

# The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform

Trenton H. Norris†

*Judges have both criticized and praised the chaos that is the judicial clerkship process, and many have for years attempted to reform it. This essay by a recent law school graduate provides an applicant's perspective and recommendations for reform. The author analyzes the current unstructured process and criticizes its failure to fully account for the preferences of judges and students, as well as to mitigate the costs to students and the public. In place of the current process, the author sides with proponents of a computerized matching system, like that used to place medical students at hospitals, and discusses its practical implications. Furthermore, noting that past efforts aimed at reform have failed due primarily to lack of adequate enforcement, the author concludes that Congress has both the constitutional authority and the public duty to require judges to use a more rational process to select clerks.*

Every year, our nation's approximately 1,000 federal judges<sup>1</sup> appoint about 2,000 law students<sup>2</sup> to influential and prestigious one- or two-year positions that make up the majority of each judge's work force.<sup>3</sup>

---

† Associate, Arnold & Porter, Washington, D.C.; A.B. 1986, Brown University; J.D. 1992, Harvard University; aide to U.S. Senator Wyche Fowler, Jr., 1987-1989. I want to thank Jack Calhoun for his encouragement and understanding; Judge Stephen Breyer and his secretary, Marsha Bishop, for their assistance in my research; my classmates at Harvard for the thoughtful discussions on which much of this essay is based; Judges Edward Becker, Abner Mikva, Patricia Wald, and others for their tireless reform efforts; and the many judges on the D.C. Circuit and District Courts without whose rejection letters I might never have undertaken this effort. Whether this essay represents "sour grapes" or "fruitful reform" is left to the reader.

1. As of June 30, 1991, there were 692 active federal judges (155 of them circuit judges) and 270 senior judges (66 of them senior circuit judges), totalling 962 judges for the 13 circuits. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1991 ANNUAL REPORT OF THE DIRECTOR bk. 1, at 38 (1992).

2. As of June 30, 1991, there were 1594 law clerks to active judges and 453 clerks to senior judges, totalling 2047 law clerks. *Id.* at 37.

3. Supreme Court Justices are allowed four clerks and two secretaries; circuit judges three clerks and two secretaries; and district judges two clerks and one secretary. See ALVIN B. RUBIN & LAURA B. BARTELL, FEDERAL JUDICIAL CTR., LAW CLERK HANDBOOK 1-2, 4 (rev. ed. 1989). Not every judge uses the full complement of clerks.

For the judges, these law clerks can make the difference between a good and a bad year.<sup>4</sup> For the public, the work of these recent graduates may bear on the outcome of individual cases or the development of entire areas of the law. And for the several thousand students who apply each year, these positions can provide invaluable learning, open doors in practice and teaching, and ensure a degree of financial security in their careers.

Judges are judicious people; before ruling, they review all the evidence, hear arguments from all sides, contemplate long-term impacts, and ponder social realities and doctrinal distinctions, all in the interest of doing justice and husbanding the judicial branch's most important resource: its reputation for fairness.<sup>5</sup> It is therefore remarkable that the method by which judges select their closest professional aides is a free-for-all, an "anarchic, 'Through the Looking Glass' process,"<sup>6</sup> resembling a "frenzied mating ritual."<sup>7</sup> Across the federal bench, "the law of the jungle reigns and badmouthing, spying and even poaching among judges is rife."<sup>8</sup>

Since 1983, there have been six major efforts to reform the system, none of which has ultimately succeeded. In early 1991, a survey of circuit judges concluded that "there is no hope of consensus [on reform], at least not in the foreseeable future."<sup>9</sup> In recent years, the debate has moved beyond the panelled walls of judges' chambers and meetings of the Judicial Conference and into the more public (if musty) pages of law reviews. Judge Patricia Wald launched the opening salvo in October 1990, describing the current mayhem and suggesting the adoption of a program similar to that used to match medical students with hospital residency programs.<sup>10</sup> Judge Alex Kozinski responded in April 1991, further documenting the mayhem but contending that it is "a normal, healthy competitive market process"<sup>11</sup> and that reform may bring its

---

4. See Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1708 (1991) ("The difference between having clerks that are merely good and ones that are awesome can be the difference between a bad year and a wonderful one."); Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153 (1990) ("Judges talk about it being a 'good' or 'bad' year . . . in terms of teamwork and the dynamics of work within their chambers.").

5. Cf. JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* x (1974) ("Without armies to carry out their judgments, courts are dependent on the consent of the governed . . . to make their pronouncements law. When the image of the judiciary is tarnished, the moral authority of the courts is critically undermined.").

6. Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1106 n.43 (1992).

7. David Margolick, *At the Bar: Annual Race for Clerks Becomes a Mad Dash, with Judicial Decorum Left in the Dust*, N.Y. TIMES, Mar. 17, 1989, at B4.

8. *Id.*

9. Memorandum from Judge James L. Oakes et al. to all U.S. District and Circuit Judges 1 (Jan. 9, 1991) (on file with author).

10. Wald, *supra* note 4.

11. Kozinski, *supra* note 4, at 1714.

own problems.<sup>12</sup> Judge Louis Oberdorfer and his former clerk Michael Levy defended the reformers' position in March 1992, taking up Kozinski's challenge to explain the reasons for and impacts of reform.<sup>13</sup>

This essay is an effort to add an applicant's perspective to the debate, in which I believe students and other citizens should side with those who seek a better way. Part I provides an overview of what is at stake in this debate, both for applicants and for the general public. Part II outlines the legal and ethical restrictions on law clerk selection and describes the process from the perspective of an applicant. Part III makes the case for reform, reviews the history of reform efforts, and suggests the entry of a new player: Congress. Finally, Part IV offers a proposal for reform.

## I

### SOME BACKGROUND: WHAT'S AT STAKE

#### A. For Student Applicants

For a variety of reasons, federal clerkships attract several thousand applicants each year. Although the annual salary for a first-year clerk<sup>14</sup> is far less than the \$70,000 or more that recent law school graduates can make at big city law firms, clerkship graduates are later wooed by these same firms, many of which pay them large signing bonuses. These young lawyers are extremely attractive to firms, both for their increased general knowledge of the law and for their understanding of the inner workings of courts before which the firms practice. Although there is no comprehensive comparison of the salaries of lawyers with similar credentials aside from clerking, a series of articles in the *New York Law Journal* in 1983 evidences the general financial security that clerks can anticipate.<sup>15</sup>

Clerks can also look forward to a broader array of career opportunities. A clerk's judge usually knows people (often lawyers) in high places, and judges frequently take an interest in their clerks' careers. In addition, a judge's chambers will occasionally serve as a meeting place for those who have clerked for her over the years, giving young lawyers a golden opportunity for networking. For some professions—notably teaching—a clerkship is an important credential for top employers. For

---

12. *Id.* at 1719-24.

13. Oberdorfer & Levy, *supra* note 6.

14. Clerks are paid approximately \$32,000 in their first year and \$36,000 in their second year. Those few clerks who are hired from legal practice instead of from law school make substantially more because of their experience. Telephone Interview with Teresa Price, Judges' Compensation and Benefits Branch, Administrative Office of the U.S. Courts (Apr. 14, 1992). These figures compare favorably with average annual pay in the United States, which was \$23,602 in 1990. See *WORLD ALMANAC* 177 (Mark S. Hoffman ed., 1992).

15. See, e.g., *Graduates of 'Lumbard U.' Make Mark on Bench, Bar*, N.Y.L.J., Apr. 27, 1983, at 1 (the first in a series of articles on the whereabouts of former law clerks for federal judges in New York district courts and on the Second Circuit).

example, almost two-thirds of Harvard's tenured or tenure-track faculty members once clerked for federal judges.<sup>16</sup> At least as much as other employers, law schools consider clerkships a plus because former clerks have already been screened, have gained experience in researching and writing about legal issues, and bring with them the prestige of having worked closely with respected jurists.<sup>17</sup>

Perhaps most importantly, law clerking is, for most of its graduates, an invaluable experience.<sup>18</sup> The pages of bar journals and law reviews are replete with paeans to the educational and personal growth that a clerkship can bring. Nowhere else has the legal profession so assiduously kept alive its most ancient tradition of apprenticeship, through which young lawyers can best learn the practice of law. Landing a clerkship may not make the difference between a successful and a lackluster legal career, but "[t]he law clerk has an enviable job"<sup>19</sup> whose benefits, for thousands of student applicants, apparently outweigh the difficulties of the selection process.

### B. For the Rest of Us

There is much more at stake in the clerkship selection process than the private aspirations of law students. Because of the role that clerks play in the American legal system, the method by which clerks are chosen implicates important public interests. Since the summer of 1875, when the first law clerk was hired by Chief Justice Horace Gray of the Massachusetts Supreme Judicial Court,<sup>20</sup> clerking has grown to the status of an institution.<sup>21</sup> As the practice has gradually gained approval among federal judges, who persuaded Congress to provide funds for salaries,<sup>22</sup> and as the federal court dockets have grown more crowded, clerks have assumed increasingly influential roles.

---

16. HARVARD LAW SCHOOL YEARBOOK (1985). Furthermore, the Harvard faculty member designated to counsel students interested in teaching careers strongly suggests that they clerk. See Memorandum to Harvard Law Students and Alumni/ae from Prof. Clark Byse 3 (Sept. 1991) (on file with author).

17. Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215, 251 (1981).

18. See Eugene A. Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, 1195-96 (1973) (explaining the learning opportunities available to clerks).

19. *Id.* at 1194.

20. See J. Daniel Mahoney, *Foreword: Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 322-23 (1988). The idea may have originated with Gray's half-brother, Harvard professor John Chipman Gray, see *id.* at 323 n.7, who helped select the clerks from among his students. When Horace Gray was appointed to the United States Supreme Court in 1882, he brought his clerk—and the practice of hiring clerks—with him. See *id.* at 323. Since Congress appropriated no money for assistants, Gray paid his clerk from his personal funds. See *id.*

21. See generally Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 VAND. L. REV. 1125, 1132-33 (1973).

22. Congress first provided for a "stenographic clerk" for each justice in 1886. Act of Aug. 4, 1886, ch. 902, 24 Stat. 222, 254. A "law clerk" was added in 1919. Act of July 19, 1919, ch. 24, 41

Clerks have traditionally performed a variety of mundane tasks for their judges, including proofreading, verifying citations, filing documents, and running errands.<sup>23</sup> Since the time of Justice Gray, though, they have played increasingly substantial roles.<sup>24</sup> The extent of this influence has been hotly debated in a variety of fora,<sup>25</sup> and the debate is unlikely to be resolved in the near future.<sup>26</sup> Nevertheless, it is clear that

---

Stat. 163, 209. In 1970, each Justice was allowed three clerks and, in 1978, four. See John G. Kester, *The Law Clerk Explosion*, LITIGATION, Spring 1983, at 20, 22.

