

# Clerking for a Retired Supreme Court Justice—My Experience of Being “Shared” Among Five Justices in One Term

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## INTRODUCTION

In 1932, Justice Oliver Wendell Holmes Jr. retired but continued to employ Mark DeWolfe Howe as his law clerk.<sup>1</sup> A tradition of retired U.S. Supreme Court Justices<sup>2</sup> employing a law clerk has continued, apparently intermittently, since that time.<sup>3</sup> At some point, this practice grew to embrace

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<sup>1</sup> MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES, VOLUME I: THE SHAPING YEARS, 1841–1870*, at vii (1957).

<sup>2</sup> Until the 20<sup>th</sup> century, most U.S. Supreme Court Justices ended their life tenure by dying in office. See J. Gordon Hylton, *Supreme Court Justices Today Are Unlikely to Die With Their Boots On*, MARQ. U. L. SCH. FAC. BLOG (Mar. 9, 2012), <https://law.marquette.edu/facultyblog/2012/03/supreme-court-justices-today-are-unlikely-to-die-with-their-boots-on/comment-page-1/> [https://perma.cc/L6FJ-RKQZ]. “[S]ince 1937, [Supreme Court Justices] have been allowed to take senior status and continue to serve on lower federal courts.” Robert Barnes, *Retired Supreme Court Justices Still Judge—and Get Judged*, WASH. POST (Mar. 10, 2013), [https://www.washingtonpost.com/politics/retired-supreme-court-justices-still-judge--and-get-judged/2013/03/10/1b22943c-897f-11e2-8d72-dc76641cb8d4\\_story.html](https://www.washingtonpost.com/politics/retired-supreme-court-justices-still-judge--and-get-judged/2013/03/10/1b22943c-897f-11e2-8d72-dc76641cb8d4_story.html) [https://perma.cc/2252-PUT5].

<sup>3</sup> Many clerks to retired Justices have gone on to prominent legal careers. Perhaps the currently best-known clerk to a retired Justice is U.S. Supreme Court Justice Neil Gorsuch.

a tradition of “loaning” the retired Justice’s clerk to also work with the chambers of one or more active Justices.<sup>4</sup> There is apparently no formal list of retired-Justice law clerks; some initial digging suggests that over 110 persons have served as law clerks to retired Justices since 1932.<sup>5</sup> Depending on their health and interests, Justices may carry a variety of work while in retirement. Such work can include sitting by designation on the lower federal courts—usually one of the Circuit Courts of Appeals—delivering lectures, writing books and law review articles, and other significant legal work.<sup>6</sup> But

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Gorsuch was hired by retired Justice Byron White for the 1993 Term and was “loaned” to the Kennedy chambers. *See* Adam Liptak & Nicholas Fandos, *How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/politics/neil-gorsuch-anthony-kennedy-supreme-court.html> [<https://perma.cc/D9NN-JVKH>]. Nominee Gorsuch was portrayed as a “Kennedy clerk.” *Id.* One of Gorsuch’s co-clerks in the Kennedy chambers was now-Justice Brett Kavanaugh. *See id.*

<sup>4</sup> There is no published work that I have found addressing the topic of law clerks to retired U.S. Supreme Court Justices. This Essay is the beginning of an ongoing book project on the subject. There are stray references to, but no substantive discussion of, the practice in a few of the wonderful essays in *IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* (Todd C. Peppers & Artemus Ward eds., 2012) [hereinafter *IN CHAMBERS*]. For example, former UC Berkeley Law School Dean Jesse Choper mentions that during the October 1960 Term, he “occasionally worked with Mark Ball, clerk for Justices Reed and Burton, who had retired but maintained an office at the Court.” Jesse H. Choper, *Clerking for Chief Justice Earl Warren*, in *IN CHAMBERS* 263, 264–65.

<sup>5</sup> Wikipedia provides lists of Supreme Court law clerks (the accuracy of which is undetermined). *See Lists of Law Clerks of the Supreme Court of the United States*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States) [<https://perma.cc/6G3N-H3YG>]. Cross-referencing dates of Justice retirements with the service dates for listed law clerks suggests that over 110 persons have so served.

<sup>6</sup> *See generally* Stephen L. Wasby, *Retired Supreme Court Justices in the Courts of Appeals*, 39 J. SUP. CT. HIST. 146 (2014). For example, during my year of clerking with retired Justice Potter Stewart (1984–1985), my memory is that he had judicial work from sitting by designation on three different circuit courts. He also served as the selected third arbitrator in a significant international dispute. By contrast, Justice John Paul Stevens eschewed sitting as a judge after he retired but kept his clerks busy working on the three books he published after his retirement in 2010. *Cf.* Emily Bazelon, *Justice John Paul Stevens Had Some Things to Say Before He Died*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/books/review/john-paul-stevens-making-of-a-justice.html> [<https://perma.cc/7X5E-24N3>]. Meanwhile, Justice O’Connor, while also sitting by designation on lower courts after her retirement in 2006, devoted much time and energy to various philanthropic foundations, writing, and public speaking in favor of judicial independence. *See* Maggie Barron, *O’Connor & Breyer on Judicial Independence*, BRENNAN CTR. FOR JUST. (Apr. 10, 2008), <https://www.brennancenter.org/our-work/analysis-opinion/oconnor-breyer-judicial-independence> [<https://perma.cc/2NJS-Y5VL>]; Adam Liptak, *Battling Dementia, Sandra Day O’Connor Leaves Public Life with Plea for Bipartisanship*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/politics/dementia-sandra-day-supreme-court.html> [<https://perma.cc/G35H-EH4C>].

that work is not always sufficient to fully occupy a retired Justice's clerk. So the tradition has become for the "retired-Justice clerk" to be "loaned" to the chambers of active Justices and to do "merits work" for that Justice.<sup>7</sup>

As far as I know, the usual practice has been for a "retired Justice clerk" to work with only one active Justice's chambers for the Term that they are there.<sup>8</sup> In my case, however, whether due to fortuity or other factors, after I began working for retired Justice Stewart for the 1984–1985 Term ("1984 Term"), I also worked with the chambers of four different active Justices.<sup>9</sup> So far as I know, this was unique, or so a number of knowledgeable people

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<sup>7</sup> The position of retired-Justice clerk is shrouded in some mystery. *See supra* note 4. In the earliest examination of clerking at the Court that I know of, Professor Chester Newland does not discuss the position, noting only in a footnote that the three clerks who served with to Justice Holmes during his retirement "were not on the [C]ourt's pay roll and were not clerks in the usual sense." Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 311 n.35, 307 (1961). Statutory authority expressly authorizes active Supreme Court Justices to hire law clerks. 28 U.S.C. § 675 (2018). Meanwhile, as Senior U.S. District Judge Frederic Block has explained, federal judges who take senior status are "entitled to continued office space and secretarial and law clerk support." Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 539-40 (2007) (citing 3 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES § B, ch. 6, pt. 7); *see also* 28 U.S.C. § 371, § 712 (2018). Technically, Supreme Court Justices, like other federal judges, may retire from regular active service while retaining their commission and the opportunity to perform judicial duties, including sitting by designation on the lower courts; a Justice normally retires only from "active service" on the Supreme Court. *See* § 371(b)(1). Thus a retired Justice retains—by the same administrative interpretation as applies to judges who take senior status on a lower federal court—entitlement to funded employment of one judicial assistant and one law clerk. *See id.*

<sup>8</sup> The phrase "retired Justice clerk" is my own. Professor Newland reports that one long-ago law clerk "served with four justices, starting with Justice Peckham in 1905 and ending with Justice Sutherland in 1924." Newland, *supra* note 7, at 307. This unnamed clerk apparently worked for those Justices in succession, however, rather than all at one time, and so far as I know, only for active Justices. *See id.*

<sup>9</sup> It was physically easy for me to work for various active Justices in the 1984 Term because we were all in the same building at One First St. NE, Washington, D.C. My office was in Justice Stewart's Chambers (a slightly reduced space upon retirement), on the rear northeast side, facing 2<sup>nd</sup> Street. Other Justices have moved upon retirement to the Thurgood Marshall Federal Judiciary Building, which was completed in 1992 and sits about four blocks from the Supreme Court. For example, when Justices White and Blackmun retired—in 1993 and 1994, respectively—they moved their chambers there, and their single law clerk was housed there with them, requiring about a four-block walk to work for active Justices in the main building on One First St. As another example, in the 1995 Term, there were four retired Justices, and space to house retired Justices in the main building is limited. However, some retired Justices (Stevens, for example) have stayed in the main building with their single clerk. My thanks to Michael Herz (White, 1983 Term) and Michael Wishnie (Blackmun, retired, and Breyer, 1995 Term), among others, for some of the information in this footnote.

have suggested. So, almost 35 years later, I have been encouraged to write up my experience.<sup>10</sup>

My experience was certainly a fantastic one. Moreover, as I have discussed my experience with Court watchers over subsequent years, I have come to think that the happy circumstance of me being “shared” among different active-Justice chambers may have had beneficial effects not just for me, but for the Court overall that year.<sup>11</sup> Thus, after describing my own experience below, I also pose this question (but do not necessarily endorse an answer): Could the “sharing” of law clerks at the U.S. Supreme Court have beneficial effects in our world of increasingly polarized ideologies? My personal experience with the other 33 law clerks who worked at the Court in the 1984 Term—which may not be typical, may be myopic, and indeed might be pure misperceived happenstance—was that sharing the retired-Justice clerk among diverse chambers contributed to collegiality and, perhaps to some small extent, to a few more moderate statements in some opinions.<sup>12</sup> While the U.S. Supreme Court is of course unique in our system, there are other courts in America that share law clerks, whether out of economic necessity, or accidental tradition—or perhaps from a conscious belief that it is good for the court itself.<sup>13</sup>

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<sup>10</sup> My particular thanks to Jeff Rosen, President and CEO of the National Constitution Center, for suggesting that my experience was unique and encouraging me to write about it for the October 2019 all-clerks’ reunion referenced *supra* note \*.

<sup>11</sup> There is a wealth of published material on the role of Supreme Court law clerks, and their possible influence or lack thereof. *See generally* Mark C. Miller, *Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward*, 39 L. & SOC. INQUIRY 741 (2014) (reviewing a comprehensive collection of works analyzing the role of Supreme Court clerks). Jeffrey Toobin writes that “many [Supreme Court] clerks think they are more important than they are.” JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 156 (2007); *accord*, Mark Tushnet, *Hype and History*, in *JURIST*, May 1998, at 23–24. Or as future Chief Justice William Rehnquist colorfully put it way back in 1957, despite what clerks themselves may think, “each clerk is in a position to offer only a worm’s-eye view of the Justice-clerk relation.” William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74. Other books also address the experience of clerking at the U.S. Supreme Court. *See, e.g.*, IN CHAMBERS, *supra* note 4; TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE SUPREME COURT* (2006); J. HARVIE WILKINSON III, *SERVING JUSTICE: A SUPREME COURT CLERK’S VIEW* (1974).

