wave of systematic research began when Todd C. Peppers (2006) published *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* at almost exactly the same time as Artemus Ward and David L. Weiden's (2006) *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. Then Peppers and Ward (2012) teamed up to

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Mark C. Miller is a Professor of Political Science and Director of the Law & Society Program at Clark University. In 1999–2000 he served as the Supreme Court Judicial Fellow in the office of the Administrative Assistant to the Chief Justice.

produce an edited volume, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, in which each chapter focuses on the relationship of a specific justice and his or her clerks. Historically, it has been very difficult to gain accurate information about or from law clerks at the Supreme Court, partly because the clerks sign confidentiality agreements, which remain in force after they leave the Court. Generally, the justices are also unwilling to discuss the role of their clerks. However, these three works indicate that former clerks are becoming less reluctant to talk about their experiences.

Together these works raise interesting questions about how one properly studies the role and power of law clerks at the US Supreme Court. How does one measure the influence of these temporary assistants to the justices? Should sociolegal scholars trust them to help us understand the approaches and behavior of the justices today or in the past or do they have an unrealistic and inflated view of their own contributions? Given confidentiality issues with the former clerks, are there certain types of clerks who refuse to cooperate with scholars, causing researchers to miss the full picture? This essay explores these important issues, among others.

The main focus of this essay is on the three books mentioned above, but I also examine other scholarly works dealing with Supreme Court clerks, some of which examine the ideologies, career paths, and demographic diversity of the clerks. Most are qualitative in nature. I also explore several works by journalists that have helped shape how scholars and the public understand the role of clerks at the high court. Finally, I examine assumed leaks by the clerks or by the justices themselves. Considering all these sources together, I offer a broad overview of what scholars and journalists currently know about the role of clerks at the Supreme Court.

## THE CLERKSHIP AS AN INSTITUTION

We should begin with a brief snapshot of the work of law clerks at the nation's highest court. Justice Horace Gray hired the first law clerk at the Supreme Court when he began his service on the Court in 1882, a recent Harvard Law School graduate whom Gray paid out of his own pocket. Since 1886, clerks have been funded through congressional appropriations (Peppers and Ward 2012, 4–5).

Today, the clerks at the Supreme Court are almost always recent law school graduates from the best law schools in the country who have already spent a year clerking, usually on one of the US Courts of Appeals. Each Associate Justice can hire four law clerks, retired justices one, and the Chief Justice five (Peppers and Ward 2012, 5). Since the 1940s, the justices have mainly drawn their clerks from only five law schools (Harvard, Yale, Chicago, Stanford, and Columbia) (see Peppers 2006, 25), although some justices tend to hire from a broader range of law schools. A little less than half the total law clerks over time have come from Harvard and Yale. The clerks normally spend only one year at the Supreme Court, starting in July after the Court has released its opinions for the previous term.

Each justice has his or her own method for choosing clerks. Many rely on so-called feeder judges on the US Courts of Appeals or on certain law school deans for recommendations. Some of the justices prefer to hire clerks who share their ideological views, while others are comfortable with a diversity of political thought among their clerks. The clerks

work only for their hiring justice, and they often develop strong and long-lasting bonds with them. Law clerks play an important enough role at the Supreme Court that Justice Powell famously referred to the Court as “nine little law firms” (Peppers 2012, 391).

The exact duties and responsibilities of the clerks are determined by their hiring justice. However, on the Court today, all the clerks have an important role in reviewing the thousands of petitions for certiorari that come before the Court each year (see, e.g., Perry 1991). Since 1972, most of the justices have “pooled” their clerks for this purpose, meaning that one clerk at the Court reviews all the materials for a petition for a writ of certiorari and then writes a memo for the entire Court on the case. Most clerks write at least five of these “cert. pool memos” each week (Ward and Weiden 2006, 125). First Justice Thurgood Marshall, then Justice Stevens, and now Justice Alito have not participated in the cert. pool, thus ensuring that each petition for a writ of certiorari is read by at least two clerks. The cert. pool memo allows the justices to avoid reading petitions for certiorari that appear to have no merit or raise no important issues for the Court (see Perry 1991). A clerk’s work for his or her justice also generally includes writing bench memos on the cases that the Court has accepted for full review, preparing possible questions for oral arguments, doing legal research, and perhaps even writing a first draft of the justice’s opinion in a case. The clerks can also serve as liaisons or ambassadors to the other justices’ chambers, helping the justices gather intelligence on the preferences of their colleagues on any given issue.

There is no doubt that serving as a law clerk for a justice of the US Supreme Court opens many doors. For example, Ward and Weiden (2006, 1) begin by stating: “Clerking for a U.S. Supreme Court justice is the most prestigious position a recent law school graduate can attain. . . . Supreme Court law clerks, past and present, are at the top of the legal profession. Law clerks are part of the legal, political, and business elite.” Furthering this idea, Peppers (2006, 1) has written: “No other internship program in the history of the United States has produced as impressive and diverse a collection of individuals as the U.S. Supreme Court law clerk corps.” Former Supreme Court law clerks can be found in the top echelons of politics, business, academia, and the law. For example, Justices Stephen Breyer, Bryon White, Elena Kagan, and John Paul Stevens, as well as Chief Justices William Rehnquist and John Roberts, all served as clerks on the high court. But how does one study the influence of these temporary assistants on the vital work of the justices and on the decision making of the Court as a whole?