Circuit judges were first permitted a clerk in 1930, Act of June 17, 1930, ch. 509, 46 Stat. 774, subject (until 1948) to approval of the Attorney General, Act of June 25, 1948, ch. 646, 62 Stat. 869, 920. In 1970, each circuit judge was allowed two clerks and, in 1980, three. See Kester, *supra*, at 22.

A few district judges were permitted a clerk in 1940, see Henry P. Chandler, *The Winds of Change in Federal Judicial Administration*, 46 J. AM. JUDICATURE SOC'Y 243, 248 (1963), and within eight years every district judge was permitted a clerk, Act of June 25, 1948, ch. 646, 62 Stat. 869, 921, subject (until 1959) to approval of their senior circuit judge, Act of Sept. 1, 1959, Pub. L. No. 86-221, 73 Stat. 452. In 1965, each district judge was allowed two clerks. See Kester, *supra*, at 22.

23. See RUBIN & BARTELL, *supra* note 3, at 1. Kester notes that "[o]ne clerk was recommended to one Justice for his skills as a barber." Kester, *supra* note 22, at 22. Although most judges would be careful to avoid using their publicly-funded clerks for such personal tasks, some have required a variety of less clearly professional tasks, including playing tennis and taking walks. See Baier, *supra* note 21, at 1149; CONGRESSIONAL Q., THE SUPREME COURT AT WORK 98 (1990); DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 146 (2d ed. 1990).

24. Samuel Williston, one of Gray's clerks, served as "a sounding board and editor." John B. Oakley & Robert S. Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CALIF. L. REV. 1286, 1289 (1979). He reviewed newly filed cases and opinions of other justices and formulated recommended positions for Gray. See Samuel Williston, *Horace Gray*, in 8 GREAT AMERICAN LAWYERS 139, 158-59 (William D. Lewis ed., 1909). Sometimes Williston drafted opinions, but these purportedly served only as discussion pieces to help Gray write his own opinions. See *id.* at 159.

25. For cogent summaries of the debates, see J. HARVIE WILKINSON, III, *SERVING JUSTICE* 55-62 (1974); Kevin D. Swan, Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 817-20 (1987). A succinct discussion of "clerk power" appears in BERNARD SCHWARTZ, *INSIDE THE WARREN COURT* 37-48 (1983).

26. First, law clerks are expected to keep confidential their knowledge of judges' private views, work habits, and the clerks' responsibilities. See RUBIN & BARTELL, *supra* note 3, at 16-17. But see Baier, *supra* note 21, at 1143 n.82 (asking "why should confidentiality of things *sub judice* close the mouths of the clerks as to the nature of their job?"). Second, those clerks who are willing to discuss their general duties probably perceive themselves to be more influential than do the judges. See Arthur M. Boley, *Pretrial Motions in a U.S. District Court: The Role of the Law Clerk*, 74 JUDICATURE 44, 50 (June-July 1990); Kester, *supra* note 22, at 23. And third, judges have a strong interest in appearing to be in control of their clerks and responsible for every aspect of their judicial roles, since "[f]or acceptance of the judicial role in our society, people must know that judges are not simply mouthpieces." See Kester, *supra* note 22, at 23; see also Baier, *supra* note 21, at 1143 n.82. In fact, Justice Brandeis attributed the Supreme Court's prestige to the fact that "[w]e do our own work." See Kester, *supra* note 22, at 62. Interestingly, although most lawyers who were once law clerks will attest to the influence of clerks, see David Crump, *How Judges Use Their Law Clerks*, N.Y. ST. BAR J., May 1986, at 43, 44, the three current Supreme Court justices who were once clerks (Rehnquist, Stevens, and White) minimize that influence, see CONGRESSIONAL Q., *supra* note 23, at 98-99, and two of them (Rehnquist and Stevens) use fewer clerks than they are allotted. See Kester, *supra* note 22, at 61; *Thanks, but No Thanks*, LEGAL TIMES, Mar. 11, 1991, at 13.

clerks exert significant influence on the work of the courts.<sup>27</sup> In addition to listening to their views and reading their summaries of cases and research,<sup>28</sup> judges delegate to clerks numerous influential tasks.

Most important, the press of business leads many judges to use their clerks to draft opinions that they then edit.<sup>29</sup> The effects of this model have been widely catalogued,<sup>30</sup> but it primarily delegates a great deal of power to the clerks.<sup>31</sup> Every lawyer understands the power that comes with drafting a legal document; this is in part why ambiguities in a contract are construed against its drafter. The author of an opinion may determine its organization and the structure of its reasoning.<sup>32</sup> Furthermore,

[n]early every lawyer has had the experience of trying to express an idea on paper and finding that it will not hold together. . . . If the judge does not have to participate in that intellectual testing, leaving it instead to a clerk who is following orders, then cases may be decided differently than the judge himself would have on deeper reflection.<sup>33</sup>

This is all the more likely given that, as Justice Scalia has noted, "[e]ach

27. At the very least, the perception of law clerks' influence on judges is present throughout the profession. See Swan, *supra* note 25, at 820. In fact, a judge's hiring choices are sometimes watched, legitimately or not, for indications of his bias or of the bias of those who may influence him. See, e.g., *Don't Blame Justices for Clerks' Views*, LEGAL TIMES, Feb. 29, 1988, at 17 (letter to the editor from Glenn Harlan Reynolds); Rowland Evans and Robert Novak, *Justice Kennedy's Flip*, WASH. POST, Sept. 4, 1992, at A25; Tony Mauro, *Kennedy's Pick for Clerk Prompts Liberal Worries*, MANHATTAN LAW., Feb. 23, 1988, at 12.

28. Influence is, of course, present in these tasks as well. See ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 57 (1990) (research); Baier, *supra* note 21, at 1169 (fact summaries).

29. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 104-06 (1985) (citing sources); Crump, *supra* note 26, at 44; George R. Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203, 1203 (1973). Of course, the extent to which a judge edits a clerk's work varies both with the judge and with the clerk. "Some judges have never let a law clerk pen a word of opinion; others have graciously delegated footnotes; some have made as much use of a law clerk's language as it merits; and doubtless some have delegated opinion writing to the point of dependence." Oakley & Thompson, *supra* note 24, at 1295 (footnotes omitted).

30. These include dull, citation-heavy style, see POSNER, *supra* note 29, at 107-08; Kester, *supra* note 22, at 21, 24, 61; longer opinions, see POSNER, *supra* note 29, at 108-09, 112-15; Crump, *supra* note 26, at 47; Kester, *supra* note 22, at 61; more opinions, see POSNER, *supra* note 29, at 112-15; Kester, *supra* note 22, at 24; greater contentiousness among judges and their opinions, see Kester, *supra* note 22, at 23-24; Mahoney, *supra* note 20, at 338 n.70; and muddled law of limited precedential value, see POSNER, *supra* note 29, at 110; Crump, *supra* note 26, at 46; Kester, *supra* note 22, at 24. The reader may note that, for illustrative purposes, pains have been taken to exhibit as many of these qualities as possible throughout this student-written essay.

31. See RICHARD NEELY, *JUDICIAL JEOPARDY: WHEN BUSINESS COLLIDES WITH THE COURTS* 137 & n.2 (1986).

32. See *id.* at 138; POSNER, *supra* note 29, at 104-11 (arguing that delegation negatively impacts many facets of judicial writing); Mahoney, *supra* note 20, at 339 (noting that, "at the very least, the judge has been transformed from a craftsman to an editor").

33. Kester, *supra* note 22, at 21; see also POSNER, *supra* note 29, at 111 ("[T]he struggle to compose a coherent opinion provides a more searching test of the soundness of one's ideas than performing an editorial function does.").

one of those law clerks knows the particular case four times better than I do."<sup>34</sup> Clerk-drafted opinions also give their authors a vehicle to make new law, for even the most conscientious judge would have trouble satisfying himself that all of the thousands of words over his name accord with the nuances of his true belief.<sup>35</sup> Finally, a judge may actually decide

whether to file a separate opinion or to dissent in a case based—at least in part—upon the support she can anticipate from her clerks. Or she may ask for, or beg off, responsibility for a particular opinion assignment because of the availability or nonavailability of a particular clerk to work on the case.<sup>36</sup>

Similarly significant clerk influence resides in matters over which courts have discretion to grant or to deny review. Although judges (and their clerks) in the lower federal courts have limited discretion in this exercise, selecting cases to review may be the Supreme Court's most important function. Eight Justices of the Supreme Court now participate in the "cert pool," an arrangement in which all petitions for certiorari are divided among their clerks so that one clerk writes a short summary of the case for the Justices to use in determining whether to grant review.<sup>37</sup> Most Justices read only the summaries.<sup>38</sup> As for the lone holdout, Justice Stevens admits that he does "not even look at the papers in over eighty percent of the cases that are filed."<sup>39</sup> It is therefore possible that clerks influence certiorari decisions more than any others.<sup>40</sup>

To the extent that the increase in law clerks is attributable to the increase in caseloads,<sup>41</sup> it seems unlikely that their numbers or influence

---

34. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1992: Hearings Before the Subcomm. on the Judiciary of the Senate Comm. on Appropriations*, 102d Cong., 1st Sess. 86 (1991) [hereinafter *FY92 Hearing*].

35. See POSNER, *supra* note 29, at 116-18 (arguing that reliance on a "ghostwriting bureaucracy" has numerous costs); Kester, *supra* note 22, at 61.

36. Wald, *supra* note 4, at 153.

37. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 263-66 (1987). According to the Court's Public Information Office, only Justice Stevens does not participate.

38. See *FY92 Hearing*, *supra* note 34, at 84 (statement of Justice Scalia).

39. Justice John Paul Stevens, Address to the American Judicature Society, San Francisco (Aug. 8, 1982), cited in HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 254 n.345 (5th ed. 1986).

40. See WILLIAM C. LOUTHAN, *THE UNITED STATES SUPREME COURT: LAWMAKING IN THE THIRD BRANCH OF GOVERNMENT* 120 (1991).

41. See Baier, *supra* note 21, at 1132-33.

will be reduced.<sup>42</sup> Whether this situation is good<sup>43</sup> or bad<sup>44</sup> may be worth debating, but it is sufficiently entrenched that simply attacking the institution of clerking or refusing to recognize clerks' power can only delay improvements in the way that power is wielded, and by whom.