<sup>12</sup> For another account of aspects of the 1984 Term, entertaining as well as informative, *see* Scott Nelson, *Dun & Bradstreet Revisited—A Comment on Levine and Wermiel*, 88 WASH. L. REV. 103 (2013).

<sup>13</sup> *See infra* text accompanying notes 57–65; *see generally* NALP JUD. CLERKSHIPS SEC., *INSIGHT AND INSIDE INFORMATION FOR SELECT STATE COURT CLERKSHIPS* (2017), <https://www.lawschool.cornell.edu/careers/judicial-clerkships/upload/insight-for-select-state-clerkships-sept-2017.pdf> [<https://perma.cc/ECE3-CERN>] (listing the different

The purpose of this Essay then, is twofold: primarily to record my own (undoubtedly imperfect) memories of a year of working for five Justices (counting Justice Stewart), all in the same action-packed twelve months;<sup>14</sup> and secondarily, to “float” the idea—which I know is immediately resisted by most former Supreme Court clerks and some Court watchers—of sharing law clerks among Justices at the U.S. Supreme Court.

I. MY ONE-YEAR EXPERIENCE: LAW CLERK TO A RETIRED JUSTICE WHILE ALSO WORKING IN THE CHAMBERS OF FOUR OTHERS.

In the Spring of 1982, I was a third-year student at Yale Law School. I had a district court clerkship lined up,<sup>15</sup> and like dozens of law students—far more than can be chosen—I wanted to apply to the “Supremes.” But I was hardly at the top of my class, nor was I an editor-in-chief of some law journal or anything else of note. I had no famous pipeline professor to write for me. So I went to a visiting professor I had for class, who wasn’t so happy at Yale and had clerked for Justice Lewis F. Powell, Jr. He agreed to write a letter for me but said to me, quite seriously, that getting a clerkship at the Supreme Court was “like lightning striking.” He was trying to let me down easy in advance.

That visiting professor in 1982 was John C. Jeffries Jr., who had clerked for Justice Powell and later became Justice Powell’s biographer (as well as perhaps the most successful Dean in the long history of the University of Virginia School of Law).<sup>16</sup> I was unaware of his especially close relationship with Justice Powell at the time. But with his steady support, I slowly wormed myself into the rarified atmosphere of “serious contenders.” After applying once in 1982 to the Justices, being turned down by all, and applying again a year later (and again being uniformly turned down), I was hired in March

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characteristics of state court clerkships, some of which utilize the sharing of clerks between judges).

<sup>14</sup> I stress that much of my account is drawn from memory. I have not reviewed whatever available archives of retired Justices may be scattered across the country. I did, however, take a glance at the papers of my own boss, Justice Potter Stewart, which are housed largely at the Sterling Library at Yale University and can be reviewed at <https://archives.yale.edu/repositories/12/resources/4553> [<https://perma.cc/6CFH-FUMB>]. I am grateful to archivist Michael Frost there for his knowledgeable assistance.

<sup>15</sup> My clerkship with U.S. District Judge Louis F. Oberdorfer, Jr. (D.D.C.) was a wonderful experience. I later co-edited a book of essays written by his former law clerks to celebrate Judge Oberdorfer’s 30<sup>th</sup> year on the bench, for a celebration over which D.C. Circuit Judge David Tatel and U.S. Supreme Court Justice David Souter presided in 2008. See *THE JURISPRUDENCE AND CHAMBERS OF JUDGE LOUIS F. OBERDORFER* (Anuj C. Desai & Rory K. Little eds., 2007).

<sup>16</sup> See generally *John C. Jeffries Jr.*, U. VA. SCH. L., <https://www.law.virginia.edu/faculty/profile/jcj3w/1176517> [<https://perma.cc/5TU3-CEBQ>]; JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

1984 by retired Justice Potter Stewart.<sup>17</sup> Of course, I was absolutely thrilled. Like so many law students, I had not only hoped but actually dreamed—truly, I’d had nighttime wake-up dreams—of working at One First Street.

When I arrived at the Court in August 1984, I learned that Justice Stewart had already sent an internal “Memorandum to the Conference,” advising all the active Justices that he did not expect to keep me busy full-time, and that if any Justice “[was] interested in using Rory, please let me know so that we can apportion this [sic] time in a manner agreeable to all.”<sup>18</sup> That memo was characteristic, as I came to learn, of the many gracious kindnesses Justice Stewart extended to me that year. During the hot and relatively lazy days of August 1984—the Justices all being away by tradition until after Labor Day—I took that memo in hand and physically ran around the building to every chambers, seeing what could be available.

My first success came with Chief Justice Warren Burger’s chambers. I had previously been interviewed (and then rejected) by the Burger law clerk screening committee. Yet some memory of that persisted, and upon my arrival at the Court, the Chief Justice’s then “Super Clerk,” Michael Luttig,<sup>19</sup> offered me the opportunity to take a regular share of preparing “cert pool memos” for the Chief as part of the “cert pool” that, at the time, six Justices

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<sup>17</sup> There is a longer story here, of course. Among much else, I have lifelong gratitude to my Yale Law classmate and 1983 Term clerk to Justice Harry A. Blackmun, Richard Bartlett, who called me in February 1984 to say that Blackmun had finished his clerk selections (he was traditionally the last Justice to hire). “But,” Bartlett continued, “have you thought about applying to retired Justice Stewart?” I had not—I did not even know of the retired-Justice clerk tradition. But I immediately sent an application to Justice Stewart, the only retired Justice at the time, from my position then as an Associate at the D.C. law firm of Miller Cassidy Larocca & Lewin. MCL&L partner (and former law clerk to Justice Powell) Bill Jeffress generously wrote a recommending note to Justice Stewart, as did Judge Oberdorfer and a new law Professor at Yale for whom I had been a teaching assistant, Drew S. Days (the future U.S. Solicitor General). Drew Days has remained a lifelong friend whom I deeply admire. My application, a brief interview, and a thrilling offer phone call all transpired within about four weeks in February through March 1983.

<sup>18</sup> Memorandum from Justice Potter Stewart to the Conference (June 13, 1984) (on file with the Yale University Library, Potter Stewart Papers, Collection MS 1367, Folder 584).

<sup>19</sup> J. Michael Luttig’s accurate title was Special Assistant to the Chief Justice, but internally the clerks referred to it as the “Super Clerk” position. I will always be grateful to Mike for the opportunity to work with the Burger Chambers in even this small way. Luttig went on to be confirmed in 1991 as a Judge on the U.S. Court of Appeals for the Fourth Circuit, resigning from that position in 2006 to become General Counsel to the Boeing Corporation. See *Executive Biography of J. Michael Luttig*, BOEING, <https://www.boeing.com/company/bios/j-michael-luttig.page> [https://perma.cc/EP6B-2E4R].

were using.<sup>20</sup> Of course I said yes, and I prepared cert pool memos for the Chief's chambers throughout that Term.<sup>21</sup>

After agreeing to assist in the Chief's chambers, I then relatively quickly arranged to work in various other chambers for two-month segments. I believe the first chambers to "contract" with me was that of Justice John Paul Stevens, for the sitting in December. (I was scheduled to travel in October with Justice Stewart to Cincinnati for his sitting by designation with the Sixth Circuit, the court from which Justice Stewart had been appointed in 1959.) At the time, Justice Stevens hired only two law clerks while the other Justices each had four (except Justice Rehnquist, who had three). Justice Stevens—and similarly, Justice Powell—was quick to say that he did not feel he needed assistance, but that he would be happy to accommodate me as a generous courtesy.

Justice Powell also sent a gracious invitation to "work with [him]" starting in January.<sup>22</sup> I had interviewed with him some months earlier, but he did not hire me. His rejection letter had said something like, "If I could have hired a fifth clerk, I would have chosen you," and he offered his assistance if I ever needed something in the future. At the time, I confess that I suspected that this might be a standard letter sent to a number of unsuccessful interviewees. Nevertheless, once I applied to Justice Stewart, I quickly wrote to Justice Powell to invoke his kind offer of assistance. I later learned that he quickly recommended me to Justice Stewart.<sup>23</sup> Justice Stewart told me that

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<sup>20</sup> Many have written about the Court's custom, instituted under Chief Justice Burger, of having a single clerk for one of the participating Justices write a memo about each petition for certiorari that is filed. That memo is then shared with a "pool" of the other participating Justices, rather than having separate clerks for each Justice duplicatively write separate memos about the same petition. See Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool'*, N.Y. TIMES (Sept. 25, 2008), <https://www.nytimes.com/2008/09/26/washington/26memo.html> [<https://perma.cc/355W-2T2M>] (explaining the process of "pool memos" and the "cert pool" at the Court).

<sup>21</sup> As an aside, I don't recall ever recommending that certiorari be granted in a cert pool memo. But one complicated case did draw my attention, and after a lengthy memo (perhaps 15 pages), I recommended against granting review because it seemed to me that the current Justices would remain split 5–4 just as the Court had been in the prior precedent that appeared to govern. Despite (or because of) my memo, the Court then granted review, and after full briefing and argument, the Court did indeed divide into the same 5–4 split to reaffirm the prior precedent. I then was given the opportunity to turn my cert pool memo into a draft majority opinion for the Court in a case that remains deservedly obscure.

<sup>22</sup> Letter from Justice Lewis Powell to Justice Potter Stewart (Oct. 26, 1984) (on file at Yale University Library, Potter Stewart Papers, Collection MS 1367, Folder 584).

<sup>23</sup> Justice Stewart had a nice internal tradition of showing his new law clerks the location in chambers of the files for all his prior clerks and inviting the new clerks to read through them as they might like. Of course I spent a long evening reading the files of many prominent former Stewart clerks. And there, on top of my own file, was a letter from Justice Powell dated February 20, 1984, recommending me and saying that my name had "ended up

Justice Powell was his “best friend on the Court;” I believe Powell’s recommendation carried virtually dispositive weight at the time. Thus, Justice Powell is among the many whom I must thank here.

Finally, Justice Sandra Day O’Connor offered me a turn in her chambers. I was fortunate to have a “contact” in her chambers: future Vanderbilt Law School Dean Kent Syverud, who had clerked for the same district court judge that I had, Louis F. Oberdorfer, Jr., the year after me.<sup>24</sup> Along with work for Justice Stewart (with whom I of course cleared everything first), two months each with Justices Stevens, Powell, and O’Connor, plus certiorari work with the Chief Justice, would certainly fill out an incredible year.

But then two additional, quite unexpected things happened.