## CONFIDENTIALITY CONCERNS

One serious problem for those who want to analyze the role of law clerks at the Supreme Court is the fact that the Court is a very secretive institution that reveres confidentiality and loyalty. In fact, like other employees of the Court such as the Judicial Fellows, who work in the office of the Counselor to the Chief Justice,<sup>1</sup> new clerks must sign a confidentiality agreement before they can begin their orientation

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1. In 1972, Congress authorized the Chief Justice of the United States to appoint an administrative assistant. In 2008, Congress changed the title of the position from administrative assistant to Counselor to the Chief Justice.

#### 4 LAW & SOCIAL INQUIRY

process at the Supreme Court. The Court is so secretive about its procedures that it has refused to release to the public the written code of conduct that law clerks must follow. But according to Peppers and Ward (2012, 9–10), *The Code of Conduct for Law Clerks of the Supreme Court* requires clerks to maintain “complete confidentiality, accuracy, and loyalty” both to their individual justice and to the Court as a whole. Most clerks feel that this confidentiality agreement remains in effect even after the law clerk year has ended. Peppers and Ward have noted that many justices and their clerks have interpreted the *Code* to forbid them from ever discussing not only deliberations over specific cases, but also any broader information about the duties and responsibilities that the justices have assigned to their law clerks.

Thus, studying the influence of law clerks at the Supreme Court is extremely challenging. As Peppers and Ward (2012, 9) observe, “[u]nlike their counterparts in the White House and on Capitol Hill, the selection and utilization of law clerks is a topic that current and retired Supreme Court justices are generally loath to discuss,” and it is very rare for justices or even former law clerks to talk about the work of the clerks at the Supreme Court. H. W. Perry, Jr. (1991) was able to interview a variety of justices and former law clerks for his now classic work on how the Supreme Court approaches the review of petitions for certiorari. Obviously, the justices wanted to allow scholars a peek into the review processes they use to help them determine how to handle the thousands of petitions for writs of certiorari the Court receives each year. That Perry was able to achieve this amount of access remains extraordinary and his book is enriched by many quotations from various justices and former clerks. However, Perry’s coup is the exception. The typical researcher studying the role of law clerks at the Court is usually met with silence or even hostility.

### TWO SYSTEMATIC STUDIES OF SUPREME COURT CLERKS

Aside from Perry’s work, the most important work on Supreme Court clerks has been done by Peppers, and Ward and Weiden, both published in 2006 (but without any collaboration between the two projects). Both rely heavily on interviews with and surveys of former Supreme Court law clerks. Again, this type of access to information from the former clerks is extraordinary. These data have been supplemented with extensive archival research and analysis of secondary sources. Both books attempt to examine the broad role of law clerks in a systematic fashion; however, obstacles remain for measuring the influence and role of the clerks.

Peppers (2006) mainly examines the history and evolution of the work of the clerks, the process of their selection, and the formal and informal rules and norms that shape their work. The book has been well received among federal judges as well as by scholars. For example, in a cover blurb, Judge Richard A. Posner writes: “This is a meticulous work of historical scholarship, tracing the evolution of the Supreme Court law clerk from its beginnings in the nineteenth century up to the present day. Refreshingly free of the gossip, politics, and rumors that have disfigured previous accounts of this important institution, the book manages to be not only scrupulous, but fascinating.” The more gossipy and rumor-driven works to which Judge Posner is probably referring will be discussed in more detail later in this essay.

Peppers conducted personal interviews with fifty-four former law clerks, including Justice John Paul Stevens, and he names these individuals in an appendix. He received letters or written surveys from more than seventy-five other former clerks, whom he also identified by name. He also received off-the-record background information from Justice Scalia, as explained in the book. Peppers (2006, xiv) reported that the former law clerks were much more willing to talk to him if their justice was retired or deceased, which explains why he adopted a primarily historical approach. Peppers also used material from the papers of various justices, from judicial biographies, from law review tributes to various justices, and from publicly available oral histories. Yet the question of whether the information Peppers received from the former clerks was reliable and verifiable remains. As William H. Rehnquist (1957, 74) once colorfully wrote: "Each clerk is in a position to offer only a worm's-eye view of the Justice-clerk relation."