## II THE "IS"

### A. *Legal and Ethical Restrictions on Law Clerk Selection*

The casual observer might think that, given the significance of clerks' roles and the tendency of lawyers and judges to obsess over rules of procedure, clerkships would be awarded only after an elaborate, fair, and orderly process. In fact, judges are bound by very few legal or ethical restrictions in their selection of law clerks, and the hiring process has all the order of a feeding frenzy.

Congress places virtually no restrictions on the manner in which judges hire, train, supervise, or fire their law clerks.<sup>45</sup> For example, statutory prohibitions on retaliation against whistleblowers,<sup>46</sup> differential treatment based on political affiliation,<sup>47</sup> and discrimination "on the basis of conduct which does not adversely affect the performance of the

42. It has been almost 10 years since the alarm was sounded on the high number of cases per judge, Kester, *supra* note 22, at 22, and yet little has been done to reduce litigation or to hire significantly more judges. Nevertheless, the number of clerks is unlikely to increase in the near future. See *FY92 Hearing*, *supra* note 34, at 85-86 (recording negative responses of Justices O'Connor and Scalia to Senator Bumpers' questions about their needs for more clerks or secretaries); POSNER, *supra* note 29, at 119 (noting wide agreement that future caseload growth cannot be met with more clerks).

Today, individual judges appear content to use their clerks as they will, satisfied that the short term will rein in the influence of any given clerk. See Kester, *supra* note 22, at 23; Oakley & Thompson, *supra* note 24, at 1295. There is an ongoing debate in the state courts over whether to hire one-year clerks or more permanent "career clerks." See *id.* at 1293-95; Lisa Stansky, *Where Have All the Law Clerks Gone?*, *RECORDER*, Nov. 1, 1991, at 1. But federal judges have almost uniformly preferred the traditional system of one- or two-year clerks, since they are intellectually fresh and aware of new scholarly theories. See, e.g., Oakley & Thompson, *supra* note 24, at 1289.

43. See, e.g., JOHN B. OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 138 (1980) (praising the institution of law clerks as adding a leavening effect to the judicial process, allowing clerks to "fiddle with the law, to advocate innovation, to introduce to its inner sanctuins the ideas of those outside"); Mahoney, *supra* note 20, at 340-45 (arguing that his law clerks are "both necessary and justified"); Alexander M. Bickel, *The Court: An Indictment Analyzed*, *N.Y. TIMES*, Apr. 27, 1958, § 6 (Magazine), at 16, 69 (expressing similar views).

44. See, e.g., Kester, *supra* note 22; Terry Eastland, *While Justice Sleeps: Supreme Court in Danger of Abdicating Control of Law to Its 'Clerk Bureaucracy'*, *L.A. DAILY J.*, June 23, 1989, at 6.

45. Nevertheless, a judge may not hire a first cousin or closer relative as a clerk. 5 U.S.C. § 3110 (1988); 28 U.S.C. § 458 (1988). Prior to enactment of this restriction, the first Justice John Harlan hired his own son, whose son in turn would become a Justice. See Kester, *supra* note 22, at 22. Some courts and judges also have policies of not hiring noncitizens or spouses of other clerks or court personnel. Interview with Margaret Tuitt, Administrator for Graduate Placement, Harvard Law School, at Harvard Law School (Apr. 14, 1992).

46. 5 U.S.C.A. § 2302(b)(8) (West Supp. 1991).

47. *Id.* § 2302(b)(3).



employee or applicant"<sup>48</sup> do not apply to the personnel practices of judges (and other high government officials) vis-a-vis assistants in "confidential, policy-determining, policy-making, or policy-advocating" positions.<sup>49</sup>

Furthermore, neither Congress nor the President has prohibited judges from discriminating on the basis of race, religion, sex, age, or disability.<sup>50</sup> The Judicial Conference of the United States, through which federal judges adopt policies for the judiciary, has endorsed resolutions against such discrimination, but no enforcement authority or mechanism exists.<sup>51</sup> Of course, judges are nevertheless bound by the Constitution's requirements of due process and equal protection and are not absolutely immune from suit thereunder in the exercise of nonjudicial functions.<sup>52</sup>

Although figures for the entire federal judiciary are not routinely kept, a few examples demonstrate that its hiring fails to mirror the diversity of the potential applicant pool.<sup>53</sup> In the Supreme Court, for instance, the first female clerk was chosen in 1944 by Justice Douglas; the second female clerk in 1966 by Justice Black;<sup>54</sup> and the first black clerk in 1949 by Justice Frankfurter.<sup>55</sup> Women have never made up more than one-third of the clerks on the Supreme Court,<sup>56</sup> and only Justice Blackmun

48. *Id.* § 2302(b)(10).

49. *Id.* § 2302(a)(2)(B)(i).

50. See 42 U.S.C. § 2000e-16(a) (1988) (limiting applicability of protections to federal employees in the competitive service); Exec. Order No. 11,478, § 6(b), 34 Fed. Reg. 12,985 (1969) (exempting judicial personnel from protections). Interestingly, even high-ranking employees of Members of Congress and of the President are protected to some extent from discrimination. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 301-19, 105 Stat. 1071, 1088-96 (covering Senate employees); *id.* § 320, 105 Stat. at 1096-97 (covering presidential employees); H.R. Res. 558, 100th Cong., 2d Sess. (1988) (enacted) (covering House employees); H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess., § 214 (1991), reprinted in 1991 U.S.C.A.N. 549, 633-34 (covering Congress).

51. See Garry Sturgess, *Five Judges Won't Report on Clerks' Race, Gender*, LEGAL TIMES, Aug. 5, 1991, at 1, 25.

52. See *Forrester v. White*, 484 U.S. 219 (1988) (holding that a state court judge is not absolutely immune from suit under § 1983 for his decision to fire a court employee, but reserving the question of qualified immunity).

53. Congress, it should be noted, has a comparable record. On Capitol Hill, women are "clustered at the bottom of the pay scale." *Congressional Worker Protection Bills Supported at Senate Committee Hearing*, BNA DAILY REP. FOR EXECUTIVES, Sept. 15, 1989, at A-7 (citing testimony of Sharon Rodine, President of the National Women's Political Caucus, before the Senate Committee on Governmental Affairs, Sept. 14, 1989). In the Senate, blacks hold only 64 of the approximately 2,700 senior policy positions. See 135 CONG. REC. E3591 (daily ed. Oct. 30, 1989) (statement of Rep. Louis Stokes quoting testimony of Jackie Parker, Chair of the U.S. Senate Black Legislative Staff Caucus before the Senate Committee on Governmental Affairs, Sept. 14, 1989). In the House, blacks hold nine percent of the policy positions, but that figure drops to only three percent if the payrolls of black Members are not counted. See *id.* Observers blame a system in which "hiring depends largely on an informal network of contracts [sic]," from which blacks are disproportionately excluded. *Id.*

54. See ABRAHAM, *supra* note 39, at 252; LOUTHAN, *supra* note 40, at 119.

55. See LOUTHAN, *supra* note 40, at 119.

56. This assertion is based on my review of the Supreme Court Library's listing of Supreme Court clerks. Figures on the racial, ethnic, or religious backgrounds of clerks are not available.

has ever hired three female clerks in a year.<sup>57</sup> The D.C. Circuit, whose clerkships are among the most prestigious, hired four women, three Asian-Americans, one Hispanic, and no blacks for its thirty-six clerkships for the 1991-92 term.<sup>58</sup> The previous year, one black and one Asian-American were hired.<sup>59</sup> Current law school graduating classes include approximately forty percent women<sup>60</sup> and approximately ten percent African-Americans, Latinos, Native Americans, and Asian-Americans.<sup>61</sup> If the Third Branch were a large fire department, its attorneys might already be defending a disparate impact suit!

Some judges have expressed frustration with this situation, lamenting the lack of minority applicants, while justifying their ratios by reference to the pool of "top" graduates from the "best" law schools.<sup>62</sup> No doubt a reliance on this limited pool is part of the problem. Few judges look to predominantly black law schools for their clerks, and many simply turn to their alma maters.<sup>63</sup>

The "old-boy network" has a long tradition among judges and their clerks. The first Justices to use clerks usually found them through friends or relatives or from the bar and law schools of the District of Columbia.<sup>64</sup> After a few decades, more and more positions were filled through recommendations from professors at the top law schools, and over time the system became more complex.<sup>65</sup> Today, most positions are filled from unsolicited applications, but recommendations from professors and lawyers (particularly former clerks) who know the judge can greatly strengthen an application, and "[i]t is not uncommon for judges to hire the sons or daughters of friends or law school classmates as law clerks."<sup>66</sup>

The system also allows room for hiring on the basis of other biases,

---

57. See David Lauter, *For High Court Clerks, Most Traditions Hold Fast*, NAT'L L.J., Mar. 25, 1985, at 5. Justice Blackmun also hired three female clerks for the 1991 term.

58. See Sturgess, *supra* note 51, at 25, 27.

59. See *id.* at 27.

60. See Lauter, *supra* note 57, at 5. Women made up 41.7% of Harvard Law School's 1991-1992 student body. See Da'aga C. Hill, 1992: *Year of Transition* (affirmative action plan supplement), reprinted in HARV. GAZETTE, Mar. 20, 1992, at 1, 3-4 (Supp.).

61. See John J. Curtin Jr., *One Among Many*, RECORDER, Oct. 21, 1991, at 8; see also JUDITH A. LHAMON, NAT'L ASS'N FOR LAW PLACEMENT, A FAIR SHAKE: LAWFUL AND EFFECTIVE INTERVIEWING 19-21 (1987) (listing schools with the largest numbers of minorities). Minorities made up 23.4% of Harvard Law School's 1991-1992 student body. See Hill, *supra* note 60, at 4 tbl.

62. See Sturgess, *supra* note 51, at 27 (quoting Judge Abner Mikva).

63. See POSNER, *supra* note 29, at 107 (also noting that "judges draw their law clerks from a pool that is far more homogeneous than the pool of judges").

64. See Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 306 (1961).

65. Cf. Charles H. Sheldon, *Law Clerking with a State Supreme Court: Views from the Perspective of the Personal Assistants to the Judges*, 6 JUST. SYS. J. 346, 349-51 (1981) (describing similar transformation of law clerk recruitment for the Supreme Court of the state of Washington).