First, I soon became a “full-time” clerk with Justice William J. Brennan, Jr. Justice Brennan had actually written back to Justice Stewart in June, saying that he “would be happy to have Rory Little’s help next Term.”<sup>25</sup> Then, when I arrived in August, the new Brennan clerks (four top-flight federal appellate clerks starting at the same time) invited me to help them plow through the huge pile of “summer certs”—petitions for certiorari review that had piled up since the previous Term had ended over two months earlier. Justice Brennan, who famously handled the bulk of the Term’s hundreds of cert petitions without assistance,<sup>26</sup> used the summer certs to train his law clerks until he returned after Labor Day. We would prepare brief memos, sometimes as short as a sentence or a paragraph, for each of the over 1,000 cert petitions that would be reviewed by the Justices at the Court’s “long conference” when they returned from their summer jaunts after Labor

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on [his] final list of half-a-dozen names.” Letter from Justice Lewis Powell to Justice Potter Stewart (Feb. 20, 1984) (on file at Yale University Library, Potter Stewart Papers, Collection MS 1367, Folder 584).

<sup>24</sup> And here lies an instructive footnote for law students applying for clerkships. A professor of mine at Yale had referred to Judge Oberdorfer as “obscure” when I had accepted his clerkship in 1981 over a more prestigious, in the minds of some, D.C. Circuit clerkship (the D.C. Circuit judge had been quite unfriendly during our interview, and I felt that I would not be able to work collegially with that judge). Three years later, when both Kent Syverud and I were hired to clerk at the Supreme Court for the same 1984 Term, a legal newspaper referred to Judge Oberdorfer as a Supreme Court clerkship “feeder.” The lesson for aspiring law clerks and other young lawyers? Times and reputations can change quickly. Trust your instincts, take the job that feels right to you, and don’t take a job that does not feel right based on the fleeting currency of present prestige.

<sup>25</sup> Letter from Justice William J. Brennan to Justice Potter Stewart (June 14, 1984) (on file at Yale University Library, Potter Stewart Papers, Collection MS 1367, Folder 584).

<sup>26</sup> Mark Miller erroneously writes that Justice Thurgood Marshall was the first to not participate in Chief Justice Burger’s pool for reviewing petitions for certiorari. *See* Mark C. Miller, *supra* note 11, at 743. No—Justice Marshall and Justice Brennan did this together, as they did so many things at the Court.



Day.<sup>27</sup> Justice Brennan believed that having his clerks review the petitions that were filed over the summer while he was gone would be great training for the clerks' work in the coming Term. He was correct—but it was also a lot of work. The Brennan clerks were happy to have help on this large and somewhat tedious task, and I pitched in as soon as I was asked.<sup>28</sup>

I ended up staying with the Brennan Chambers for the entire Term—I recount more of my experience in that chambers below. But first, another unexpected event came when I did my earlier-arranged work with Justice Stevens. As that work developed (in December? Early spring? Memory fades), Justice Stevens kindly asked me whether I would keep working with him. At the time, Justice Stevens (well known for doing much of the work himself) hired only two law clerks. At the same time, the Court in 1984 was hearing more than twice the number of merits cases than the Court does today.<sup>29</sup> By winter, the Term was in full gear, and Justice Stevens' two clerks were shouldering the same number of cases as were being handled by four clerks in every other chambers (three in Rehnquist's). They, too, generously accepted my presence to help with Justice Stevens's work through the remainder of the Term. My gratitude to Justice Stevens and his clerks for their gracious and unpretentious acceptance of an "outsider" is immense, and I have been privileged to be included as a "Stevens Clerk" for reunions ever since.<sup>30</sup>

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<sup>27</sup> See *Many Filed, Few Chosen at High Court*, N.Y. TIMES (Oct. 8, 1985), <https://www.nytimes.com/1985/10/08/us/many-filed-few-chosen-at-high-court.html> [<https://perma.cc/X5A6-6V4M>] (reporting that 4,043 petitions for certiorari were filed in the 1984–1985 Term with "more than 1,000 pending" over the summer).

<sup>28</sup> Michael Klausner (now a law professor at Stanford), whom I had known as a student at Yale and who was an outgoing Brennan clerk from the 1983 Term, recommended to the new Brennan clerks that he thought I should be included. I remain grateful beyond measure to Mike.

<sup>29</sup> A "merits case" is one in which the Court has granted certiorari and has set for oral argument after full briefing by the parties. This can be distinguished from additional research and writing occasions that often arise for the Justices, such as opinions related to denial of certiorari, summary dispositions of certiorari petitions, orders and opinions regarding emergency motions, and other "loose ends." Regarding the numbers, in the 2018 Term, the Court heard and decided about 70 cases on the merits. See *The Supreme Court—The Statistics*, 133 HARV. L. REV. 412, 421 (2019). By contrast, in the 1984 Term, the Court heard and disposed of about 160 merits cases. See *Caseloads: Supreme Court of the United States, Method of Disposition, 1970–2016*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-method-disposition-1970-2016> [<https://perma.cc/G2R6-P2NA>]. The precise numbers depend on what exactly one counts as a "case," and different databases report slightly different numbers.

<sup>30</sup> I must also give thanks to Justice Stevens's longtime assistants Nellie Pitts and Janice Harley, who accepted and encouraged me not just that year, but over the many years since. Indeed, I was honored to be included at Justice Stevens's final clerks' reunion in May 2019, only weeks before his unexpected passing. He was in fine shape at that reunion, as was Nellie, and he held forth for well over an hour of warm and candid Q&A with his clerks. He also

Now back to the Brennan chambers. When Justice Brennan returned to One First Street after Labor Day, his greeting to me was warm and generous. Remarking on our shared connection of having been raised in New Jersey, he invited me to “come by for coffee any morning you can.” “Coffee with Brennan” is a term of art among his former clerks of that time. It was the way he conducted virtually all his case-work business—he neither required nor desired written “bench memos.”<sup>31</sup> Instead, he would sit with all his clerks gathered around his desk starting at 8 or 8:30 am (the Justice often got to the Chambers first, even occasionally answering the main phone without identifying himself). We would sip coffee prepared by the clerks<sup>32</sup> and discuss whatever the business of the Court was at the moment (or anything else on the Justice’s mind—he was an avid observer of current events and news). This is the way that Justice Brennan prepared for oral arguments and hashed out what would ultimately be written in opinions. Hours and hours and hours of conversation took place amongst all the clerks together, orally taking apart the briefs and intricate legal issues. We would also discuss the merits and nuances of draft opinions, both our own and those from other chambers. These conversations were fast-paced, high-level debates with some of the smartest young lawyers around.<sup>33</sup> There were detailed and sometimes even contentious discussions, with the need for further research and redrafting often exposed. “Coffee with Brennan” sometimes went until two in the afternoon!

In my experience, the most challenging times for clerks in the Brennan chambers were the pre-argument “case presentations.” The clerks would divide the cases coming up for argument among themselves, and the assigned

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distributed signed copies of his new book, which is a wonderful and historic read. See JUSTICE JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS* (2019).

<sup>31</sup> Professor Owen Fiss, who clerked for Justice Brennan during the 1965 Term, has told me that this was much the same during his clerkship time two decades earlier.

<sup>32</sup> Fellow clerk Don Verilli took on the job of trying to get to Chambers before Justice Brennan did to make the coffee. He usually succeeded, although there is debate as to the quality of the coffee (I liked it!). The less early-rising clerks were, and remain, grateful for that service.

<sup>33</sup> For example, one of my Brennan co-clerks that Term was Don Verrilli, later to be Solicitor General of the United States under President Obama. See *Donald B. Verrilli, Jr.*, MUNGER TOLLES & OLSON LLP, <https://www.mto.com/lawyers/donald-b-verrilli-jr> [<https://perma.cc/6LY4-8JNV>]. Another was Jim Feldman, who went on to serve for seventeen years as an Assistant Solicitor General and orally argued 49 cases before the U.S. Supreme Court, one of the larger numbers in history. *James A. Feldman*, AM. L. INST., <https://www.ali.org/members/member/441218/> [<https://perma.cc/5N6N-3YWM>]. Chuck Curtis, a third clerk, has also argued cases at the Court from private practice in Wisconsin. *Charles G. Curtis, Jr.*, Partner, PERKINS COIE, <https://www.perkinscoie.com/en/professionals/charles-g-curtis-jr.html> [<https://perma.cc/P6FG-LZ3W>]. Together, these three former Brennan clerks have gone on to present well over one hundred oral arguments before the Court.

clerk would then orally present the case to Justice Brennan and the other law clerks. This was great preparation for the upcoming arguments; Justice Brennan would listen to four young clerks present and then take apart the issues, point by point. Along the way, the Justice might ask questions to stimulate more analysis. He might even let his preliminary views be known, but usually not until the clerks had initially discussed the arguments and precedents. This was a wise strategy, because hearing the Justice's views first might well have squelched our own, and he wanted to hear full debate of all sides. The Justice had a remarkable, almost photographic, memory for prior decisions of the Court. Not infrequently he would spin around and grab a volume of the U.S. Reports off the shelves behind him, saying, "I think we said something about this back in . . ." He knew the precise volume and often the page. In the 1980s, there were as many as 24 cases argued per two-week sitting each month (October through April): four cases a day with an hour of argument for each, three days a week (Monday, Tuesday, and Wednesday, 10 AM to noon and 1–3 PM). Supreme Court clerks today have no idea how easy they have it—they only hear one or two arguments per day! Moreover, in Brennan's chambers, most upcoming cases would be presented and discussed repeatedly, over multiple days. By the time of oral argument, the Justice was as well or better-prepared than any bench memo would have left him.<sup>34</sup>

The same oral processing also happened in the Brennan chambers following arguments. After the Justices met to vote on the recently-argued cases in Conference, Justice Brennan would return to chambers, gather us clerks, go over his Conference notes, and recount what results had been

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<sup>34</sup> By contrast, my 1984–1985 discussions with the clerks for Justice Harry A. Blackmun indicated that one of them would prepare a lengthy (20–35 pages) written bench memo for each upcoming case. Other chambers wrote similar, albeit perhaps not as lengthy, memos for their Justices. Justice Blackmun would review his clerks' memos, and if he had more questions—which, understandably, was not infrequent—the clerk would have to prepare a supplemental memo. There is no doubt that with this process, which seemed inefficient to the Brennan chambers, the Blackmun clerks worked harder than we did. Indeed, my perception was that they were likely the hardest working chambers in the building.

Because I was clerking for retired Justice Stewart, I had a special opportunity to get to know the Blackmun clerks. Justice Blackmun enjoyed breakfasting with his clerks in the Court's public cafeteria almost every day—it was virtually a mandatory, if also wonderful, aspect of the job as his law clerk. *See generally* LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005). Not surprisingly, however, after a few weeks, the conversation might get somewhat repetitive, and the Blackmun clerks were usually happy to have a new voice at the table. Because I was, in some sense, an "independent" within the building, I believe I was viewed as a "safe" choice for that new voice. Thus, I was often invited to have breakfast in the Court cafeteria with the Justice and his clerks. I took advantage of that opportunity every time I could.

reached.<sup>35</sup> He would discuss potential assignments for cases in which he, by his senior position in 1984, would be making an assignment, although of course we had to wait for an official “assignment memo” to come from the Chief Justice.<sup>36</sup>

Perhaps most importantly, after cases were assigned to Justice Brennan for writing, he would again orally go over—with the clerks at coffee—the potential paths for decision and nuances to be reflected in the writing. It is true that in my Term, Justice Brennan’s clerks (as well as the clerks for most of the other Justices) usually produced the first drafts of opinions for the Justice. However, at least in the Brennan chambers, by the time you put pen to paper—or fingers to keyboard—it was really Justice Brennan writing. You had already heard from him, in hours and days of coffee discussions, exactly what he wanted and expected an opinion to say. Undoubtedly, Justice Brennan’s writings were his opinions, words, and phrasings, not the clerks’.