The key question for Peppers was the extent of clerks' influence on Court outcomes. He defines influence somewhat oddly, and certainly narrowly, as the ability of clerks to persuade the justices to make decisions that they would not normally make. Thus, as he sees it, in order to exercise any influence, the clerks must have different policy preferences and goals than their justices, and also the ability to persuade their justices to abandon their own preferred preferences and therefore change to the clerks' preferred decisional outcomes. The way Peppers uses the term "law clerk influence," really seems to mean that the clerks exert inappropriate control over or manipulation of the justices. Peppers frames his research question in this way: "The enduring intrigue and interest about Supreme Court law clerks has stemmed primarily from one central debate—do law clerks wield an inappropriate amount of influence over their justices? . . . Americans love a good conspiracy theory, and the idea that unelected, unaccountable, young law school graduates are the puppet masters of infirm and elderly justices is too irresistible to ignore" (2006, 2). Given his narrow definition of influence, Peppers is able to conclude that "[t]he necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court" (2006, 206).

In my view, "influence" should be understood more broadly and focus on the ability to persuade, rather than to manipulate or control. I see law clerks as functioning in much in the same way as congressional staff or presidential advisors function, providing advice and assistance, while the employer is ultimately responsible for whatever choices he or she individually makes. I agree with Peppers that there has been very little opportunity at the Court for clerks to control the choices made by their justices. Justice Rehnquist, who seems to have changed his views on the influence of law clerks after he joined the high court, has argued that "[t]he line between having law clerks help one with one's work, and supervising subordinates in the performance of their work, may be a hazy one, but it is at the heart . . . [of] the fundamental concept of 'judging'" (quoted in Ward and Weiden 2006, 236). This seems to be the hallmark of principal-agent analysis, which serves as the foundation for most of the historical analysis in Peppers's book.

At least one former clerk believes that even my assessment gives too much credit to the clerks. Ronald Klain, a former Supreme Court clerk who has held high-ranking posts in both the legislative and executive branches, has stated, "Supreme Court law clerks have less impact on the Supreme Court than do the staff of Congress and the White House. The difference is that the law clerks are so young and inexperienced. The

fact that any power at all is vested in someone who is one or two years out of law school is incredible” (quoted in Ward and Weiden 2006, 233).

Peppers’s focus on whether law clerks inappropriately influence the decisions of their hiring justices ironically stems from a debate carried out in the popular press in the late 1950s. The controversy started when *U.S. News & World Report* ran a piece on Supreme Court law clerks in the summer of 1957 (*U.S. News & World Report* 1957), ending by asking whether “the influence of these young law clerks—some not yet admitted to the bar—is reflected in Court opinions” (quoted in Peppers 2006, 2–3). A few months later, *The New York Times* responded with a story subtitled, “Recent Law Graduates Aid Justices with Their Facts but Not Their Opinions” (*New York Times* 1957). Then future Justice Rehnquist entered the debate, writing in *U.S. News & World Report* that liberal law clerks were inappropriately guiding the decisions of their hiring justices, especially regarding decisions on the petitions for writs of certiorari (1957). Finally, Yale Law School Professor Alexander M. Bickel, also a former clerk, wrote a piece in *The New York Times* refuting Rehnquist’s assertions (Bickel 1958). Bickel saw the criticism of the Supreme Court clerks as part of a broader ideological attack on the Warren Court. While arguing that the clerks were not radicals bent on controlling their justices, Bickel did concede that the “law clerks were a conduit through which new legal theories migrated from the law school classrooms to the Supreme Court” (Peppers 2006, 4). Bickel’s idea that law clerks fresh out of law school help the justices remain up to date on current legal theories has become the conventional wisdom about one aspect of the role of the clerks at the Supreme Court.

Ward and Weiden’s approach to the study of Supreme Court clerks is somewhat different from that of Peppers. While they look at clerking in historical perspective, they also ask questions specifically from the perspective of political science. For example, Ward and Weiden place more emphasis than does Peppers on the role of clerks as liaisons or ambassadors to the other chambers.<sup>2</sup> They examine the notion of a “clerk network” at the Court, symbolized by their separate private dining area at the Court where they can discuss cases among themselves without being overheard by the public, the press, or other Court personnel. As they explain, “[an] important aspect of clerk influence on judicial decision making is the clerk network. Clerks regularly talk to each other about their justices’ as well as their own views and positions on cases and issues and then relay that information to their justices. . . . Clerks informally mine the network during the coalition-forming stage as votes are cast, opinions joined, and requests for changes are made from chambers to chambers” (2006, 159–60). In her confirmation hearings to become Solicitor General of the United States, now-Justice Elena Kagan admitted that clerks gather important intelligence for their justices. Kagan, who clerked for Justice Thurgood Marshall, acknowledged that Marshall wanted to know as much as possible about the positions of the other justices before he made any decisions, especially on the petitions for writs of certiorari (Confirmation Hearings 2009, 99).

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2. Ward and Weiden use the language of ambassadors. They also imply that the clerks can serve as liaisons as well. The clerks provide information to the other chambers, gather information from the other clerks, and at times serve as negotiators between the chambers. How much of this information gathering, information sharing, and negotiation occurs between the justices rather than among the clerks is not clear. Hence, I use both terms.