66. Memorandum from Judge Alex Kozinski to Ninth Circuit Executive Gregory B. Walters 2 (June 23, 1989) (on file with author).

such as law school or regional affiliation. Justices Gray, Holmes, Brandeis, and Frankfurter favored Harvard; Chief Justice Taft and Justice Stewart favored Yale; Justice Murphy favored Michigan; Justice Minton favored Indiana; Justice Butler favored Minnesota; and Justice Vinson favored Northwestern.<sup>67</sup> Justice Douglas favored Westerners; Justice Black favored Southerners; Justice Whittaker favored Midwesterners; Justice Powell favored Virginians; and Chief Justice Warren favored Californians.<sup>68</sup> These practices are not confined to the Supreme Court. For example, Judge Dooling of the Eastern District of New York hired only from Harvard.<sup>69</sup> Indeed, one state court judge has gone so far as to *disfavor* a particular school.<sup>70</sup> Although the ABA's Model Code of Judicial Conduct states that a judge "shall exercise the power of appointment impartially and on the basis of merit. . . . [and] shall avoid nepotism and favoritism,"<sup>71</sup> this has apparently never been invoked to challenge a federal judge's hiring practices.

As a result of this unfettered discretion, the current process reflects the individual goals of judges, rather than the interests of the public or of the judiciary as a whole. And, since a judge's reputation may be enhanced by attracting top students embarking on successful careers,<sup>72</sup> the goal of many judges is to hire the most credentialed set of clerks, often without regard to other considerations.

Although judges may agree that an applicant's "academic record is the single best predictor of clerkship performance,"<sup>73</sup> personality is also relevant. It is essential that judges be able to work closely with their clerks, to trust them, and to count on their best efforts. Clerks provide companionship in an otherwise solitary enterprise,<sup>74</sup> and many judges greatly enjoy tending a flock of likeable clerks (and former clerks).<sup>75</sup>

67. LOUTHAN, *supra* note 40, at 119; Baier, *supra* note 21, at 1139.

68. LOUTHAN, *supra* note 40, at 119; Baier, *supra* note 21, at 1139.

69. Daniel M. Taubman, *The Clerkship Experience*, HARV. L. SCH. BULL., Fall 1975, at 27, 28.

70. After a faculty member criticized the Illinois Supreme Court, one of its justices announced he would not consider applications from John Marshall Law School. See Ken Myers, *Vow on Clerks by Illinois Justice Upsets the Academic Community*, NAT'L L.J., May 28, 1990, at 4.

71. MODEL CODE OF JUDICIAL CONDUCT Canon 3(c)(4) (1990). The Commentary states further that "[c]onsent by the parties to an appointment . . . does not relieve the judge of th[is] obligation." *Id.* The 1972 version, which does not differ significantly on this point, has been adopted by the federal judiciary. See LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 7 (1992).

72. See Wald, *supra* note 4, at 154 ("A judge's reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner so that he can maintain a reputation as a 'feeder' of clerks to the Supreme Court.").

73. Kozinski, *supra* note 4, at 1710 n.8. But see Wald, *supra* note 4, at 155 (quoting a judge as saying that "top grades don't necessarily predict who will end up doing the best job, and the professors don't know either").

74. See Wald, *supra* note 4, at 153.

75. See Kozinski, *supra* note 4, at 1708 ("By accepting a judge's clerkship offer, a young lawyer becomes part of the judge's extended family . . ."). The familial relationship has a long

Resumes, grades, and recommendations do not relate an applicant's compatibility; yet, few judges devote significant time to interviewing applicants.<sup>76</sup> The most energetic actively recruit;<sup>77</sup> most, however, do their best to weed applications down to a manageable few, conduct brief interviews, and occasionally take a highly recommended applicant on faith without an interview. In any case, they must generally rely on their intuition and hope for the best.

### B. A Student's Perspective<sup>78</sup>

If judges approach the clerkship selection process with a sense of weariness, law students approach it with a sense of awe. Through this process, they will interact with the powerful men and women whose work they have been reading and discussing in school. They know that a prestigious clerkship is a mark of a successful law school career, and most believe quite strongly in the idea of meritocracy, that the best candidates—or at least those with the best grades and other credentials—will be chosen for the best clerkships.

The process formally begins for most students sometime between August and February of their second year of law school. At a meeting on campus, which the majority of the class often attends, one of the school's placement officers describes the process of applying, the process of obtaining recommendations from professors, the types of clerkships that are available, and sources of information on judges.<sup>79</sup> Faculty and other former clerks may also attend to give advice, but the student who relies on this session alone may be disappointed.<sup>80</sup> In fact, the session may be held so late that some clerkships are never within a student's reach.<sup>81</sup>

Students weigh a variety of factors as they decide where to send

---

tradition, dating back to Justice Gray, who referred to his clerks as "his boys" and followed their careers closely. See Oakley & Thompson, *supra* note 24, at 1290 & n.13.

76. See Wald, *supra* note 4, at 159; cf. Kozinski, *supra* note 4, at 1710 (noting that it takes time to gather more information on applicants).

77. See, e.g., Margolick, *supra* note 7, at B4. Judge Kozinski employs a number of unorthodox recruitment techniques; he has landed clerks "by beating them at poker, losing to them at chess, calling them during ski vacations, . . . [and] wining and dining" them. *Id.*

78. This Section is admittedly written from the perspective of a single two-time participant in the application process. I have, however, discussed these thoughts with a number of other students, many of whom have had similar experiences. Therefore, this Section can, I believe, be thought to describe a fairly representative perspective.

79. Law schools have institutional interests in their students' obtaining prestigious clerkships. Most keep statistics on their graduates' clerkships, and many have assigned a staff person or committee of professors to facilitate the application process for both students and professors. Some schools centralize the word processing of recommendations in order to relieve professors' secretaries of the burden of sending out as many as a hundred letters per student.

80. See Kozinski, *supra* note 4, at 1726-28 (providing an interesting list of erroneous advice given by law schools).

81. See *id.* at 1725. Not surprisingly, those schools that feel they are disadvantaged by application and interviewing schedules that conflict with their vacation and class calendars have

their applications. Prestige is one of the most important criteria for some students, despite the fact that clerkships vary significantly with a judge's attitude, philosophy, and working style.<sup>82</sup> Some simply want a federal clerkship, anywhere in the country. Others would prefer a state supreme court to a federal district court, but because state court judges usually choose later, students may put in applications with federal judges anyway. Some are concerned about geography so that they are close to family, don't have to move a second time after the clerkship, or can live with or near a loved one. Others want to work only for liberals or conservatives or for those judges whose opinions or careers they admire.

Then comes the matter of lining up recommendations. Most judges want three letters of recommendation, preferably from people who know a student's legal work. Although some students have worked closely with an attorney the previous summer, the most likely recommenders are law professors, since judges more often know them or know their work and may be expected to accord greater deference to their judgments. This puts most second-year students in a bind. After three semesters of law school, they have been taught by only eight or ten professors, mostly in large classes, and usually without having had much choice over their professors.<sup>83</sup> Few students have secured research assistantships at that point; there are not many to go around, and students in their first year are generally excluded. Consequently, most students who have not had the foresight to schmooze their way into a professor's line of vision are forced to ask professors who have heard them speak in class a half-dozen times, perhaps gone to lunch with them in a group, answered a few questions at office hours, or simply graded one of their exams. It is hard to imagine that a professor in this all-too-common position could provide judges with an accurate, insightful picture of a student.<sup>84</sup>

---

actively advocated a more orderly process in which the dates are set in advance. Interview with Margaret Tuitt, *supra* note 45.

82. See Kozinski, *supra* note 4, at 1711 n.9.

83. Of course, where students do have some choice, they may consider professors' reputations for promoting clerk applications as well as for teaching or scholarship, an odd side effect of the clerkship race on students' educations.

84. Professors often find it hard to turn down students' requests. As a result, they must find it aggravating to write dozens of form letter recommendations, attempting to draw meaningful comparisons among students they may barely know and then wondering whether their advice has any impact or may have been misinterpreted. Cf. Kozinski, *supra* note 4, at 1728 ("Judges and professors communicate on a complex and very sophisticated level."). Nevertheless, this is one of the few opportunities a professor has to provide some career guidance to students and to interact directly with the judges at whom his scholarship may be aimed. See *id.* at 1729 ("The ability to influence clerkship decisions gives faculty members a good bit of power and prestige."). In fact, law professors facilitate this process not as mere bystanders but as suppliers of information, or even as power-brokers. See *id.* at 1728 ("No one plays a more decisive role in influencing clerkship selection."). Some report that this power is occasionally abused. See David A. Kaplan & John C. Metaxas, *Editors-in-Chief of Law Reviews Headed Mainly to U.S. Clerkships*, NAT'L L.J., June 17, 1985, at 4 (describing N.Y.U. Prof. William E. Nelson's withholding of clerkship recommendations for editors of the N.Y.U. Law Review as a result of their refusal to publish his article).

Additionally, professors can prove delinquent in writing and mailing recommendations. Since some judges will not act on an application until all recommendations are received, such tardiness may prove fatal to a student's chances. It therefore may be more important to find an efficient professor than one who promises lavish praise.

On a student's resume, nothing compares to two words: "Law Review." Judges see law review experience as the mark of a good applicant, presumably because it helps one to be a better writer, editor, and reader of legal writing. Interestingly, rank-and-file members of the school's main journal usually get preference over the editors-in-chief of the school's lesser-known journals. Some observers may wonder about this: after all, those who run the other journals often have to work longer hours with pieces that may need more editorial attention; they have to manage time, money, and other students; and they were not necessarily rejected for the main review, often preferring instead to work on a subject-matter journal. Probable explanations for this preference are either simply force of habit or the relative ease with which a judge whose current and former clerks may have worked on the Law Review can find out more about an applicant.

There is also the matter of elections for law review officers, most of which take place in February or March. As judges have moved their date for making offers to applicants earlier and earlier, law review elections have become the starting gun in the clerkship race.<sup>85</sup> Some judges have been known to monitor these elections and set interviews or even make offers immediately after they are finished.<sup>86</sup> In fact, journals that had traditionally elected their officers later in the year have moved elections up so as not to be disadvantaged.<sup>87</sup> And in the elections, editors realize and talk openly about what is at stake: officers are more likely to get the top clerkships. This not only heightens the importance of winning an election (or convincing the editor-in-chief to appoint you, as some journals handle some positions), it also introduces unwanted side-effects. For one, the editor who wants a good clerkship but is not thrilled about editorial responsibilities may take the spot anyway, perhaps thereby diminishing the quality of the journal's work. And for another, editors may vote based on who they think deserves the prestige of the

---

85. See Kozinski, *supra* note 4, at 1710 (noting that by February or March of a student's second year, third semester grades are out, law review elections are held, and individualized student-professor relationships have had time to develop). Some judges have, however, particularly in the past two years, jumped even this gun by hiring clerks before law review elections.