Finally, in my Term, no draft opinion went to Justice Brennan until all the clerks had reviewed it and suggested edits. We had many debates among ourselves about how to structure, what precisely to say, and whether the draft really reflected what we believed the Justice wanted. Again, we were “inputting” ideas we had already heard the Justice speak. Finally, before any opinion was circulated to the other Justices, the Justice himself, together with his clerks, worked it over. This was different—and I would say more thorough—than the other chambers I observed, where often it was just one clerk working with their Justice to finalize draft circulations.

Without breaking confidences, over the first months of the 1984 Term oral arguments, I began to shoulder a full load of merits cases for Justice

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<sup>35</sup> In 1984, the Justices met in Conference on Wednesday afternoons to vote on the cases argued on Monday, and on Fridays to vote on the cases argued on Tuesday and Wednesday. The Justices meet in Conference alone; none but the nine Justices are permitted to be present in the room. Thus, the notes that each Justice may make are the only record of what transpires in these meetings.

<sup>36</sup> If the Chief Justice was on the opposite voting side from Justice Brennan in a case, Justice Brennan would, as the Senior Justice in either the majority or a dissenting minority of Justices, assign the writing of the opinion to either himself or another Justice in the group. There occasionally was concern because Chief Justice Burger’s assignment memo would not always match Justice Brennan’s notes from the Conference as to who had voted for what result. The Chief would make an assignment if he were in the majority, which of course is the Chief Justice’s right by tradition, even if junior in tenure to another similarly-voting Justice. But Justice Brennan’s notes or memory occasionally indicated that the Chief had not voted with the majority in Conference, yet his assignment memo would surprisingly assign the opinion in the case as if he had. *Accord* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 154–55 (Little, Brown & Co. 2012). There was, of course, no recourse, at least not until opinions were later circulated. Justice Brennan always insisted that Burger be referred to, by him as well as by his clerks, as “the Chief,” and the Chief’s authority was followed, even if amid some quiet clerk grumbling.

Brennan, divided among the clerks, for oral argument preparation. The decision of what cases to assign me was made by the Justice and the other clerks—I was not driving the bus. But from November or so, I was included and considered within the Brennan chambers as a full-time “Brennan Clerk.” Indeed, my memory is that sometime in December, Justice Brennan himself formally asked me if I would work for him fully. He said that he had, of course, already spoken with “Potter,” and I too checked with Justice Stewart (who graciously agreed). I was honored to have the arrangement formalized.

And so, by December or January, I was simultaneously carrying work not just for Justice Brennan and the retired Justice Stewart, but also my assigned cert pool work for the Chief Justice and the merits work I was given for my two-month stints in other Chambers. For the January and February sittings, I was scheduled to work with Justice Powell. As a result, in late December and over the “holiday” period (but with 160 cases that year, there were no relaxed holidays for clerks at the Court), I was also working on bench memos for Justice Powell for the January cases assigned to me. At some point, I also picked up work for Justice Stevens. There is no doubt that I have never worked harder, or more hours, than I did that year.

Justice Powell had a particularly friendly and informal relationship with the Stewart chambers; he was Justice Stewart’s best friend at the Court, and (fortunately for me) he had almost hired me and had encouraged Justice Stewart to do so. Consequently, my relationship with Justice Powell felt quite comfortable. As a University of Virginia graduate, I felt a particular bond with Justice Powell, a deeply-rooted Virginian, as well as huge jurisprudential respect for his work at the Court. I was fortunate to share invaluable, informal moments with the Justice. For example, he would occasionally stop by my office after visiting with Justice Stewart, and even prop his feet up on my desk and chat. On Saturdays, unlike the other days of the week, Justice Powell’s clerks were free to dress more informally, forgoing the ties they routinely wore on weekdays. (Yes, back then in most chambers, although not in Brennan’s or Marshall’s, the male law clerks wore suits and ties.)<sup>37</sup> To signify the weekend, on some warm spring days, Justice Powell would bring a single beer in a brown paper bag and drink it at lunch with his clerks in one of the courtyards. I also recall one moment in particular when Justice Powell modestly mused to me that “Judge Friendly [Henry Friendly of the Court of Appeals for the Second Circuit] should by all rights be on this Court, perhaps in my place.” That was, to me, simply incredible.

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<sup>37</sup> John Jeffries, whose association with Justice Powell was particularly intimate, see *supra* note 16, has told me that he never saw Justice Powell in the Court without a tie. My dim memory is that, in 1985, Justice Powell may not have worn a tie on Saturdays, but that memory is uncertain.

I was in awe of Justice Powell, the former President of the American Bar Association among other luminary achievements. It had never occurred to me that a Supreme Court Justice might have such regard for “lower” court judges. Justice Powell’s gentle humility has always stuck with me as a model.

Unfortunately, Justice Powell fell ill that winter, had some surgery, and did not sit for the arguments in January. He was expected back, however, so I again prepared some merits cases for him for the February sitting. But again, Justice Powell was too ill to sit. Thus, although I did do my agreed-upon merits work for two months in the Powell chambers and even met with him to help prepare for some oral arguments, he could not participate in their decision under the Court rules then in operation, because he had missed the oral arguments.<sup>38</sup> Thus, while I forged a close relationship with the Justice, and indeed went back to visit with him repeatedly after 1985, my work for him was—in some sense—for naught.

Having worked with Justices Brennan, Stevens, Powell, and Burger by Spring 1985, I had also agreed to work with the O’Connor Chambers for two months. However, by January it was well-known that I was working as a full-time Brennan clerk. My memory is that Justice O’Connor’s clerk, Kent Syverud—my friend after we had both clerked for U.S. District Judge Oberdorfer—graciously let me know that the Justice was not comfortable with a Brennan clerk working intimately in her chambers. So I never did work in the O’Connor chambers. Years later, when I attended Ninth Circuit Judicial Conferences as a U.S. Attorney Appellate Chief in San Francisco, Justice O’Connor and I became well-acquainted. She once chuckled lightly with me about that 1984 Term, saying, “I was relatively new then; I’m not sure I would feel that way now.”

An advantage for me during the 1984 Term was that I was relatively independent, both in terms of location and time. I had my own desk and office in Justice Stewart’s chambers (shared only occasionally with Justice

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<sup>38</sup> See Stuart Taylor Jr., *Tie Vote: What Happens*, N.Y. TIMES (Oct. 5, 1987), <https://www.nytimes.com/1987/10/05/us/tie-vote-what-happens.html> [<https://perma.cc/X8AW-VKDC>] (noting that Justice Powell missed 56 oral arguments, consequently leading to 13 cases that were either tied 4–4 or set for reargument). The tradition of a Justice forgoing participation after missing oral argument was shifted by the 2004 Term when Chief Justice Rehnquist missed 44 oral arguments but participated in their decision by reviewing the briefs and transcripts and recordings of the arguments. See Elizabeth Slattery, *What Justice Ginsburg’s Absence From the Supreme Court Means—and What it Doesn’t*, HERITAGE FOUND., (Jan. 11, 2019), <https://www.heritage.org/courts/commentary/what-justice-ginsburgs-absence-the-supreme-court-means-and-what-it-doesnt> [<https://perma.cc/W8ZC-U5DA>]. Today, an absent Justice may still participate in decision after listening to the recording of the oral argument, as well as reviewing the briefs and record. See *id.*

Stewart’s “messenger” and driver, Harlan), with only the Justice and his longtime assistant, Carolyn Sands, keeping an eye on me. The room had its own entrance into the hallway, so I could come and go without necessarily passing either Carolyn’s or the Justice’s office. I kept them informed of my whereabouts, of course. But the reality was that I was more of a “free agent” than other clerks—I had no co-clerks keeping track of my presence or “competing” with me in terms of work or hours.

Independence, however, did not lead to slacking. I worked seven days a week (sometimes with Sunday mornings “off” until maybe 11 AM) from about 8 AM until shortly after midnight every day.<sup>39</sup> But whether I was in the Brennan chambers, the Powell Chambers, the Stevens Chambers, or visiting in other chambers, no one knew (or was interested in) my whereabouts. This gave me great flexibility in terms of visiting virtually all of the other 33 clerks in the building, without raising any “suspicion” that an “outsider” was intruding. By nature, I am an outgoing and friendly person, and I really wanted to get as much out of the year as possible. I also needed lunch partners, not having any pre-ordained co-clerks to ask. So simply for daily friendships in an otherwise lonely office, as well as my innate attraction to the work of the Court in every corner, I made it my business to get to know as many of the other clerks as would have it.<sup>40</sup>

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<sup>39</sup> In the interests of history, I can report that word-processing desktop computers were relatively new at the Court in 1984. Indeed, when I served from 1982–83 as a U.S. district court clerk, there was only one computer in the office—the Judge wrote longhand, and my co-clerk and I produced our memos and draft opinions on electric typewriters. At the Court in the 1984 Term, for technological (or perhaps humanitarian) reasons, the early word-processor computers that we each had on our desks all shut down automatically every night at midnight (“for maintenance”). For me and many of the other clerks in the building (but not the Blackmun clerks, whom I recall often working well beyond midnight, see *supra* note 34), this served as a de facto “end of the workday” whistle. The Metro ride or drive home at 12:30 AM (some of the Chambers had law clerk parking a block behind the Court building) was blissfully peaceful and traffic-free.

<sup>40</sup> For example, when the weather was good, I regularly went for an afternoon run with a number of different clerks, particularly in the Powell (Dan Ortiz), O’Connor (Scott Bales), and White (Scott Nelson) chambers. In addition, there were regular basketball games on the fifth floor—it’s been called the “Highest Court in the Land.” Stanley Kay, *The Highest Court in the Land*, SPORTS ILLUSTRATED (Jul. 25, 2018), <https://www.si.com/nba/2018/07/25/supreme-court-building-basketball-court> [<https://perma.cc/W9KF-N28W>]. When one is working as hard as we all were, physical exercise is a healthy outlet for pent-up energy, as well as an essential key to balance. Justice O’Connor had, two years earlier, begun her regular exercise class for staff and clerks (female only, is my memory). Conversely, the basketball games were usually all male, although my dim memory is that Blackmun clerk Vicki Been occasionally played with us. Another dim memory is that, once or twice, Justice White—then 67 years old—joined us on the basketball court to shoot around, although by that point in his career he was seen more often on the informal golf ball putting course he set up with his clerks on the carpeting within their

These friendly relationships, and my independence, were quite helpful when it came to doing merits work with the various chambers. It has been noted that law clerks at the Court, in addition to assisting with legal research and writing for the Justices that hire them, sometimes “serve as liaisons or ambassadors to the other justices’ chambers.”<sup>41</sup> I think this is accurate. But my position, as an ambassador from a “neutral country” (so to speak), as well as an active participant in the merits work of a number of different (and not necessarily ideologically-linked) chambers, gave me a special measure of ease in moving from one chambers to another to discuss the cases and issues of the Term. I could make small suggestions on circulating drafts without being viewed as “that Brennan clerk” or “that Powell clerk.” My own ideology, as well as my approach to sensitive issues, might be described as “moderate,” and my allegiances were viewed as not tied in lockstep to any one Justice. Thus, when I was involved in a particular merits case, I could move between various chambers to speak with the clerk who was working on the same case in each of the other chambers, without necessarily being “typed” or viewed as committed on an ideological, as opposed to purely legal, basis to one view.