Ward and Weiden use a much broader notion of “law clerk influence” than does Peppers. For them, the clerks seem to function very much like congressional or presidential staff, gathering information and having input in—but not control over—decision making.

Ward and Weiden also use a variety of sources in their research. They surveyed over 160 former law clerks and supplemented these data with personal interviews with a subset of them. The authors also extensively used the personal papers of various justices, judicial biographies, and other secondary sources. Many of the former clerks reported to Ward and Weiden that they had been able to change some of the choices of their justices: 38 percent thought that they had been able to change the minds of their justices on certiorari decisions and a surprising 32 percent of the respondents said that they had been able to change the minds of their justices regarding opinion content. Only 4 percent said that they had been able to change the justice’s mind on the outcome of a case. However, there are limits to these data. Many former law clerks refused to cooperate with these scholars, and it is unclear whether the clerks themselves are the best source of information about their own influence at the Court, despite their often interesting and insightful quotations in the book. Ward and Weiden acknowledged that “[a]sking clerks to comment on their own influence over the decisions of their justices is necessarily an imperfect strategy. Only the justices themselves can know for sure exactly how influential clerks are” (Ward and Weiden 2006, 151).

It is remarkable that this book and the Peppers book were published at almost exactly the same time, meaning that some former law clerks may have cooperated with both sets of scholars. Given the relatively high response rate that both projects enjoyed, one wonders whether the justices gave their tacit approval. Perhaps the clerks and the justices felt that letting scholars peek behind the curtain at the Court would be appropriate in the context of carefully researched, historically focused academic works.

## A MICRO-LEVEL LOOK AT THE ROLE OF LAW CLERKS

Building on their separate projects, each of which took a macro-level look at the role of Supreme Court law clerks, Peppers and Ward (2012) recently jointly edited a volume—*In Chambers: Stories of Supreme Court Law Clerks and Their Justices*—which examines the interactions between nineteen specific justices and their law clerks. Eleven of the twenty-two chapters are written by former clerks, while the rest are written by the editors or by other scholars with no apparent ties to the justices they discuss. As a result, some of the chapters read more like memoirs, while others read more like judicial biographies. Two of the essays explore the work and later career paths of specific clerks: the first female clerk at the high court and the first African American clerk. Although they focused on the micro-level relationship between specific justices and their clerks, the editors also had a broader goal: “By emphasizing the personal, we hope that these essays will build on our earlier works and help us understand how the private bonds between selected justices and clerks impact the clerkship institution and the Supreme Court in general” (Peppers and Ward 2012, 2).

Most of the stories in this volume paint a very rosy picture of the justice-clerk relationship, which is not surprising given that almost all clerks develop a special bond

with their justice that lasts throughout their careers. The clerks often refer to their justice as a “mentor” and the law clerks as a “family,” and they often describe the relationship as “intimate” and “personal.” These essays usually discuss reunions of former clerks with the justices and the kindnesses that their justices did for them over the years. The stories are personal and often inspiring. Some essays provide some key insights. For example, Randall P. Bezanson, who clerked for Justice Harry Blackmun, wrote: “A justice’s relationship with his or her law clerks is wider ranging and more complex than most people realize. It is professional and personal, intellectual and avocational (baseball!), individual and familial. The relationship shapes the justice and the clerks alike” (Bezanson 2012, 326).

All in all, the essays by former law clerks read like fond remembrances and tributes to their hiring justices. However, can we trust the clerks to provide an accurate and verifiable account of the justice-clerk relationship? Since the norm at the Court is for clerks to remain fiercely loyal to their justices, should we expect that the clerks would reveal anything negative about their experiences? Since none of these essays were authored by recent clerks, has time affected the memories of the respondents? I think it is very unlikely that clerks who did not enjoy their clerkships would reveal that in a published essay. Thus, while the insights from the former clerks are certainly valuable, we cannot assume that they are willing to tell us, or even capable of telling us, the full story of the role of the clerks at the Supreme Court. For example, two chapters by judicial biographers reveal a much less sanguine view of the relationship between Justices Douglas and Whittaker and their clerks.<sup>3</sup>

It is worth noting that no former law clerks for a living or even recently deceased justice contributed to the Peppers and Ward volume. Thus, at best, the volume is a history of the work of the clerks rather than an examination of contemporary practices. As the editors explain the situation: “It is nearly impossible to coax sitting justices or their clerks to talk about the clerkship institution; most of the present justices are disinterested in (or perhaps wary of) discussing their staffing practices, and the former law clerks themselves feel constrained by confidentiality concerns” (Peppers and Ward 2012, 3).