86. See, e.g., David Lauter, *Clerkships: Picking the Elite; Judges, Students Fault Process*, NAT'L L.J., Feb. 9, 1987, at 1, 28 (Judge J. Skelly Wright); Margolick, *supra* note 7, at B4 (Judge Wald).

87. See, e.g., David Lauter, *Students Scrambling for Position as U.S. Clerkship Race Opens Up*, NAT'L L.J., Apr. 1, 1985, at 4 (reporting change by *University of Chicago Law Review*).

office (and potential clerkship) rather than who might do the best job.<sup>88</sup>

The final part of most applications, the writing sample, also poses problems. Few students have written much of anything in a legal vein by the fall of their second year. First year legal writing classes often require perfunctory inemos or team-written briefs, hardly the place where brilliant writing shines. Some student journals require their applicants to write a comment on a given case, but those who do not make the journal are understandably hesitant to submit such pieces as writing samples. Those who are accepted may also wonder whether a judge will take the time to read yet another comment on the same case. The process therefore seems to give the jump to those few who are lucky enough to have secured a writing slot for a journal by the spring of their second year, since they may have a draft to send off.

Once a student sends out the application materials and has hounded recommending professors until the letters are sent, the anticipation begins. Very few judges send acknowledgements of the applications they have received, so students may be left wondering whether the postal service has round-filed their dreams. Soon the rumors start: so-and-so got a clerkship with Judge X; Judge Y has already filled her slots; Judge Z took all of his from Stanford already; etc.<sup>89</sup> Information seems to travel rapidly in law review circles where students may be more likely to know current clerks from working with them the year before, but it is nevertheless hard to come by. Judges themselves may play a role in this by setting their own schedules and then not adhering to them.<sup>90</sup>

---

88. During the past two years, many judges have chosen their clerks before law review elections. Nonetheless, many top clerkships are still affected by election results.

In the interest of full disclosure, I should say that I ran for almost every office on the *Harvard Law Review* in February 1991, lost each election, and ultimately settled for appointment to the one unfilled masthead position, which entailed coordinating the completion of the Fifteenth Edition of *The Bluebook*. Perhaps this is what a recent reviewer of *The Bluebook* meant when he called me "a very good sport." James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1780 n.\* (1992).

89. Most judges follow a "rolling admissions" plan, making offers and interviewing in the same period. Some have been known to continue interviewing after making a full complement of offers, in case one of those should back out, and perhaps not to disappoint a student who has just paid an airline several hundred dollars for this half-hour chat. Others prefer to complete their interviewing before making offers, so that they can compare all the candidates against each other. In the "hottest" circuits, though, some judges may make offers sooner, thereby poaching an applicant that the judge thought was in her pen. For a judge, this makes it hard to achieve a balance among the backgrounds of those she hires; for a student, this makes it hard to know where one stands in the process.

90. Compare Letter from Judge Who Shall Remain Anonymous to Trenton H. Norris (Oct. 29, 1991) (on file with author) ("My practice is not to consider any of the clerk applications until my screening period, which will commence around March 1. Your application will be kept on file until that time.") with Telephone Interview with Secretary to Judge Who Shall Remain Anonymous (Jan. 28, 1992) (reporting that Judge had chosen two clerks already and would choose a third soon) and Letter from Judge Who Shall Remain Anonymous to Trenton H. Norris (Feb. 26, 1992) (on file with author) ("So that you can plan accordingly, I wanted you to know that I have completed my selections for the 1993-94 term."). See Margolick, *supra* note 7, at B4 (describing how Judge

Finally, a lucky call from a judge's chambers: "When can you come in for an interview?" The wise student's response is simple: "Tomorrow morning, if the judge isn't free this afternoon." Then the scramble: call the other judges in that city, inform them that you will be visiting soon, and ask if they want to interview you too. With a little luck, you will get to see a preferred judge before the judge who called, since you might have to take the first offer you receive. The night before you leave you might have time to hop on WESTLAW and find out a little more about the judges, if only to flatter them.<sup>91</sup>

The logistics of all this can be challenging. Using overnight mail can often cost hundreds of dollars, and the airline tickets, without any advance purchase, can run to thousands of dollars. To many, this seems an expensive lottery ticket, but since few judges interview more than ten applicants for their two or three slots, the odds of a big payoff do not seem bad. Of course, some classes will be missed, but rare is the second-year student who loses sleep over this; the conscientious can catch up on reading while travelling.

Students' interview experiences undoubtedly vary. Some are very pleasant; some are "surreal."<sup>92</sup> Most are short, ranging from twenty to forty minutes. Like other employment interviews, they run the gamut from bull sessions to cross-examinations to exercises in listening to the judge prattle on about his grandchildren or experiences on the law review. Students have expressed dismay at being asked questions that are clearly off-limits in most employment contexts, such as whether they are married or planning to have children, what their fathers do, or for whom they voted in the last election. But few students complain about this to their interviewers, to other judges, or to anyone else in a position to do something about it.

This is but one example of students not considering themselves as having any sort of bargaining power in the clerkship selection process. It is interesting that some judges see things differently: Kozinski believes that "the parties [in this process] bargain with each other on roughly equal footing."<sup>93</sup> Perhaps the editors-in-chief of the ten top law reviews can choose their judges, but most students cannot.

In contrast, the selection process for law firms and public interest groups attempts to empower students by closely regulating employers. Such employers are governed at most law schools by the rules of the

---

Stephen F. Williams had made three offers by February 27, 1989, after just five days earlier informing an applicant that he was hoping to "not conduct many interviews until well into March.").

91. See Kozinski, *supra* note 4, at 1711 ("[J]udges are not immune to flattery . . .").

92. Margolick, *supra* note 7, at B4 (quoting an applicant). This applicant ended up working for Judge Kozinski, whose interviewing was apparently less surreal. See Kozinski, *supra* note 4, at 1714 n.17.

93. Kozinski, *supra* note 4, at 1714.



National Association for Law Placement, which restrict when first-year students and employers can contact each other,<sup>94</sup> how long offers must remain open,<sup>95</sup> and how many offers a student may hold open at any one time.<sup>96</sup> Employers must categorically refrain from applying undue pressure on students to accept an offer.<sup>97</sup> In the clerkship process, however, students are frequently warned not to apply to a judge whose offer they might not accept on the spot, since judges may interpret a student's hesitation as a slight and are free to withdraw an offer at any time. It is common practice among many judges to make "short-fuse" offers.<sup>98</sup> This sends a message that students have little power and no protection from unfair, even unethical treatment from a potential judicial employer.

There are also reasonable concerns about whether a judge will treat applicants fairly regardless of their race, religion, sex, or sexual orientation. For example, some judges have belonged to clubs that exclude minorities or women.<sup>99</sup> Furthermore, although a judge may have a relatively good record for hiring minorities and women, his image in a student's eyes may have more to do with his published decisions or with other actions that may indicate insensitivity.<sup>100</sup> Gay students are in a peculiar bind. They can avoid the most intolerant, since judges' opinions are less likely to veil their homophobia than their racism or sexism. But, because sexual orientation is not an apparent trait, an applicant seeking to avoid an unpleasant year may have to reveal that he is gay during the selection process, thereby giving the judge an opportunity to discriminate. Similarly, nonminority applicants may also wonder whether they

---

94. First-year students can contact employers only after December 1; employers can contact first-year students only after December 15. *Principles and Standards for Law Placement and Recruitment Activities* (adopted June 10, 1988), in NATIONAL ASS'N FOR L. PLACEMENT, MEMBER HANDBOOK 5-7 (1990).

95. Initial offers of summer employment must remain open for at least two weeks. Offers of permanent employment to summer associates made by October 1 must remain open until November 15. All other offers of permanent employment must remain open until December 15. *Id.* at 8.

96. Students may hold open only four offers at any one time after October 1. *Id.*

97. *Id.* at 6-7. Despite competitive pressures, employers generally adhere to these guidelines. See Jamiene S. Studley, *Balancing Academics and Student Placement*, NAT'L L.J., Oct. 19, 1987, at 20. An employer or student who violates the standards may lose recruiting or placement privileges at some law schools.

98. See Kozinski, *supra* note 4, at 1716-17; Oberdorfer & Levy, *supra* note 6, at 1102 n.18 (citing results of a survey in which "[a]lmost one out of six [judges] stated that students should have to respond on the spot."); Wald, *supra* note 4, at 156; Margolick, *supra* note 7, at B4. Even reformers think it would be reasonable to allow an offer to be open for only one or two hours. See Wald, *supra* note 4, at 160. This seems an inordinately short period in which to make such a momentous decision, particularly when family, spouses, or other loved ones may be involved.

99. See, e.g., Marcia Coyle, *Group says Judge Kennedy's Civil Rights Record is Mixed*, NAT'L L.J., Dec. 14, 1987, at 29. (describing then-Judge Kennedy's resignation from two such clubs once his name surfaced as a potential Supreme Court nominee).

100. For example, failing to abide by the Judicial Conference policy on reporting race and gender of applicants. See Sturgess, *supra* note 51, at 1.

have an equal shot at a judge who supports and may aggressively practice affirmative action.

A judge's current clerks may also exert unfair influence on the process. Some judges delegate the initial screening of applications to their clerks.<sup>101</sup> This screening might be based on some predetermined criteria such as law review experience, a certain grade point average, or prior work experience. Many more at least turn to their clerks for further information on those applicants they might know. It is therefore not uncommon for clerks, eager to help out, to call friends at their alma maters or other schools to inquire about applicants. Whether the information comes from the clerks or their friends, this process ultimately subjects students to the vicissitudes of the rumor mill and the possibility that a mere personality conflict or misunderstanding with a present clerk might block their dreams. A judge with a hundred or more applications<sup>102</sup> for two or three positions is not likely to waste time considering any that are even slightly suspect.

Where does all this leave students once the dust settles? The process and its results may lead applicants to doubt any prior belief in the meritocracy of clerkships. Considering that "a clerkship can have a significant impact on [a young lawyer's] further career development,"<sup>103</sup> students may feel dismayed at having been pressured into snap decisions about which judge to work for or whether to clerk at all.<sup>104</sup> Most important, after what was probably their first exposure to the federal judiciary, students may rightly wonder about judges' commitment to fairness, equal protection, and due process.