I would add that, in my year at least, virtually all the clerks I got to know were interested in “getting it right,” rather than being driven without question to ideological results.<sup>42</sup> Still, suspicions about the ideological loyalties of clerks tied to specific active Justices were not absent. My belief is that my unique position freed me to some extent from these suspicions, at least until the end of the Term when my loyalties to the Brennan chambers were relatively clear.

By December 1984, I was operating more within the chambers of other Justices than with Justice Stewart.<sup>43</sup> My memory is that by the end of

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chambers. *See, e.g.*, IN CHAMBERS, *supra* note 4 (depicting the putting course on the book jacket).

<sup>41</sup> Miller, *supra* note 11, at 743.

<sup>42</sup> This notion might be contrasted with the picture of the Court and its law clerks described by Edward Lazarus in his book focused on the 1988 Term. *See* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (Penguin Books 1998). I spent hours debating with then-Judge Alex Kozinski about his criticisms of that book before Kozinski published his critical barrage. *See* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835 (1999). Erwin Chemerinsky has called Kozinski’s criticisms “unfounded.” Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1088 (1999). I agree, as I repeatedly told Kozinski at the time.

<sup>43</sup> Justice Stewart’s health was in decline during the 1984 Term; he sadly passed away in December 1985, just months after I left his chambers. One of my great daily pleasures, when the Justice was in the office, was to take a walk with him around the building, something his wife stressed to me was part of my job (I was also his companion on visits to see his doctors at the Walter Reed hospital, to which his longtime Court “messenger” Harlan would drive us). We would walk out of chambers and straight down the broad wide marble steps at



November, I had completed assisting Justice Stewart with a visiting “sitting by designation” with the Sixth Circuit, as well as finalizing work on other Circuit opinions left over from some designated sittings from the previous year. I had also largely completed work for Justice Stewart on a huge international arbitration matter. Here are a few more, specific, memories about my work with the active Justices that year:

I recall that when I mentioned to Justice Stevens that I had been offered an opportunity to work more fully with Justice Brennan, Justice Stevens did not bat an eye. My impression was that Stevens was completely confident in his own work and positions in cases; he appeared to rely far less on his law clerks than was the case in other chambers. Another small example of this: Later in the Term, Justice Stevens handed me a draft majority (or perhaps it was a dissent?) opinion he had written, in a case on which I was assisting. “I think it’s pretty good,” he said with a smile, “but feel free to work on the footnotes.” Knowing that I was working with other chambers, Justice Stevens never expressed concern to me about confidences or ideology. Although he was certainly independent, I think Justice Stevens also truly viewed the Court as something like a small law firm trying hard to get all its cases decided correctly. I never heard him express even a hint of attributing bad faith toward any member of the Court. He was confident in his own judgment, skills, and positions on the cases.<sup>44</sup>

As for Justice Brennan, let me first recount what many others have also reported: at the age of 78, he still had the most surprising, powerful, handshake! When I first met Justice Brennan, he was a relatively small man, sitting behind a huge desk, Yoda-like. With his broad smile he warmly welcomed me to his chambers. He reached his hand out over the desk, and I leaned in to take it. He took my hand, placed his other hand on top of ours—and almost pulled me over the desk! I was so surprised by the force of his grip and pull that I stumbled and almost fell over. Many other clerks and friends of the Justice tell similar stories.

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the front of the building, without a guardrail. He would often take my arm, and I was always terrified that he might fall on my watch. Thank goodness he never did!

<sup>44</sup> One additional observation I will make here is that, in my Term anyway, Justice Stevens sometimes appeared to come to his independent—some might even say quirky—positions relatively late in the day. Yet he was often spoken of, by us law clerks as well as many others, as the “smartest” Justice at that time. On at least one occasion I recall Justice Stevens circulating a draft lone dissent just a day or two before we expected the full disposition to be publicly released. I recall a number of clerks in the building, including me, reading the draft and saying to each other something like “wow, he is actually right, this is a whole new way of thinking about the case.” However, the uniform view was also something like “but it’s too late. No one is going to change a vote now.” And indeed, at least as I recall it, no votes changed and the opinion, with Stevens’ dissent, was issued as planned.

And here is an anecdote descriptive of Justice Brennan's own confident attitude. At "Coffee with Brennan" one morning, we were going over various draft opinions on already-argued cases. One of the other clerk's cases came up for discussion, and it happened that I was assisting Justice Stevens with the dissent on that same case. (Or perhaps it was the other way around, with Justice Brennan working on a dissent in a case where Stevens had the majority—my memory is dim.) I stood up and said that I thought I should leave the room because I was working on the same case for Justice Stevens. "No, no, no Rory," Justice Brennan said, "please sit down. I want John to know exactly what I think!"

I stayed. I was thrilled to be working on anything at the Court, and the Justices themselves clearly were (for the most part) not concerned by my circulation among Chambers. By the time of the December arguments, I was doing merits work for at least two active Justices' chambers (three if you include the cert pool for the Chief), with two months coming up with Justice Powell and another two (although this did not come to fruition) coming with Justice O'Connor. And I continued to do some work for Justice Stewart. Thus, I was shared by five Justices (four active) in one Term. I've told friends, family, and students anecdotes about these experiences for years. I am happy to now commit the experience to paper, some 35 years later, before memories fade entirely.

## II. THE FLEXIBILITY AND INDEPENDENCE OF RETIRED-JUSTICE CLERKS—COULD THE JUSTICES TODAY PROFITABLY SHARE CLERKS AMONG THEIR CHAMBERS?

Quite secondarily, I simply want to explore the concept of sharing law clerks among Supreme Court Justices. Thinking back, for this Essay, on my individual experience of "floating" between various chambers at the Supreme Court has led me to wonder if there are some more general advantages to the concept. Could the Justices at today's Supreme Court benefit from (or even accept) a sharing of law clerks between their chambers? Initial circulations of this Essay to former U.S. Supreme Court clerks have elicited polite and pretty uniformly negative reactions on that idea if it were a general practice. Yet some other appellate (as well as trial-level) courts do utilize such clerk sharing in various forms. I am not writing here to endorse the idea. I simply want to explore the question a tiny bit and see if any reader is even interested.<sup>45</sup>

In circulating drafts of this Essay to former clerks, I immediately heard objections, as well as polite responses like "interesting idea, but no Justice

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<sup>45</sup> This of course assumes the existence of readers.

would even be interested, let alone do it.” I quite understand the quick reactions against the idea. The understanding of Supreme Court clerks as strongly committed to their Justice is deeply embedded.<sup>46</sup> Fear of breaches of confidences are quickly expressed. Moreover, even if some other courts do commonly share law clerks among their judges, there is a long and largely unbroken tradition of individual-Justice law clerks at the U.S. Supreme Court—except for retired-Justice clerks who have been shared with active chambers for many years. Perhaps resistance to the idea of Supreme Court clerk sharing is based in part on a reasonable philosophy of “if it ain’t broke, why fix it?”—a “solution in search of a problem” as one reader of this Essay suggested.

Nevertheless, my year went wonderfully well, and—as far as I know all—or at least the overwhelming majority—of the Justices’ law clerks that Term got along famously. This was true even as some very hard-fought cases were decided and the ideologies of the Justices were sometimes passionately, even bitterly, displayed.<sup>47</sup> I believe that in some instances (none earth-shattering), my non-aligned opportunity and ability to speak directly with other chambers’ clerks, without divided-loyalty suspicions, occasionally furthered more open and more receptive communications among chambers. I do not claim any huge impact on the work of the Court, nor do I know whether my perceptions (undoubtedly egocentric) were shared at the time (or are now) by other 1984 Term clerks. I merely want to wonder with an open mind whether a more general practice of sharing law clerks across chambers could improve both the collegiality and the work product of the Supreme Court, without damaging other essential values.

Other than the relatively modern practice of sharing the retired-Justice clerks, I believe the unbroken tradition at the U.S. Supreme Court has been individual Justice-clerk relationships. Starting with Justice Horace Gray

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<sup>46</sup> Here I would reference my friend Scott Nelson’s wonderful published remembrances of our Term. See Nelson, *supra* note 12, at 113–14. Nelson, a “White clerk” in the 1984 Term, repeatedly refers to the Brennan clerks as a unified, apparently undifferentiated, entity. *See id.* Whether right or wrong regarding the specifics of those clerks or that Term, such characterization of clerks, as identified by and with their Justice, is common. And it tends to follow clerks throughout their careers (e.g., introductions decades later that include “she was a Brennan clerk;” “he was a White clerk;” “they were Scalia clerks;” etc.). Indeed, I think that the clerks of all Justices, in addition to Court watchers outside of that small circle, tend to view persons who have clerked or are clerking for specific Justices in the same, undifferentiated way. And yet we all know clerks who have departed from the presumed ideologies of their prior Justice-bosses.

<sup>47</sup> Paging through the five volumes of the 1984 Term after 35 years, I easily noted a dozen or more cases that might be cited here. While every clerk has their individual “favorites,” here are two particularly fraught examples that jumped out at me: *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

hiring a clerk out of his own pocket in 1882,<sup>48</sup> with congressional appropriations for the purpose beginning in 1886,<sup>49</sup> each Justice has hired their clerks individually, and those clerks have worked only for the Justice that has hired them.<sup>50</sup>

Side note: a partial exception, not relevant to my suggestion of clerk sharing, is for clerks whose Justice dies. As far as I know, at least by recent tradition, the clerks presently working for a Justice who dies during a Term have been “picked up” by other Justices, often by distribution of the Chief Justice, for the remainder of their year. But such “reassigned clerks” still work only for one individual Justice at a time. Similarly, I believe that clerks who have been hired in advance for future Terms by a Justice who subsequently dies, are often (although not always) picked up by the new incoming Justice, or by other Justices for a future Term. Still, such “future Term” law clerks work for only one Justice, even if not the one that initially hired them.<sup>51</sup>

One commonplace mark of this individual-Justice tradition is that Supreme Court clerks are often described by reference to the Justice for whom they clerked. Indeed, it is common to refer to a clerk as working for “Justice XXX” by name,<sup>52</sup> clerks often self-identify by their Justice, saying for example, “I was a Brennan clerk” or “I am a Kagan clerk.” The assumption that law clerks at the Supreme Court work for one—and only one—Justice, is long, strong, and often unconscious.