## UNWANTED ATTENTION TO LAW CLERKS

The justices and other personnel employed by the Supreme Court generally do not like most scholarly or media attention to the inner workings of the Court. Thus, it is a rare event when the justices or their clerks will talk to reporters or to scholars. This may in part result from the fact that there was a great deal of media attention to the law clerks in the late 1950s. After that, the media then generally ignored them, until *Washington Post* reporters Bob Woodward and Scott Armstrong’s (1979) *The Brethren*:

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3. Craig Alan Smith reports that Justice Whittaker remained “detached” from his law clerks and rarely interacted with them at all (2012, 252–53). Bruce Allen Murphy reports that Justice Douglas seemed to disrespect his clerks, treating them as “necessary and sometimes expendable foot soldiers in his personal judicial army” (2012, 182). Douglas once reportedly told Justice Harry Blackmun that “[l]aw clerks are the lowest form of human life,” and then apparently treated them that way (quoted in Murphy 2012, 182).



*Inside the Supreme Court*, which provided a detailed and insider look at the relationships among the justices on the Court at the time, as well as the interactions between the justices and their law clerks. For example, Woodward and Armstrong reported that Justice Douglas had almost no interactions with his clerks (see discussion above), while Justice Thurgood Marshall was portrayed as being almost totally dependent on his clerks. In addition, the book painted a very negative picture of the intellectual, social, and administrative skills of Chief Justice Burger. Woodward and Armstrong based their book mostly on interviews with several unnamed justices, with former employees of the Court, and with more than 170 former law clerks. Surprisingly, they also gained access to previously private internal papers of the justices, including thousands of pages of documents from the chambers of eleven of the twelve justices who served between 1969 and 1976. At the time, the reporters did not reveal the identities of those who spoke with them or provided them with internal documents from the Court.

*The Brethren* was not well received by most scholars and judges. Many, including Chief Justice Burger, were shocked by the breaches of confidentiality among the clerks and/or the justices themselves (see, e.g., Perry 1999, 94). Immediately, the Court took steps to prevent future leaks from law clerks, including having the clerks sign the *Code of Conduct* discussed earlier in this essay. A biography of Justice Byron White, while focusing exclusively on the views of this specific justice, seems to summarize most of the justices' reactions to the publication of this book. Dennis J. Hutchinson, White's biographer, notes that the justice "viewed *The Brethren* with unrelieved contempt, largely because he assumed former law clerks compromised the confidentiality of the institution they served" (1998, 6). Hutchinson concluded that "White was offended and hurt by the book, which retailed backstairs gossip and internal Court documents in the same leering tone. The image of the institution was damaged, the mystique of the decision-making process was shattered, and the net effect, worst of all in White's view, was that respect for the Court was eroded" (385).

*The Brethren* changed the way scholars and the public approached the Court and its clerks. As Peppers describes the effects of this book, "*The Brethren* provided tantalizing, if unsubstantiated, glimpses of the varied roles of the law clerk across chambers. Besides enraging many justices, the book guaranteed that Supreme Court law clerks, and the question of their influence, would never again leave the public eye" (2006, 7).

Some scholars were quite critical of the methodology used by Woodward and Armstrong. Barbara Perry, who spent a year working as the Judicial Fellow at the Supreme Court, noted: "One of the major criticisms of *The Brethren* was, and remains, that the book relied too heavily on anecdotal evidence from the law clerks, whose notorious egos may not have made them the most dependable sources" (Perry 1999, 94). Others have also questioned the quality of information that former clerks can provide. In his book *The Nine: Inside the Secret World of the Supreme Court*, Jeffrey Toobin (2007, 156) concludes that "[m]any clerks think they are more important than they are." Mark Tushnet, a former clerk to Justice Thurgood Marshall, is also skeptical of the quality of information that former clerks can provide:

Law-clerk accounts of the Court's operations are infected by a serious flaw. Law clerks won't tell what happened inside "their" chambers, and they don't know what happened inside other chambers. Gossip flows freely among the clerks, but

information is harder to come by. And, as should be expected, clerks exaggerate—they overstate the importance of their own Justice and, more significantly for present purposes, they overstate the importance of the work they do. (quoted in Kozinski 1999, 851)

Others felt that Woodward and Armstrong had just missed the point. As H. W. Perry has written: “Any political scientist who read *The Brethren* surely came away with the notion that there was nothing really new here except some juicy gossip. . . . After reading the book, one gets a sense that behavior at the Court differs little from that in Congress, or the Chicago city government for that matter. The chambers sound like cloakrooms. In short, *The Brethren* creates a misleading notion of how the Supreme Court operates” (1991, 142).

While many former law clerks must have talked to these reporters, we now know that one of the main sources for *The Brethren* was none other than Justice Potter Stewart, who was angry with the way that Chief Justice Burger ran the Court (see, e.g., Toobin 2007, 29). Woodward and Armstrong also spoke with Justices Powell, Blackmun, White, and Rehnquist in addition to 170 former law clerks (see Peppers and Ward 2012, 356). Even today it is not clear how much of the information and documents these reporters received came from the justices directly and how much was leaked by former law clerks.