### III

#### THE "OUGHT"

##### A. *The Case for Reform*

For over a decade now, judges have taken sides in the debate over reform of the law clerk selection process. Law schools have also taken a stance, generally in favor of reform, sometimes to the short-term detriment of their students.<sup>105</sup> Law students, who have at least as much at stake as judges and law schools, have been quieter, perhaps reflecting their relative lack of power.

But the point is not only what the players in the process think.

---

101. See Collins T. Fitzpatrick, *Selecting Law Clerks*, 28 JUDGES' J., Winter 1989, at 33, 34.

102. See Wald, *supra* note 4, at 152 ("In the circuit courts of appeal . . . , it is not unusual for a judge to receive 300-400 clerk applications, most from top-drawer candidates.").

103. Kozinski, *supra* note 4, at 1709.

104. See Lauter, *supra* note 87, at 4.

105. See Kozinski, *supra* note 4, at 1725 (noting that law school administrators "are among the strongest advocates of restraint and reform, and therefore bristle at holding orientation meetings at a meaningful time lest they be accused of contributing to the problem").

Every citizen has a stake in the law clerk selection process through its ultimate effect on the administration of justice, the development of the law, and the expenditure of government funds.<sup>106</sup> Public officials, if not all members of the bar, are "citizen[s] having special responsibility for the quality of justice."<sup>107</sup> Imagine the potential impact of a hypothetical report that might succinctly describe the situation in these terms:

Two thousand federal jobs a year. Over \$65 million in government salaries. Recent law school graduates, many not yet members of the bar, influence judges' decisions and draft opinions in thousands of cases that affect tens of thousands of lives, millions of dollars, and the development of important legal doctrines. They are chosen after only a year's worth of law classes in a frenzied competition among judges who are free to appoint based on hometown, alma mater, race, sex, or whether they know the student's family or teachers.

Notwithstanding a lack of popular response, the preceding discussion and the judges' debate identify numerous conventional reasons for imposing a regulatory structure on the existing process.

First, the current system is not a pure or efficient market. In fact, the closest market analogy would be a once-a-year shopping spree in which hundreds of shoppers, each with different amounts of money, enter the corner grocery at different times and buy goods that are only partially visible, that are each unique, and whose prices and brand names may not reflect their true value. Even if there are plenty of quality goods on the shelves, the shoppers (whether judges or students) would feel cheated. The current selection process fails to satisfy two fundamental characteristics of the model "free market"; it neither maximizes the preferences of the participants nor provides full information to them.<sup>108</sup>

Second, the current system is riddled with externalities. In an unregulated system, judges will still tend to get good clerks.<sup>109</sup> Critics of

---

106. Cf. Kester, *supra* note 22, at 21 ("The public, which is the least aware [of the debate over clerks' influence], has the greatest stake in the problem of law clerk proliferation.").

107. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1991); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1980) ("[Lawyers] should participate in proposing and supporting legislation and programs to improve the [legal] system . . ."); cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-2 (1980) (stating that a lawyer shall endeavor to improve the law); *id.* EC 8-6 (1980) (noting responsibility of lawyers to assist in selection of judges based on merit).

108. See Oberdorfer & Levy, *supra* note 6, at 1103.

109. Although there are not many of the name-brand students (e.g., President of the *Harvard Law Review*) that some judges strongly favor, the pool of candidates does seem to be deep, see, e.g., Fitzpatrick, *supra* note 101, at 35, having already been screened by college and law school admission officers and professors. Witness the opinion of Judge J.L. Edmondson: "To the best of my knowledge, judges in [the Eleventh Circuit] have over the years had no difficulty in getting good law clerks, with each judge proceeding at his or her own convenience. Law clerk selection is just not a problem." Letter from Judge Edmondson to Judges Becker, Breyer, Oakes & Wald 1 (Dec. 6, 1990), quoted in Kozinski, *supra* note 4, at 1712 n.11. Judge Kozinski expresses a similar contentment:

the unregulated system may concede this, focusing instead on the unseemliness of competition among judges, and the collective inability to maintain the appearance of dignity and collegiality. Noting that public confidence in judicial decisions results in part from a foundation built by dignity,<sup>110</sup> Oberdorfer and Levy argue that the selection process threatens to undermine this confidence.<sup>111</sup> Judge Wald is frustrated by the judiciary's "inability to devise an orderly process that comports with the seriousness of the job and the dignity of the relationship between judge and clerk."<sup>112</sup> Judge Breyer is more succinct: "It's unspeakable."<sup>113</sup> But Judge Kozinski, the system's most vocal defender, finds nothing so unseemly as to threaten the judiciary<sup>114</sup> and resigns himself to the likelihood that there will be some "cads" among the "saints."<sup>115</sup> There are no decisive arguments here, only conclusions that are rooted in virtually untestable perceptions.

Externalities exist because individual judges do not bear the costs that their behavior imposes throughout the system: increasing travel expenses, disrupting classes, affecting law review elections, skewing students' decisions in a host of areas, pressuring students to decide without much information or time to reflect with their loved ones, and limiting the ability of other judges to hire a diverse set of clerks.<sup>116</sup> Law schools, whose cooperation can help the system work, have little incentive to challenge the federal judiciary. Their institutional reputations are enhanced by sending students to prestigious clerkships; as long as their students do not appear to be disadvantaged relative to those at other schools, and as long as students and professors are not vocal in their complaints, schools are unlikely to consider reform seriously. In short, those who make and enforce the rules derive benefit from the system without bearing their share of the costs.<sup>117</sup>

---

"[T]he result achieved through this process year in and year out—the annual matching of clerks to judges—has, by all accounts, been satisfactory to all involved." Kozinski, *supra* note 4, at 1730. By "all involved" Judge Kozinski must mean the judges; it certainly does not include all applicants.

110. See, e.g., MACKENZIE, *supra* note 5, at x; see also Swan, *supra* note 25, at 814-15 (citing sources for similar arguments).

111. Oberdorfer & Levy, *supra* note 6, at 1097.

112. Wald, *supra* note 4, at 152.

113. See Marcia Chambers, *Clerk-Shopping Shows Judges at Their Worst*, NAT'L L.J., Apr. 4, 1988, at 13 (quoting Judge Breyer).

114. See Kozinski, *supra* note 4, at 1716 n.24 ("My colleagues may be concerned that criticism of the clerkship selection process could tarnish the public's image of the judiciary . . . . Were this a realistic concern, I would sympathize with it . . .").

115. *Id.* at 1713.

116. The frenzy leaves little time for assembling a set of clerks with diverse backgrounds. See Lauter, *supra* note 87, at 4 (quoting Judge Mikva: "I used to try to keep a wide net out and was proud of the fact. That gets hard to do with this kind of rush to judgment."). For example, those judges on the coasts find it hard to lure an applicant from the opposite coast at great cost on short notice.

117. Perhaps this is why even reformers from within view reform as "not necessary" but "only highly desirable." Oberdorfer & Levy, *supra* note 6, at 1099.

Third, information does not flow adequately in both directions. Judges can easily and cheaply obtain detailed information on enough candidates from which early, solid winnowing can be done. Although interviewing takes time, judges receive hefty packets from most students, plus sometimes quite candid appraisals of applicants from professors, attorneys, other friends, and current and former clerks. The vast majority of students, by contrast, have to work quite hard to find useful information.<sup>118</sup> Most students have never met judges. Indeed, most know but a handful of current clerks well enough to ask questions about judges and clerking in general.

Finally, it is not clear that the best candidates get the best clerkships. The early selection date punishes late bloomers. It advantages those who had good grades in their first year, those who are lucky enough to have written a solid legal research paper, and particularly those who have had their papers edited and published. It gives preference to those who by luck or by pluck get to know the "feeder" professors. And it is abundantly clear that judges are free to—and frequently do—base their selections on factors that have little, if anything, to do with a clerk's potential performance.

In sum, the clerkship selection "market" requires intervention in order to function more smoothly, more cheaply, and, most important, more fairly.

### *B. A Brief History of Efforts at Reform*

Efforts to bring some semblance of order to this chaotic process have consisted of periodic attempts by a core of reform-minded circuit judges who have enlisted the sometimes half-hearted support of law schools and a few Supreme Court Justices. Ultimately, each attempt has failed, but neither because reformers have lacked energy or commitment, nor because there is a lack of consensus that reform is needed. Rather, reform efforts have failed simply because they have not been enforced against transgressing students, professors, and judges.

In the mid-1970s, concerned that the increasingly early selection of law clerks was placing undue emphasis on first-year grades and reducing students' time to consider career choices carefully, deans of a few leading law schools asked chief circuit judges not to allow offers to be made before students' second-year grades were available.<sup>119</sup> Because the response was not overwhelming, the deans turned to the Association of

---

118. Things may be improving in this regard with the November 1992 advent of an on-line database initiated and maintained by a consortium of seven law schools (Chicago, Columbia, Harvard, Michigan, Stanford, Virginia, and Yale). The JCLERK file in the CAREER library on LEXIS allows students to retrieve information supplied by participating judges, including application requirements, interview dates, and names of current and former clerks. Information on judges' reputations, abilities, and work styles is, of course, not so readily available.

119. Ellen J. Miller, *Puisse Judges*, HARV. L. SCH. BULL., Fall 1975, at 22, 23.

American Law Schools (AALS), a consortium of deans from almost every law school in the country, which in 1978 issued a set of recommended guidelines. These also were not widely followed.<sup>120</sup>

In late 1982, with the support of the law schools,<sup>121</sup> the Judicial Conference of the United States, which is composed of the Chief Justice and two judges from each circuit, established a committee to investigate the process.<sup>122</sup> In March 1983, the Conference approved a two-year experiment barring judges from considering applications before September 15 of students' third year.<sup>123</sup> By that fall, reports of noncompliance prompted the Conference to move the date forward to July 15 for the following season.<sup>124</sup> By the 1984 season, however, gun-jumping was once again rampant and, following an inconclusive survey of judges' reactions to the proposal,<sup>125</sup> the experiment was abandoned in March of 1985.<sup>126</sup>

Still concerned, a few law school deans worked with judges to draft new guidelines: judges were not to make offers until May 7, and students could not accept formally until June 4, the date on which schools could provide grades or recommendations of students who had not agreed to the guidelines.<sup>127</sup> In the end, however, judges dismissed the effort as too complicated.<sup>128</sup>

But following the unregulated 1985 season, numerous circuit judges responded favorably to Judge Stephen Breyer's effort at building consensus, pledging not to consider applications before April 1 of students' second year.<sup>129</sup> The 1986 and 1987 seasons seem to have worked well under

---

120. See Letter from First Circuit Chief Judge Frank M. Coffin to Chief Justice Burger 2 (Feb. 24, 1982) (on file with author).