But note that the duties of loyalty and confidentiality take on an interesting dualistic character for Supreme Court law clerks. As Scott Nelson, a clerk for Justice White during the 1984 Term, notes in his remembrance of that Term, “a law clerk has a duty of confidentiality *both* toward his or her Justice *and* toward the Court as an institution.”<sup>53</sup> I certainly always understood these dual obligations, and I think I observed them responsibly in the 1984 Term (and still do, even in publishing this Essay). But these duties, contrary to the commonplace individual-Justice descriptors, are *not* individualized: they are Court-wide.

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<sup>48</sup> Miller, *supra* note 11, at 742.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 742–43.

<sup>51</sup> Thanks to my colleague Professor Radhika Rao for some of this information. Professor Rao had a very unusual experience: after being hired to clerk for Justice Thurgood Marshall, the Justice announced his retirement two weeks before her start date. Justice Marshall then asked Rao to clerk for him in his retired status starting a year later. She did arrive at the Court in that capacity, but then Justice Marshall died during that Term. Rao was then “picked up” by the Blackmun chambers, where she served her remainder of the Term as a full merits clerk.

<sup>52</sup> Miller, *supra* note 11, at 743.

<sup>53</sup> Nelson, *supra* note 12, at 103 (emphasis added).

Nevertheless, the strong and largely unconscious individual Justice-to-clerk ethic leads many former clerks and other knowledgeable Court watchers to be openly aghast at the idea of the Justices of the U.S. Supreme Court sharing law clerks. Objections based on loyalty and confidentiality concerns are immediately voiced.<sup>54</sup> Indeed, an initial objector might say that such an idea is at war with the time-honored, general tradition of individuality in American judging: “Judges do the work themselves,” and law clerks are “merely their assistants.” Any sharing of work and ideas is—or should be—done between the judges of a court themselves, not through law clerks. Law clerks are, at most, messengers or “ambassadors,”<sup>55</sup> and not in any sense co-workers who should seek to substantively influence the work of *other* Justices. The role of law clerk is not—or should not be—impactful, nor is it general. At the Supreme Court, the Justice-clerk relationship is so intimate, so personal, and so exposing of the Justice that it cannot be shared or else the deep trust and faith that is essential to the Justice’s function would be destroyed. In sum, many would argue that Supreme Court Justices should no more share law clerks than they would share a toothbrush.

*A. Some Courts Already Share Law Clerks Among Their Judges.*

I think it could be useful to unpack the many and varied premises that underlie these objections. But preliminarily, I would note that the sharing of law clerks is already done in a number of other courts throughout the country. Is there a reason that the Supreme Court’s unique position and stature requires an opposite practice?

Perhaps the best example of judges on a court sharing law clerks is the position of court “staff attorney,” a job that exists in various federal and state appellate courts, with some prestige and large impact but little public notice.<sup>56</sup> In addition, some multi-judge trial courts share a pool of law

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<sup>54</sup> These and other negative reactions in the text are gathered and summarized from dozens of conversations I have had with knowledgeable folks since I began preparing this Essay in October 2019 and are not attributable to any specific source. Some lower-court judges undoubtedly feel the same. *See generally* Kozinski, *supra* note 42.

<sup>55</sup> Miller, *supra* note 11, at 743.

<sup>56</sup> *See* Elizabeth Armand & Malini Nangia, *Judicial Clerkships: Federal Staff Attorney Positions*, NALP BULLETIN (Dec. 2008), <https://law.richmond.edu/docs/cdo/staff-attorney-positions-and-pro-se-clerkships.pdf> [<https://perma.cc/9E3A-GDA9>] (“Staff attorneys work for the court (and its judges) as a whole rather than for individual judges.”); *Staff Attorney Positions—What Are They And Are They Right for You?*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/careers/judicial-clerkships/Staff-Attorney-Positions.cfm> [<https://perma.cc/76YX-LQ85>] (explaining staff attorneys and their duties and listing information for how to apply to positions in various federal and state appellate courts); *see also infra* text accompanying notes 63–65.

clerks<sup>57</sup>—although perhaps the reason for this is that there are insufficient resources for individual Judge-to-clerk assignments,<sup>58</sup> a rationale that is absent at the U.S. Supreme Court. I am most aware of law clerk pools in state courts, such as in the San Francisco Superior Court for example.<sup>59</sup>

Moreover, at the California Supreme Court—a high court that is similarly not stressed for clerk resources—Justices rely on a large group of staff attorneys for various subject matters (notably, capital cases).<sup>60</sup> Meanwhile, the Alaska Supreme Court uses a shared selection system for its law clerks (although once chosen, the clerks generally are assigned to individual judges).<sup>61</sup> The judges of these courts are, in general, not heard to express concerns regarding the effectiveness of their shared clerk systems. In fact, I wonder if the phenomenon of shared law clerks may exist more widely than *published* sources reveal? Perhaps it is the U.S. Supreme Court that has the financial and historical luxury of being an outlier here?

Indeed, even in federal circuit courts of appeals, there is often a dual system in which individual judges hire individual law clerks but also take advantage of shared staff attorney offices.<sup>62</sup> The Ninth Circuit, for example, has a staff attorney office with close to one hundred lawyers, many of whom work closely and substantively with the active judges.<sup>63</sup> The D.C. Circuit

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<sup>57</sup> For example, this takes place at the Georgia Superior Court. *See* NALP JUD. CLERKSHIPS SEC., INSIGHT AND INSIDE INFORMATION FOR SELECT STATE COURT CLERKSHIPS, *supra* note 13, at 14.

<sup>58</sup> *See id.* at 22 (“The number of law clerks varies widely among the [Michigan] trial courts—some busy trial level courts employ many and others lack funding to hire any”).

<sup>59</sup> *See Court Legal Research Assistant*, SUPERIOR CT. OF CA., COUNTY OF S.F., (June 17, 1999), <https://www.sfsuperiorcourt.org/sites/default/files/pdfs/2294%20310%20Job%20Code.pdf?1585256490495> [<https://perma.cc/7698-SQM9>] (describing a job opening for a law clerk “to perform legal work, legal research, and legal consultation for [multiple] Court judicial officers and staff”).

<sup>60</sup> California Constitution Center, *SCOCA Chambers Staff: Annual Clerks or Staff Attorneys—or Both?*, SCOCABLOG (Feb. 2, 2015), <http://scocablog.com/scoca-chambers-staff-annual-clerks-or-staff-attorneys-or-both/> [<https://perma.cc/WD9P-3RU3>].

<sup>61</sup> *See* ALASKA CT. SYS., ALASKA COURT SYSTEM GUIDE FOR PROSPECTIVE LAW CLERKS 2–4, 16 (July 1, 2019), <https://public.courts.alaska.gov/web/hr/docs/prosclerks.pdf> [<https://perma.cc/JHX8-EY7X>].

<sup>62</sup> *See* Armand & Nangia, *supra* note 56.

<sup>63</sup> *Staff Attorney*, U.S. CT. OF APPEALS FOR THE NINTH CIR., <https://ca9-employment.breezy.hr/p/f10f778791c3> [<https://perma.cc/HX3X-9ZNH>] (describing staff attorney duties, including “orally submit[ting] recommended dispositions” to motions panels of judges); Armand & Nangia, *supra* note 56 (“Staff attorney offices have played an integral role in helping the circuit courts manage the growing number of pending appeals.”); *see also* Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CALIF. L. REV. 937 (1980); HEATHER JONES HOLMES, THE ROLE OF STAFF ATTORNEYS IN THE REVIEW AND DRAFTING PROCESS 1–2 (Apr. 15, 2011), [http://www.texasbarcle.com/Materials/Events/9826/130296\\_01.pdf](http://www.texasbarcle.com/Materials/Events/9826/130296_01.pdf) [<https://perma.cc/E8AH->

similarly has had staff attorneys or “court law clerks” since at least the early 1980s.<sup>64</sup> At the same time, every active federal circuit judge is authorized to hire multiple individual law clerks who are assigned only to them.<sup>65</sup>

Are there advantages to the shared law clerk systems that currently exist? Or is it merely a question of tradition and resources—that law clerks, like living spaces, would not be shared if everyone could afford their own? (But of course, this analogy is inaccurate: some people say they would rather live together than alone.)<sup>66</sup> Other than the foregoing footnotes, I have not found much published on the variety of systems and benefits of shared law clerk systems. But some judges that work in shared law clerk systems have told me that they think there *are* benefits, including a sense of collegiality and absence of suspicious or hostile secrecy; cross-pollination of ideas from multiple clerks who interact with judges of varying backgrounds and ideologies; and a greater commitment to “getting it right” without interference from individual loyalty interests. Maybe these judges are right, or maybe they just do not know any differently. I would like readers who are judges themselves to comment, or at least discuss the idea among themselves. In this Essay, I merely want to open the idea for discussion among those who watch and care about the U.S. Supreme Court.

### *B. Concerns, and Potential Benefits, of Judicial Law Clerk Sharing*

The concerns I have most frequently heard about the shared clerk idea as applied to the U.S. Supreme Court center around deep-seated feelings about confidentiality and loyalty. The U.S. Supreme Court has always been,

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CSAJ]. I am aware from personal experience (as Chair of the UC Hastings Clerkship Committee and former Appellate Chief of the San Francisco U.S. Attorney’s Office) that Ninth Circuit staff attorneys frequently interact with the Ninth Circuit judges on substantive matters, and indeed, are occasionally hired or move from a staff attorney to a law clerk position for an individual judge.

<sup>64</sup> My colleague, Professor Kate Bloch, served as such a “Court law clerk” in 1986 and 1987 and has generously shared her experiences with me. *See Kate Bloch*, UC HASTINGS L., <https://www.uchastings.edu/people/kate-bloch/> [https://perma.cc/3GPB-SF99].

<sup>65</sup> *See generally Court Officers and Staff: Law Clerks*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/court-officers-and-staff-law-clerks> [https://perma.cc/2KG8-W5HW].