In the late 1990s, a second book, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*,<sup>4</sup> by Edward Lazarus (1998) rocked the Court. Lazarus was a former law clerk to Justice Harry Blackmun. In contrast to Rehnquist’s complaint that liberal clerks were asserting undue influence over their justices in the 1950s, Lazarus argued that a cabal of conservative clerks was improperly exerting influence, especially on some of the swing justices.<sup>5</sup> This book was also not well received among scholars and other serious Court watchers. As Peppers summarizes Lazarus’s account: “Authored by a former Blackmun law clerk, *Closed Chambers* offered gossipy stories of conservative law clerks—determined to undo the ‘excesses’ of the Warren Court—manipulating their gullible justices and pushing the Court to the political far right” (Peppers 2006, 9).

Responding to allegations that Lazarus breached his confidentiality agreement, in a review of the book published in the *Yale Law Journal*, Erwin Chemerinsky (1999) argued that Lazarus did not reveal any confidential material in the book. He did not see Lazarus’s conduct as improper or unethical, but instead as part of typical scholarly analysis of specific Supreme Court rulings. On the other hand, Judge Alex Kozinski (1999), writing in the same law journal, saw Lazarus’s behavior as highly unethical and immoral, if not potentially illegal. Judge Kozinski explained the responsibilities of Supreme Court law clerks and Lazarus’s alleged violation of those duties in this way:

The clerk has a duty of diligence, loyalty, and confidentiality both to the Justice who appoints him and to the other Justices. He also has a duty of loyalty to his

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4. The subtitle is somewhat misleading and sensationalized, in part because Harvie Wilkinson (1974) had much earlier published a book about his experiences as a Supreme Court law clerk.

5. Some of the material in the Lazarus book probably came from documents released to the author by other former clerks (see Garrow 1998).

fellow clerks and to other Court employees. In exchange, the clerk gets to work in the headiest environment to which any young lawyer could aspire and enjoy the luxury of open, robust, and unbridled debate about our nation's most pressing legal issues, not only with the Justices, but with the sharpest legal minds of his own generation. Until *Closed Chambers*, everyone counted on the good faith of everyone else to stay well within the Court's written and unwritten rules. (Kozinski 1999, 834–35)

## OTHER SCHOLARY ANALYSSES OF LAW CLERKS

Several scholarly works have also looked at the ideological makeup of clerks at the Supreme Court and their later career paths. Ditslear and Baum (2001) found that over time the justices have become much more likely to hire clerks who had previously worked for like-minded judges on the US Court of Appeals. Thus, beginning in the 1990s, conservative justices were hiring almost exclusively conservative clerks and liberal justices were hiring liberal clerks. Peppers and Zorn (2008, 53) took this analysis one step further, finding that “clerks’ ideological predilections exert an additional, and not insubstantial, influence on the Justices’ decisions on the merits.”<sup>6</sup> This project is largely based on a brief survey of 532 former clerks, which used political party affiliation as a proxy for the ideological views of the clerk. While using this proxy for ideology is convenient, it does raise a question about the validity of the findings, in part because for the last several decades the most liberal members of the Supreme Court have often been Republicans. In addition, the authors themselves recognized that their project was subject to selection bias in the respondents because “[a] substantial number of respondents refused to answer the question about political preferences, and an even larger number did not respond to the survey at all” (Peppers and Zorn 2008, 62). Peppers and Zorn nonetheless argue that their quantitative study demonstrates that law clerks have independent influence over the choices made by the justices.

Nelson et al. examined the postclerk careers of former law clerks at the high court to see whether these career paths revealed ideological polarization among the former clerks. They found that on the Rehnquist Court, the career paths of conservative former clerks were markedly different from those of liberal former clerks. This was true regardless of whether the former clerks found careers in the private sector, the public sector, or in the professoriate. For example, former clerks for liberal justices were about twice as likely to enter academia as their conservative colleagues, and the small number of conservative justices’ clerks who went to academia tended to teach at religious schools or at schools closely associated with the conservative movement instead of “teaching in the elite, highly ranked law schools to which clerks have customarily gone” (2009, 1782). Conservative clerks were more likely to choose private practice than their liberal colleagues, and the authors identified specific firms that almost exclusively hired conservative clerks, while other firms exclusively hired liberal clerks. As for government

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6. Peppers acknowledges that the Peppers and Zorn (2008) piece seems to come to different conclusions than Peppers did in his 2006 book. In their 2012 volume, Peppers and Ward (2012, 14 n3) note that “Peppers was skeptical that law clerks wielded substantive influence when he wrote *Courtiers of the Marble Palace*. Since then, his views have changed slightly.”

service, the authors found that “the senior management offices of the Department of Justice during the administration of George W. Bush have shown a pronounced preference for clerks bearing strong legal conservative credentials” (1792). The authors argue that these differences in career paths are important because “[f]ormer clerks typically find themselves in positions of power in government, private practice, or the academy and use those positions to transmit to others what they learned at the Court. The legal profession and, to a lesser extent, the general public thereby share vicariously in the law clerks’ experiences” (Nelson et al. 2009, 1752).