121. See David Lauter & David A. Kaplan, *Federal Judges End Experiment to Limit Clerk Selection Process*, NAT'L L.J., Mar. 25, 1985, at 4.

122. See Wald, *supra* note 4, at 156. This had been suggested by Chief Judge Frank M. Coffin after a group of reform-minded judges, including Judges Breyer, Mikva, and Feinberg, had not been able to establish a consensus date among their colleagues. See Letter from Chief Judge Coffin to Chief Justice Warren Burger 1, 2 (Feb. 24, 1982) (on file with author).

123. Memorandum from Marie Provine, Research Division, Federal Judicial Center, to the Judicial Conference Committee on the Law Clerk Selection Process (Feb. 27, 1985) (on file with author).

124. *Id.*

125. Lauter & Kaplan, *supra* note 121, at 4. Two-thirds of all judges responded; just over half (50.6%) of the respondents favored the Judicial Conference policy on the timing of the application process.

126. *Id.*

127. Association of American Law Schools, *Standards for Judicial Clerkship Selection* (Nov. 16, 1985) (draft copy, on file with author).

128. See Chambers, *supra* note 113, at 13, 14 (noting Judge Breyer's comparison of the proposal to the Internal Revenue Code).

129. See Letter from Judge Breyer to Circuit Judges 1 (Jan. 24, 1986) (on file with author).

this voluntary system,<sup>130</sup> but by 1988 the mayhem had resumed.<sup>131</sup> Even reformists concluded that “[i]t is just too hard to try to follow [an orderly timetable when judges] all about me are ignoring it.”<sup>132</sup>

Judge Edward Becker and other reform-minded judges then turned to the Supreme Court.<sup>133</sup> Chief Justice Rehnquist agreed in principle that, if eighty-five percent of all circuit judges agreed on a date, individual Justices would consider disfavoring those applicants for Supreme Court clerkships who had jumped the gun in acquiring their lower court clerkships.<sup>134</sup> But by early 1989, it was clear that the eighty-five percent threshold could not be met.<sup>135</sup>

The 1989 season saw earlier hiring than ever before, and an unflattering piece in the *New York Times*<sup>136</sup> prompted judges to look to the governing bodies of their circuits to provide more order.<sup>137</sup> In June, the D.C. Circuit’s Judicial Council, under the leadership of Chief Judge Patricia Wald, resolved not to make offers before May 1 in the 1990 season,<sup>138</sup> and eventually most of the thirteen circuits were in line.<sup>139</sup> Despite some rumblings and rumors, the system held together through noon E.S.T. on May 1, 1990, when thousands of offers and acceptances were exchanged in a fateful fifteen minutes.<sup>140</sup> Nevertheless, a follow-up survey showed no consensus among judges for continuing the system.<sup>141</sup>

---

130. See Letter from Judge Breyer to Circuit Judges (Jan. 2, 1987) (on file with author) (noting that he received only two letters of complaint from judges in 1986 season); Letter from Judge Breyer to Circuit Judges (Jan. 29, 1988) (on file with author) (noting that he received only one or two letters of complaint from judges in the 1987 season).

131. See Chambers, *supra* note 113, at 14 (quoting Judge Reinhardt, who observed that “[t]he bottom line is that when it comes to law clerks, nobody can agree on anything”).

132. Letter from Judge Abner Mikva to Judge Stephen Breyer 1 (June 28, 1988) (on file with author).

133. See Letter from Judge Edward R. Becker to Chief Justice Rehnquist 1 (Oct. 14, 1988) (on file with author).

134. Letter from Judge Becker to Chief Justice Rehnquist (Dec. 5, 1988) (on file with author). This agreement may have been so tentative because “the justices consider it a problem that lower court judges must resolve for themselves.” Wald, *supra* note 4, at 157.

135. Letter from Judge Becker to Circuit Judges 1-2 (Jan. 23, 1989) (on file with author). The tally was 91 in favor, 47 against, and 13 abstaining. *Id.* at 1.

136. Margolick, *supra* note 7.

137. See Wald, *supra* note 4, at 157.

138. See *id.* at 157-58; Terry Carter, *Federal Judges Try Once Again to Put Off Offers for Clerkships*, NAT’L L.J., July 24, 1989, at 4; Letter from Judge Wald to Chief Judges (June 21, 1989) (on file with author).

139. See Letter from Chief Judge James L. Oakes to Chief Judges 1 (Aug. 4, 1989) (on file with author); Wald, *supra* note 4, at 157. Only the Fifth, Seventh, and Eleventh Circuits completely held out, *id.* at 158, but the Sixth Circuit dropped out of the “cartel” in mid-April. See Letter to Judges Breyer & Becker from Chief Judge Gilbert S. Merritt 1 (Apr. 18, 1990) (on file with author).

140. See Wald, *supra* note 4, at 159; Marcia Coyle et al., *Judicial Appeals*, NAT’L L.J., May 14, 1990, at 5-6.

141. See Memorandum from Judges Oakes et. al. to District and Circuit Judges 3 (Jan. 9, 1991) (on file with author) (noting that almost half of 73 respondents were against a system for 1991 even if 75% of circuit judges agreed on it).

The reformers threw in the towel.<sup>142</sup> The 1991 season was as frenetic as 1989. The next season, all judges in the D.C. Circuit and many other judges had finished their hiring by February 18, 1992;<sup>143</sup> some offers were even made in December 1991, before the ink was dry on students' third-term exams and almost two years before they would start work as clerks.<sup>144</sup> The most recent "1993 season" was, for many judges and applicants, over before 1993 began:<sup>145</sup> despite the aborted attempt of the editors-in-chief of several law reviews to encourage their fellow editors to delay their applications,<sup>146</sup> many students applied even earlier than before, reportedly on the recommendation of law school advisors.<sup>147</sup> Judges now joke about competitive colleagues casing kindergartens for bright young prospects!<sup>148</sup>

Of these many attempts, only two were formally binding on judges, but even these were never enforced. No judge was ever publicly reprimanded—much less brought before the Judicial Conference or the appropriate judicial council—for jumping the gun.<sup>149</sup> To the contrary, even proponents of reform have carefully avoided naming the "bad apples" in public. "Once burned, twice shy" goes the old saw, and it is clear that judges are "disinclined to join yet another voluntary compact."<sup>150</sup>

### C. *The Enforcement Problem*

As this history shows, reform efforts have labored in the context of what is fundamentally a multi-party prisoners' dilemma among judges.

142. See *id.* at 1 (conceding that "there is no hope of consensus, at least not in the foreseeable future").

143. Oberdorfer & Levy, *supra* note 6, at 1099.

144. *Id.*

145. See Letter from Unnamed Seventh Circuit Judge to Applicant David W. Simon (Nov. 10, 1992) (on file with author) (noting that the judge had already chosen clerks for the 1994 term).

146. In September and October of 1992, editors of the *University of Chicago Law Review*, the *Columbia Law Review*, the *Harvard Law Review*, the *Stanford Law Review*, and the *Yale Law Journal* discussed withholding their applications until a specified date and notifying judges of the plan to discourage those editors who might be inclined to disregard the plan. The proposal was reportedly rejected, though, because of concerns, among others, that many applications had already been submitted and that there was no guarantee that it could be enforced. Telephone Interview with Emily Schulman, President, *Harvard Law Review* (Jan. 7, 1993); Telephone Interview with Elizabeth Earle, Editor in Chief, *Columbia Law Review* (Jan. 12, 1993).

147. See Letter, *supra* note 145.

148. See Kozinski, *supra* note 4, at 1720; Lauter, *supra* note 86, at 29 (quoting Judge Feinberg).

149. The historical ineffectiveness of the judicial councils is documented in Peter G. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 223-27 (1970). As for the Judicial Conference's effectiveness on at least the issue of dates for the clerkship process, one judge has written that "[s]ince the Judicial Conference allowed a number of judges to publicly flaunt [sic] its policy and never was willing to take the first step toward censure or discipline, we [had] better get out of this as quickly as possible." Lauter & Kaplan, *supra* note 121, at 4 (alterations in original) (quoting an anonymous judge).

150. Wald, *supra* note 4, at 157.



The judiciary as a whole might profit in the long run if each judge abided by rules in the selection process, yet each judge also faces great temptations to break the rules in order to corral the most sought-after clerks.

In fact, the single distinguishing feature of all prior reform efforts is their lack of enforcement. Perhaps judges are hesitant to apply Holmes' "bad man" view of the law to themselves. Perhaps they think the problem is not so serious as to merit penalizing a colleague. Perhaps judges are concerned that enforcement of administrative rules would jeopardize their independence in deciding cases. Whatever the reason, even those who seek better enforcement have been unable to enlist their colleagues, the Supreme Court, or law schools in a workable scheme.

Some systems must necessarily count on the parties to act in the mutual interest of the group, relying on peer pressure and a strong sense of the common good.<sup>151</sup> The clerkship system, though, has a ready-made outside enforcement authority. This authority is the same body that regulates so many other areas, and the body that provides the Third Branch with funds: the United States Congress. The thought of congressional regulation may send shivers down judges' spines, but fears of weakening separation of powers or inter-branch comity are unfounded.

There is no clear constitutional problem with Congress refusing to appropriate funds for the salaries of clerks chosen outside a specified process. There may be some question of Congress' power to prescribe selection criteria or restrictions for potential Supreme Court clerks, since the Supreme Court was created by the Constitution. If Congress, however, can create or abolish lower federal courts and even restrict their jurisdiction at its whim, it certainly can put restrictions on the way in which their personnel are chosen, particularly where those restrictions are aimed at improving the ability of judges to make impartial decisions.<sup>152</sup> Since Congress authorizes and appropriates funds for the judges' law clerks,<sup>153</sup> it should be able to place reasonable restrictions on their hiring and firing to serve the public interest.<sup>154</sup>

---

151. See, e.g., *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1590-93 (1991) (describing international system of regulation).

152. See generally PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 366-87 (3d ed. 1988). Exempting Supreme Court Justices would not diminish the restrictions' effectiveness, since Justices generally choose their three dozen clerks from a smaller pool—those who have already received lower court clerkships—in a relatively orderly, collegial manner. Perhaps this order is due to the equal, high prestige of each clerkship, see Wald, *supra* note 4, at 155, or perhaps it results because judges are less likely to transgress norms within a smaller, more personal group.