<sup>66</sup> *See, e.g., Jennifer Purdie, I Can Afford to Live Alone, but I Prefer a Roommate*, WASH. POST (July 14, 2015), <https://www.washingtonpost.com/news/soloish/wp/2015/07/14/i-can-afford-to-live-alone-but-i-prefer-a-roommate/> [https://perma.cc/LC7R-BFPP]; Nellie Bowles, *Dorm Room Living for Professionals Comes to San Francisco*, N.Y. TIMES (Mar. 5, 2018) <https://www.nytimes.com/2018/03/04/technology/dorm-living-grown-ups-san-francisco.html> [https://perma.cc/KJH8-C45M] (reporting on the new phenomena of dorm-style living for young professionals). Current pandemic “lockdown” experiences might also now support this idea.

for many reasons, shrouded in secrecy.<sup>67</sup> Justices are concerned about the confidentiality of their work and of their chambers. As a related concern, Justices want their clerks to be loyal to them.<sup>68</sup>

It has been said that the chambers of the Supreme Court Justices are like nine little law firms.<sup>69</sup> If this is so, then the ethical duties of loyalty and confidentiality, from law clerks to their judges, are explicit in applicable rules.<sup>70</sup> Supreme Court law clerks also now have to sign a confidentiality oath as part of a code of conduct that was formally implemented well after the Term I was there.<sup>71</sup> Yet cautions against sharing information outside the Court have been culturally conveyed by the Justices to their clerks for many generations. In fact, confidentiality regarding the Supreme Court has been a concern for at least over a century, when in 1919, a clerk was indicted for allegedly leaking an opinion to friends who then traded ahead of the market.<sup>72</sup> Publication of *The Brethren: Inside the Supreme Court* in 1979 and *Closed Chambers* in 1998 intensified concerns about court confidentiality.<sup>73</sup>

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<sup>67</sup> See Peter G. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225, 225-26 (1967). When a number of inside sources broke confidentiality to provide inside information about the Court to the authors of *The Brethren: Inside the Supreme Court*, there was a firestorm of controversy. See generally David J. Garrow, *The Supreme Court and The Brethren*, 18 Const. Comment. 303 (2001). When that controversy was revived after publication of *Closed Chambers* in 2005, the Court instituted a formal code of conduct for its law clerks—the text of which itself has never been publicly released. Cf. IN CHAMBERS, *supra* note 4, at 9–10.

<sup>68</sup> See Miller, *supra* note 11, at 743–44.

<sup>69</sup> It is claimed that Justice Powell coined this term when he stated, “for the most part, perhaps as much as 90 percent of our total time, we function as nine small, independent law firms.” DONALD P. KOMMERS ET AL., AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 20 n.20 (3d ed., 2010) (quoting Lewis F. Powell, Jr., *What the Justices are Saying* . . . , 62 AM. B. ASS’N J. 1454 (1976)); see also Clare Cushman, *Foreword*, in IN CHAMBERS, *supra* note 4, at ix. Other Court watchers have told me that the description was already commonly heard when Powell popularized it.

<sup>70</sup> E.g., MODEL RULES OF PROF’L CONDUCT r. 1.6, 1.7, 1.9 (AM. B. ASS’N 2019).

<sup>71</sup> See IN CHAMBERS, *supra* note 4, at 9–10; Miller, *supra* note 11, at 742.

<sup>72</sup> For a fascinating in-depth account of this largely forgotten episode, see John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271 (2000); see also Newland, *supra* note 7, at 310 n.29 (noting the indictment, and subsequent nolle prosequi years later, in the case of *United States v. Ashton F. Embry*). The episode well preceded the Supreme Court’s 1987 formal condemnation of criminal insider trading in *Carpenter v. United States*, 484 U.S. 19, 28 (1987). Owens clerked for Justice Ruth Bader Ginsberg and Ninth Circuit Judge J. Clifford Wallace, and now serves as a judge on the U.S. Court of Appeals for the Ninth Circuit. *Ninth Circuit Circuit Judge John B. Owens Seated* (Apr. 28, 2014), [https://www.ca9.uscourts.gov/ce9/view.php?pk\\_id=0000000696](https://www.ca9.uscourts.gov/ce9/view.php?pk_id=0000000696) [<https://perma.cc/A4LV-3CQS>].

<sup>73</sup> See LAZARUS, *supra* note 42; BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979); *supra* notes 42, 67. The controversy over the speedy release of Justice Thurgood Marshall’s papers in 1993 also raised concerns about



No doubt it is a most serious concern in light of the prominence and widespread impact of Supreme Court decisions.

But as Professor Goldsmith has written, many incentives are already in place for law clerks to strictly honor confidentiality about the Justices and the Court,<sup>74</sup> and experience shows that they almost universally do (at least in public). There is no reason to believe that the obligation of confidentiality, which is routinely stressed by every Justice to every new law clerk, would not bind clerks who are shared just as effectively as it now binds clerks to individual Justices. Courts that share law clerks do not suffer, so far as we know, from more leaks than does the Supreme Court. I believe that confidentiality about the work of the Court would be—and in fact is—honored by Supreme Court law clerks whether or not they are assigned to individual chambers. Certainly, this has been my personal experience.<sup>75</sup>

Moreover, the reality is that all law clerks at the Supreme Court routinely see the work product, including drafts and unpublished memoranda, emanating from the other Justices' chambers. They also frequently see personal (and non-public) behaviors of the Justices themselves. And the fact is, such clerks *do* share non-public stories about the Court and the Justices outside of the small world of the Court. They simply do not (usually) do it for publication. It is common knowledge among former Supreme Court law clerks, although not much publicly discussed, that we share confidences about the Court and our Justices. This is usually done,

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confidentiality at the Court. See Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES (May 26, 1993), <https://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html> [<https://perma.cc/3FDM-F7Q2>].

<sup>74</sup> Jack Goldsmith, *Temple of Silence: Why SCOTUS Leaks Less Than the CIA*, NEW REPUBLIC (June 22, 2012), <https://newrepublic.com/article/104219/jack-goldsmith-scotus-leaks-cia> [<https://perma.cc/PL9J-KUF9>].

<sup>75</sup> I have always felt that I am bound by the same confidentiality obligations as other clerks with regard to information I learned about the Court and about the individual Justices I worked with, despite having worked for a number of them simultaneously. Indeed, I circulated drafts of this Essay to clerks for various Justices (those of the 1984 Term and others) and asked them to please examine it for any perceived or inadvertent breaches. To date, I have received no critical responses. Of course, an obligation of confidentiality does not mean one cannot speak about the Court or the Justices at all. Many have done so. See, e.g., WILKINSON III, *supra* note 11; see also Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1093 (1982) (explaining the author's role as a former law clerk to Justice Stone and discussing both "the provenance . . . and the spirit" of the famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)). Wilkinson served as law clerk to Justice Powell and has served for 35 years as Judge on the U.S. Court of Appeals for the Fourth Circuit. *Judge J. Harvie Wilkinson III*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., <https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-j-harvie-wilkinson-iii> [<https://perma.cc/6HP9-MBZJ>].

however, only within a small group of insiders,<sup>76</sup> or as anecdotes shared only long after the clerkship has ended, and perhaps viewed by the clerk who shares as endearing and unharmful.<sup>77</sup>

With these realities in mind, the dualistic nature of the Supreme Court law clerk's duty of confidentiality noted by Scott Nelson (if only in passing)<sup>78</sup> becomes more honestly relevant: Is it the duty of a clerk to keep general information about the Court confidential from the outside world? Or is this duty more individual—just to keep the confidences of *your* Justice secret, from everyone outside of the individual Justice's chambers? Perhaps the more accurate descriptor for the clerk's confidentiality obligation is “doubled” rather than “dualistic”—a law clerk is obligated not only to keep secret information about the Court as an institution or as a body from the world, but also to keep secret any individualized information about the clerk's Justice and their individual work.

It is this individualized concern—keeping information about one's individual Justice secret—that I also heard (somewhat *sotto voce*) from some former clerks with whom I previewed this Essay. The concern was about clerks telling stories about their individual Justice, even if only to other Justices' clerks already within the same institutional cone of silence. Perhaps the law clerk's obligation of confidence is to their individual Justice and forbids discussion of one's Justice even with clerks for other Justices?

To me, this concern sounds more related to loyalty than confidentiality. But however the concern is described, I can report that the duty is often honored in the breach. That is, clerks for individual Justices often share

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<sup>76</sup> Peppers and Ward recount an “instructive” example in the Introduction to their book. *Introduction*, in *IN CHAMBERS*, *supra* note 4, at 10–12. In 1994, some former clerks proposed forming an “Association of Supreme Court Law Clerks.” *Id.* at 10. A former clerk to Chief Justice Rehnquist expressed concern, however, regarding potential disclosure of “experiences, war stories, insights, and evaluations” in violation of “the implicit oath of confidentiality.” *Id.* This clerk contrasted his concern to something he apparently considered to be okay, exclaiming that “[i]t is one thing to have an occasional article by a clerk for *Hand* or *Frankfurter*, discussing matters a half century old.” *Id.* at 11. Thus, he endorsed the idea that such disclosures are, at some point and in some contexts, permissible. I can also state with authority that many former clerks who become law professors occasionally share non-public anecdotes with their students. Similarly, former clerks, when they gather for reunions, commonly share stories about the Court and their Justices with each other—stories that they surely would not recount on the record to a media reporter.

<sup>77</sup> In addition to this Essay, incidents to support the idea that clerks share endearing anecdotes are too numerous to list. Just for example, in 2012 Professors Peppers and Ward published *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, which contains essays written by numerous former Supreme Court law clerks. *See IN CHAMBERS*, *supra* note 4; *see also* WILKINSON III, *supra* note 11 (offering Wilkinson's account of clerking for Justice Powell, published one year after his clerkship ended).

<sup>78</sup> *See* Nelson, *supra* note 12, at 103 (noting that law clerks have both institutional and individual Justice confidentiality obligations).

stories about their boss with clerks for other Justices. Undoubtedly—but not always—these shared stories are often praiseworthy, as most law clerks “fall in love” with their Justice (I surely did, if polyamorously). Nevertheless, I have sometimes heard negative anecdotes about individual Justices repeated by their clerks from many Terms over the years—albeit only to other members of the “Supreme Court former-clerks club.”<sup>79</sup>

In this sense, the idea of law clerk confidentiality is more individualized and more personal, and not just about the Court as a powerful and influential institution. It begins to merge with an idea of loyalty to one’s Justice. I tell my students that one of the many advantages of clerking is that you learn “up close and personal” that judges are human beings. Like you and me, they have their individual strengths and flaws. They have good days and bad days, and have deeply personal concerns about things like unhappy children and spouses and disruptive relatives, friends, and pets, just as we all do. Judicial chambers are small, and law clerks see the human flaws as well as strengths of their judges. Perhaps loyalty (or confidentiality) means not disclosing these flaws to the outside world. Perhaps a concern is that clerks who are shared with more than one Justice will not have that same sense of individual, specific loyalty regarding confidences or secrets that reflect badly on a Justice.<sup>80</sup>

I would dispute this in at least one respect. Indeed, I might argue to the contrary: that law clerks who feel intense loyalty to one judge on a multi-judge court are sometimes *more* likely to reveal unhappy personal facts about the *other* judges—negative anecdotes that law clerks will inevitably observe working in close quarters with other Justices in residence. I am chastened to report that I have, in fact, listened to such negative anecdotes from current and former Supreme Court clerks in person. Intense loyalty to one Justice may actually weaken the loyalty felt (if any) toward others. To be slightly more concrete, law clerks to judges who are at one end of an ideological spectrum may take perverse pleasure in “telling stories out of school” about

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<sup>79</sup> The description of the group of former clerks as a “club” is my own; perhaps others would use “guild,” “cabal,” “privileged insiders,” or some other informal term.