Other works have continued to question whether the clerks have too much influence. Recall that none other than William H. Rehnquist in the late 1950s severely criticized the alleged improper influence of law clerks at the Court, at least at the certiorari stage. In the late 1990s, Kenneth Starr also criticized the influence of law clerks in certiorari decisions when he argued: “Selecting 100 or so cases from the pool of 6,000 petitions is just too important to invest in very smart but brand-new lawyers” (quoted in Mauro 1998c, 1A). Bradley Best (2002) has argued that the increase in dissenting and concurring opinions at the Court is in part the result of the increasing number of law clerks. Jan Crawford Greenburg, in her book *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (2007), recounts stories about clerks being disgruntled with the actions of specific justices. Among her sources for this project, she conducted off-the-record interviews with nine justices (plus interviews with Justices O’Connor and Kennedy that were on the record) and spoke to an undisclosed large number of former clerks.<sup>7</sup> Greenburg also tells stories about justices being disappointed with the clerks from other chambers. For example, she cites Justice Kennedy as complaining about clerks for other justices who “had a difficult time distinguishing a personal from a professional disagreement. . . . They understood the law [Kennedy said] but not the traditions of the Court” (2007, 77).

## LEAKS FROM THE HIGH COURT

Although the Supreme Court is an institution that highly values secrecy and loyalty, occasionally leaks do occur.<sup>8</sup> One recent incident happened after Chief Justice Roberts wrote the majority opinion on the constitutionality of President Obama’s health care reform legislation in *National Federation of Independent Business v. Sebelius* (2012). A news report by Jan Crawford—formerly Jan Crawford Greenburg—(Crawford 2012) indicated that originally Chief Justice Roberts was planning to write a majority opinion that was more acceptable to the Court’s conservatives. However, in the drafting stage, he changed his views and upheld the mandate that individuals must buy health insurance, an outcome that was joined by the liberals on the Court.

Crawford reported that Justice Kennedy had tried very hard to bring the Chief Justice back into the conservative camp. This meant that Crawford had obtained a great

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7. Greenburg (2007, 321) reports that she spoke to “scores” of former law clerks for her project.

8. As Goldsmith (2012) has reported: “Actual leaks of Court decisions are rare. The last one occurred in 1986, when ABC News reporter Tim O’Brien disclosed that the Court had decided to invalidate the Gramm-Rudman-Hollings balanced budget amendment. (The suspected leaker worked in the printer’s office).”

deal of confidential information about the internal decision-making processes at the Court. Court observers were shocked because it appeared that the information was leaked by conservative law clerks then working at the Court or even by a conservative justice. Commentators speculated on who had leaked the information, noting Crawford's close connections to conservatives at the Court and her previous television interviews with Justices Thomas and Scalia, as well as her interviews with Justice Kennedy for her 2007 book discussed above, but the source of the leak was never determined. Nevertheless, it is clear that Crawford obtained inside information from key individuals at the Court that appeared designed to embarrass Chief Justice Roberts for his unusual vote in the health care reform case.

Some have argued that the leak in this case must have come from a justice because the clerks have a variety of disincentives to prevent them from revealing such confidential information. As Goldsmith (2012) explained in a *New Republic* piece that ironically ran just a few days before the Crawford leak:

The justices benefit from the reality and mystique of secrecy, and gain nothing from a leak. . . . Law clerks also have a personal incentive to keep quiet. After one year at the Court, clerks can fetch hundreds of thousands of dollars in signing bonuses from law firms and are all but guaranteed successful careers. Leaking the Court's decisions is one of the few ways to screw up these prospects. The leaker would have a hard time obtaining or keeping a license to practice law. And he or she would establish a reputation for irresponsible gabbing in a profession that places a super-high premium on the ability to keep confidences. No clerk wants to take these risks, especially since the chance of getting caught is relatively high.

But if the leak in the health care reform case did come from clerks, it would not be the first time that clerks have allegedly disclosed confidential information. *Vanity Fair* ran a piece in October 2004 discussing the *Bush v. Gore* (2000) decision, and part of the story involved the Supreme Court's internal deliberations in the case (Margolick, Peretz, and Shnayerson 2004). The article seemed to rely heavily on information obtained from former law clerks. However, those leaks occurred four years after the case was decided, not four days, as was the case in the leaks about Chief Justice Roberts.

## DIVERSITY AMONG THE CLERKS

Supreme Court law clerks have also received a great deal of media and scholarly attention for another issue, the lack of demographic diversity among the clerks, a topic that is at least indirectly related to decision making at the Court. In a study of Supreme Court clerks from 1882 to 2004, only 15 percent were female and only 6 percent were from racial and ethnic minorities, with the liberal justices tending to be the ones with more diverse clerks (Peppers 2006, 20–24). Tony Mauro (1998a, 1998b, 1998d) wrote various newspaper articles in 1998 that pointed out the tiny numbers of minority law clerks at the Supreme Court at that time. In response, in 1998 the NAACP held a rally outside the Supreme Court that was attended by over 1,000 people, at which several

high-profile professors and politicians were arrested (New York Times 1998). Academics then began to publish articles about the lack of diversity among the clerks (see, e.g., Agostisi and Corrigan 2001). In 2006, women's groups complained that of the thirty-seven law clerks hired at the Supreme Court that year, only seven were female, the lowest number since 1994 (Greenhouse 2006).

Members of Congress also expressed their unhappiness about the situation (see, e.g., Biskupic, 1999, 2000). Every year, members of the Supreme Court go across the street to testify before the House Appropriations Committee regarding annual funding for the federal courts. Almost every year, members of Congress ask the justices about the number of minority and female law clerks at the Court (see, e.g., Mauro 2010). The normal response is that each justice determines the hiring practices for his or her chambers. The justices also note that they tend to draw their clerks from a very small pool of individuals who clerk for judges on the US Court of Appeals. Until this pool is more reflective of the nation's demographics, the justices claim that it will be difficult for them to hire more female and minority law clerks (Mauro 1998b). The lack of minority clerks at all levels of the federal courts continues. A 2010 study conducted by the Judicial Conference of the United States found that fewer than 14 percent of all law clerks in the federal judiciary at that time were members of various racial and ethnic minority groups (see Mauro 2010).

The assumption from critics of the lack of diversity among the law clerks at the Supreme Court seems to be that the presence of female and minority law clerks might change the way the justices approach cases regarding race and sex discrimination, among others. Jeffrey Toobin (2007, 186–87) argues that the presence of another minority group among the clerks, gay and lesbian individuals, did change the way the justices approached gay rights cases. Writes Toobin: "The gay clerks changed the Court, not because of their advocacy but because of their existence. They were, of course, pretty much indistinguishable from their straight colleagues, and that was precisely the point" (Toobin 2007, 186). In their work, Murdoch and Price (2001) identified at least twenty-two gay and lesbian former Supreme Court clerks.

## CONCLUSIONS

We return to the questions posed at the beginning of this essay. How does one measure the influence of clerks on the decision making of the justices? Should scholars trust the information obtained from former clerks as reliable and verifiable? The answer seems to be that while most former law clerks remain quite hesitant to talk about their role at the Court, when they do share their insights with academics they can provide valuable information. Nevertheless, for a variety of reasons explained throughout this essay, scholars must approach these data with a healthy skepticism. Qualitative research involving elite interviewing has its obvious pitfalls; information obtained from former Supreme Court law clerks is no different. Because of confidentiality issues, among other things, former clerks seem more willing to discuss their experiences after their hiring justice has died or retired. Thus, the information provided by former law clerks may be more useful for historical analysis than in helping us understand the current decision-making practices on the Court.

Can scholars accurately measure the influence that clerks have over the decisions of their hiring justices? Clerks may be an important source of information for the justices, and these recent law school graduates may help the justices gain familiarity with the current legal theories being taught in law schools. Clerks also seem to work as ambassadors or liaisons for their justices, helping them gather intelligence about the views of their colleagues and perhaps assisting them in indirect negotiations with other justices through the clerk network. However, are clerks more influential than congressional staffers or presidential advisors? It seems unlikely that the justices on the US Supreme Court do not make their own independent decisions. Anyone who has recently attended oral arguments at the Court can see from the justices' questions and comments just how invested they are in finding the best answers to difficult legal questions. Clerks may provide useful assistance to the justices, but it does not seem possible that clerks would somehow manipulate the decisions made by any individual justice. The clerks are temporary employees who are severely constrained by their usually young age and inexperience. Clerks may also exaggerate their own importance. Only the justices themselves truly know the influence that clerks wield on the Supreme Court, and the justices generally refuse to discuss the question.

The books by Peppers (2006), Ward and Weiden (2006), and Peppers and Ward (2012), which are carefully researched and use multiple sources to confirm their findings, take us a long way toward a better understanding of the role of law clerks at the Supreme Court. They use information from the clerks themselves, but these projects also draw heavily on other sources, such as the papers of the justices and oral histories. Given the comprehensive and systematic nature of their research and the care with which they treat their data, the findings seem valid. They are important additions to the scholarly literature on the Supreme Court.

While the works of journalists can provide some useful insights into the role of clerks at the Court, there are obvious limits to this type of inquiry. There can be a fine line between professional reporting about the Supreme Court based on internal sources and merely spreading sensationalized rumors and gossip. Published books and news stories that rely on gossip, innuendo, and nonverifiable leaks from the Court make the job of serious scholars that much more difficult because they make clerks and judges more reticent.

There are certainly institutional realities that may prevent scholars from thoroughly examining the question of how much influence or control the clerks have over their hiring justices. Nevertheless, these obstacles do not diminish the value of the comprehensive studies of the law clerks by Peppers, Ward and Weiden, and Peppers and Ward.

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