<sup>80</sup> Here, I think I am referring more to individual personal quirks that might be observed about a Justice, as opposed to confidences about a Justice’s work product or statements made by a Justice (although these too would be encompassed). This is reminiscent in some ways to the distinction in lawyers’ ethics rules between “confidences” and “secrets.” *See, e.g., CAL. BUS. & PROF. CODE 6068(e)(1)* (“It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”).

judges at the other end of the ideological spectrum, who are not their judges.<sup>81</sup>

This phenomenon is not the rule by any means. Nor should it be. In my experience, Supreme Court law clerks feel an intense loyalty toward the Court as an institution and do not—with rare exception—publicly tell confidential stories about their work or about *any* of the Justices. They are loyal, and they maintain confidences for all the Justices, the Court’s internal staff, and its non-public occurrences and practices.<sup>82</sup> The Court’s law clerk code of conduct may encourage this,<sup>83</sup> but the phenomenon predates its codification. Again, I do not know why sharing law clerks among Justices would detract from this already extant ethic. Indeed, it might strengthen the ties that bind, as opposed to intensifying single-Justice loyalties that may undercut a sense of loyalty toward other Justices.

I am in favor of maintaining confidentiality about the Court—some version of a “maintaining the myth” defense of Court secrecy, which holds that continuing some degree of mystery and infallibility for the highest court in the land helps to maintain its authority as a separate and powerful Constitutional branch.<sup>84</sup> Yet we have not seen a problem regarding the authority of the Court even after criticized publications of “inside information.”<sup>85</sup> I am not convinced that sharing law clerks would negatively

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<sup>81</sup> In a similar vein, I am aware of some former clerks who had unhappy experiences with their own individual Justices and who have told negative anecdotes (again, almost always among the limited former-clerk club) to explain or support their unfavorable views.

<sup>82</sup> This comes with one exception (although I do not know how far it extends): In recent years, Supreme Court law clerks are often paid huge bonuses to join firms who have substantial Supreme Court practices, and they are then occasionally relied upon to describe—or to litigate based on—their insider’s knowledge of the Justices, court staff, and practices of the Court regarding the handling of cases. At least so far, I have not heard complaints that sharing the “unwritten rules” or practices of a court where one once clerked violates accepted confidentiality norms.

<sup>83</sup> See Miller, *supra* note 11, at 744; *supra* note 67 and accompanying text.

<sup>84</sup> Thus it might be said that the Court is not infallible merely because it provides final decisions; its mythlike status in the minds of the public also helps. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”). Secrecy and myth are part of at least one rationale that some offer to support the Court’s uniform resistance to video capture of its oral arguments—a rationale for which I have some sympathy. See, e.g., Richard Wolf, *Cameras in the Supreme Court? Not Any Time Soon*, USA TODAY (Mar. 7, 2019, 5:32 PM), <https://www.usatoday.com/story/news/politics/2019/03/07/justices-alito-kagan-say-video-cameras-have-no-place-supreme-court/3086187002/> [<https://perma.cc/HXG2-LEES>]; see also Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 L. & SOC’Y REV. 385, 387 (1974) (“Myth sustains mystique.”).

<sup>85</sup> E.g., *supra* note 73.

affect the stature of the Court or its Justices. Indeed, I have advanced a few thoughts addressing why it might improve it.<sup>86</sup>

Another aspect of individual Justice law clerk loyalty might be a desire for law clerks to zealously or vigorously represent the views of their Justice—some kind of “vigorous advocacy leads to truth” concept, holding that if all individual Justices’ law clerks vigorously push the arguments and views of their bosses, the result will be the best developed legal opinions possible.

Again, while I can acknowledge this argument, I am not confident that it is theoretically accurate, let alone empirically correct. If one accepts the view that the Supreme Court is primarily interested in getting the right legal answer to hard problems, then having an open mind to, and open discussions of, various points of view and proposed legal solutions would seem to be the best posture to adopt.<sup>87</sup> “Zealous advocacy” works as a theory of legal dispute resolution only because it assumes a neutral decisionmaker at the end, after partisan advocates have finished zealously advocating. But in our system, the Supreme Court *is* that decisionmaker. Unrestrained advocacy for any one Justice’s point of view—moreover, not by the Justices themselves, but by their subordinates—is not immediately obvious as the best path to the best decisionmaking.<sup>88</sup>

In fact, it can well be argued that individualized partisan zealotry, along polarized ideological lines, is responsible for what could be considered the ills of the Court, present and past.<sup>89</sup> Perhaps a practice of sharing law clerks among the Justices would lower the temperature, so to speak, of polarizing loyalties.

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<sup>86</sup> See *supra* Section II.A.

<sup>87</sup> For example, Professor Carrie Menkel-Meadow has argued that the adversary system is not the best way to reach the truth. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996).

<sup>88</sup> One former clerk has countered my suggestion that sharing clerks could reduce extreme ideological partisanship by pointing out that, in fact, some Justices may prefer having clerks who are ideological soulmates. In interviews, Justice Thomas has suggested this in countering the claim that Justice Scalia often tried to hire one clerk who leaned oppositely to him. See Adam Liptak, *A Sign of the Court’s Polarization: Choice of Clerks*, N.Y. TIMES (Sept. 6, 2010), <https://www.nytimes.com/2010/09/07/us/politics/07clerks.html> [<https://perma.cc/5AX6-6RXQ>]. Sharing clerks hired by other, less ideologically committed, Justices might be seen as threatening to that goal. An underlying assumption of my arguments above is that extreme ideological commitment by Justices is, on the whole, not good. So while this former clerk’s observation may be accurate, I find it normatively unfortunate.

<sup>89</sup> See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 304–05 (2016); David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412–16 (2018).

My own experience was that being shared among various chambers allowed me to forge stronger, more friendly, relationships with other clerks than those assigned to just one Justice were able to do. My non-aligned status reduced the level of suspicion that a full-fledged “Brennan clerk” or “Rehnquist clerk” might carry. This was not a false impression, and it was a useful one. I spent many hours debating the finer points of draft opinions with clerks from all chambers, and it generally felt (to me anyway) genuine—that is, not discounted due to suspicion of fierce loyalty to one Justice. I think this helped get small changes done (at least in the footnotes) in some of the Court’s or Justices’ opinions in the 1984 Term.

A final concern expressed to me by at least one federal judge centers on a concept of trust or confidence in the work of law clerks that a judge has individually selected and trained. Perhaps the same level of trust or confidence on the judge’s part in working with new law clerks cannot be achieved on shorter-term or intermittent experiences. This concern seems valid to me, but perhaps a system of small-scale clerk sharing could be designed to address it. There is always a learning-curve—a “getting-to-know-you” process—between judges and their new clerks. If, just for example, two Supreme Justices were to share a clerk or two for a Term, it is not clear to me why the same trust or confidence curve could not be achieved. Justices sharing clerks might even decide to select clerks together, hiring only those who satisfied both Justices.<sup>90</sup> Perhaps developing trust or confidence in six clerks rather than four is more work than is worth the candle—but it does not necessarily seem so on first consideration.

This Essay, which originally set out to be short, is not the place to finely or fully develop this debate. I merely suggest the concept—born out of my own, perhaps unusual and certainly egocentric, experience. But let us at least be honest about the process of producing Supreme Court opinions: Discussions among Supreme Court law clerks often develop the details, if not the conclusions, of important decisions.<sup>91</sup> And the Justices do sometimes

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<sup>90</sup> One experienced Court watcher reading a draft of this Essay suggested a far more radical change: Have the Justices choose all of the Court’s law clerks jointly, and then assign them randomly to particular chambers, four or five per Justice. Such daydreams remind me of my old boss Judge Oberdorfer’s suggestion (together with D.C. Circuit Judge Patricia Wald) to match federal clerkships with chambers the way medical schools do with residencies. See Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply To The Bad Apple*, 101 YALE L. J. 1097 (1992); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152 (1990). For a more recent collection of data and sources on this topic, see Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289 (2014).

<sup>91</sup> In addition to the many sources about Supreme Court clerks cited above, a recent paper provides further, more current information about this “notoriously secretive” topic.

if not always, share their views through surrogates. This can be done at a preliminary “trial balloon” stage of a case (such as at the cert stage), in later preargument memos, after argument, and both before and after circulation of draft opinions. This is, on balance, a healthy phenomenon. Clerks can share drafts which allows Justices to have their views tested out in other chambers, discovering what arguments may attract or repel a joining vote without firm attribution. Thus Justices themselves do not have to personally “pull their punches” to be courteous, or suffer inter-personal rancor for inapt expression that is never published. Supreme Court law clerks—who today almost universally have already clerked in a lower court chambers—quickly learn to be diplomatic in the hallways and cafeterias at One First Street, and to not attribute their preliminary thoughts about a case to their boss, but rather to present them as merely their own experimental ideas. Sharing the law clerks of retired Justices has, I would argue, aided rather than interfered with these internal mechanisms. Perhaps a greater sharing among the Justices’ active clerks would be healthy for an increasingly partisan Court.

#### CONCLUSION

I will be interested to see whether this Essay attracts any attention at all; I concluded some time ago that the huge bulk of a law professor’s published work sinks into the mass of publications with hardly a ripple.<sup>92</sup> Nevertheless, in addition to simply leaving a published record of my own unusual experience of clerking at the U.S. Supreme Court, I have in this Essay put the idea of shared U.S. Supreme Court law clerks out for discussion. If the idea has any merit, then it needs development, thought, and work by others. Perhaps even courageous experimentation is needed (imagine Justice Kagan and Chief Justice Roberts deciding to share their clerks for a Term or two). But to be clear, the Court has already been mildly experimenting with the idea for decades with its unwritten tradition of sharing the law clerks of retired Justices to the chambers of active Justices for merits work. Whether

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Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the U.S. Supreme Court*, 35 J. L. ECON. & ORG., no. 1 2018, at 2.

<sup>92</sup> Thus some time ago, I shifted a fair amount of my time to writing shorter pieces for SCOTUSBlog and publishing annual accounts about the Supreme Court’s cases for the ABA. See *Rory Little*, SCOTUSBLOG, <https://www.scotusblog.com/author/rory-little/> [<https://perma.cc/E3QJ-CPJ6>]; *Rory K. Little*, *Annual Review of the Supreme Court’s Term: Criminal Cases*, AM. B. ASS’N, [https://www.americanbar.org/groups/criminal\\_justice/resources/annual\\_review\\_ussc/](https://www.americanbar.org/groups/criminal_justice/resources/annual_review_ussc/) [<https://perma.cc/G75J-VUXT>]. My thanks to the ABA, and specifically to Carol Rose and Kyo Suh in the ABA’s Criminal Justice Section, for their patient support for this effort.

the idea deserves any further exploration or not, the results of sharing one retired Justice's law clerk among four active Justices worked out reasonably well in the 1984 Term. I encourage the Justices to continue, and perhaps even expand, the tradition.