153. Congress has provided Justices and judges with blanket authority to appoint law clerks and secretaries subject to limitations on the aggregate salaries of these aides imposed by annual appropriations acts. See 28 U.S.C. § 675 (1968) (Supreme Court Justices); *id.* § 712 (Supp. 1991) (circuit judges); *id.* § 752 (Supp. 1991) (district judges).

154. There is, in fact, strong precedent. When Congress provided for official court reporters, at the request of the Judicial Conference, it required the Conference to set the qualifications of the reporters. PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 230 (1973).

There are similarly no strong reasons of comity for Congress not to require judges to select their clerks in a more systematic manner. Some judges will likely consider this an interference with their independence; indeed, some refuse on these grounds even to report statistics on the race and gender of their clerks as required by the Judicial Conference.<sup>155</sup> Over thirty years ago, however, Justice Brennan criticized judges for assuming that "to be free and independent in judicial determinations, each judge and each court must also be completely independent in matters of administration as well."<sup>156</sup> In fact, "experience with centralized administration . . . taught us that . . . such administration often enhances the judge's independence to do right and justice in every case."<sup>157</sup> Judges themselves have recognized this by refusing to extend absolute immunity to judges for decisions in administrative, as opposed to judicial, matters.<sup>158</sup> Furthermore, it is clear that "[i]n administration as distinguished from judicial decision-making, the Third Branch is dependent on Congress" for money and manpower.<sup>159</sup> Congress might not be able to starve the judiciary to the extent that it cannot perform its functions,<sup>160</sup> but restrictions on the way in which clerks are hired hardly rises to this level of interference.

Of course, Congress is unlikely to feel compelled by public outcry to intervene,<sup>161</sup> but Congress should be concerned about how judges select those who will influence their decisions. It is one thing to appoint and

---

155. See Sturgess, *supra* note 51, at 1, 25 (reporting that Judge Laurence Silberman defends his refusal to report the race and sex of his clerks in part on the basis of a judge's independence: "I do not think it appropriate for any organization, including a group purporting to represent judges, to inquire into irrelevant factors which I do not use as criteria for selecting clerks.").

156. William J. Brennan, Jr., *The Continuing Education of the Judiciary in Improved Procedures*, Address to the Tenth Circuit Judicial Conference (July 5, 1960), cited in FISH, *supra* note 154, at 434. Justice Brennan, of course, is a staunch defender of judicial independence against legislative majorities.

157. *Id.*

158. See *Forrester v. White*, 484 U.S. 219, 225-29 (1988).

159. FISH, *supra* note 154, at 433.

160. Although the federal courts have not dealt with this issue, the highest courts of several states have held that the judiciary has the inherent power to compel the legislature to provide funding for it to carry out its necessary functions. See, e.g., *Pena v. District Ct. of Second Jud. Dist.*, 681 P.2d 953, 956 (Colo. 1984); *Gary City Ct. v. City of Gary*, 489 N.E.2d 511, 512 (Ind. 1986); *McAfee v. State ex rel. Stodola*, 284 N.E.2d 778, 782 (Ind. 1972); *O'Coin's, Inc. v. Treasurer of Worcester*, 287 N.E.2d 608, 611-13 (Mass. 1972); *Employees of Second Jud. Dist. Ct. v. Hillsdale County*, 378 N.W.2d 744, 749 (Mich. 1985); *Judges for Third Jud. Cir. v. County of Wayne*, 190 N.W.2d 228, 230-31 (Mich. 1971), *cert. denied*, 405 U.S. 923 (1972); *State ex rel. Cleveland Mun. Ct. v. Cleveland City Counsel*, 296 N.E.2d 544, 548-50 (Ohio 1973); *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 196-98 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

161. Overwhelming support from judges is equally unlikely, but it is possible that, threatened with congressional action, the Judicial Conference might take the initiative by proposing a system over which it would exercise oversight and enforcement authority. Cf. FISH, *supra* note 154, at 428-29 (describing how "[r]eform of administrative structures" by the judiciary "gave visible evidence of the court's recognition of popular opinion" while leaving "intact and untouched the substantive heart of the judicial decision-making process").

confirm judges who may be blank slates but whose decisions will affect millions of Americans; it is quite another not even to get a look at those who will influence and do a great deal of the judges' work. Comity may require Congress to eschew Senate confirmation of clerks,<sup>162</sup> but it does not require Congress to leave the clerk selection process so open to favoritism, prejudice, pressure tactics, or other unseemly behavior.<sup>163</sup> Congress can and should establish a better process and enforce it by refusing funds for the salaries of clerks that are not hired through it.

#### IV A PROPOSAL

Despite the many failures, reform efforts have recently returned, to some like a horror film's villain, to others like the songbirds in spring, and the focus is now on the "medical match" model over which Wald, Kozinski, and Oberdorfer and Levy have sparred.<sup>164</sup> The bare-bones system would work as follows: on a specified date, presumably sometime in the fall of the third year, each student and each judge would rank his or her preferences on a form and file it with a central clearinghouse. A few days later, each judge and student would receive a computer printout of his or her preferences to check for errors. Once these were returned, a program would be run to match each judge with the students whom that judge ranked highest and who ranked that judge highest. Once the rankings were completed, students and judges would be notified of their matches and required to accept them unless a good reason could be certified. Any judges with left-over positions would be free to offer them to any unmatched students.

Fundamentally the same system has been used for four decades to match graduating medical students with residencies at hospitals and other medical institutions.<sup>165</sup> In fact, uncannily similar circumstances led the medical profession to establish its matching system.<sup>166</sup> As Judge Kozinski notes, this system is superficially appealing, offering both the "panache" of interprofession cross-fertilization<sup>167</sup> and "the promise of

---

162. In fact, during the tenure of the Warren Court, Senator John Stennis, in an angry speech to the Senate, called for the establishment of statutory minimum qualifications for clerks and their confirmation by the Senate. See 104 CONG. REC. 8107-08 (1958); ABRAHAM, *supra* note 39, at 251.

163. Congress traditionally has been hesitant to restrict hiring of close aides of high public officials, but having recently begun to apply anti-discrimination restrictions to itself and to the President, see *supra* note 50, Congress may be more likely to place some restrictions on judges, particularly since judges cannot argue, as many Members of Congress once did, that the public's ability to vote out a Member was enough to ensure fairness.

164. See *supra* notes 10-13 and accompanying text.

165. See John S. Graettinger & Elliott Peranson, *Sounding Boards: The Matching Program*, 304 NEW ENG. J. MED. 1163 (1981).

166. See Alvin E. Roth, *New Physicians: A Natural Experiment in Market Organization*, 250 SCIENCE 1524, 1524 (1990).

167. Kozinski, *supra* note 4, at 1721. A similar program, however, is used by law firms in

modern technology.”<sup>168</sup> The system, however, has many more deeply appealing characteristics.

### A. *Maximized Preferences*

At the outset, one must discard Judge Kozinski's “ideological canard” that a matching system would replace a free market with a centrally planned one.<sup>169</sup> A centrally planned system attempts to fulfill the preferences of the central planner, as in the apparently facetious proposal put forth by Judge Sifton in early 1990:

All applicants . . . will agree to accept the first offer they receive. The district judge within [New York] with the highest rate of reversals . . . will have the first pick among the applicants. The prime dissenter in the Second Circuit will go next. The holder of the title of second most reversals will go third, and so on. . . . Talent will go where it is needed . . . . The quality of justice will improve.<sup>170</sup>

The medical matching system, by contrast, attempts to maximize the preferences of the participants.

In its most basic form, the matching would occur within the computer according to the following algorithm. Each judge makes an offer to a favorite candidate, who can either reject the offer in favor of one already received (including the “offer” of remaining unmatched) or tentatively accept it by rejecting any previously accepted offer. If the first student rejects the offer, the judge would make an offer to the next most preferred student, who would either reject or tentatively accept the offer. This process continues until each judge has either been accepted by some student or rejected by every student the judge had selected. Empty positions are filled in a left-over market after the matches have been accomplished. In practice, the computer can allow more than one offer at a time; simultaneous offers require greater computer calculations but do not affect the characteristics of the result.<sup>171</sup>

The advantages of this algorithm were mathematically proven three decades ago.<sup>172</sup> First, the result is rational, because no matched judge or

---

Toronto and Vancouver to match approximately 900 students to over 800 positions with 150 employers. See Wald, *supra* note 4, at 160 n.8.

168. Kozinski, *supra* note 4, at 1721. Interestingly, the “match” could also be done by hand. Computers just speed up the process. The medical match computer takes only six minutes to match 15,000 students with residencies at 1600 hospitals. See NATIONAL RESIDENT MATCHING DIRECTORY 2 (1986).

169. Oberdorfer & Levy, *supra* note 6, at 1103 (also noting that a matching system “would be no more a centrally planned bureaucracy than is the New York Stock Exchange”).

170. Charles P. Sifton, *A Modest Proposal for Law Clerk Hiring*, N.Y.L.J., Mar. 14, 1990, at 2.

171. See Dale T. Mortensen, *Matching: Finding a Partner for Life or Otherwise*, 94 AM. J. SOC. S215, S220 (Supp. 1988).

172. See David Gale & Lloyd Shapley, *College Admission and the Stability of Marriage*, 69 AM. MATHEMATICAL MONTHLY 9 (1962).

student would prefer to be unmatched. Second, it is Pareto-optimal, because no judge and student who are not matched together would prefer to be matched together.<sup>173</sup> These dual characteristics make the result stable:<sup>174</sup> the cleanup, secondary market after the program runs would not upset previous matches.

Thus, the proposed matching system is superior to reform proposals which merely set common dates for offers and acceptances. The matching system creates a rational, Pareto-optimal result, while others do not. In fact, the only reform short of the proposed algorithm which may approximate this result is one proposed by Judge Breyer.<sup>175</sup> In this model, judges would make offers for all open positions on Day 1, giving prospects 24 hours to accept or reject the offers. On Day 2, judges would make offers for all remaining positions, again giving prospects 24 hours to accept or reject. Finally, on Day 3, those judges who have not filled all their positions would be set free to fill the remaining positions as they choose. This algorithm could provide better results than the current system, but it remains vulnerable to the same enforceability problems that cursed previous efforts.<sup>176</sup>

This matching algorithm also maintains the relative advantage that judges enjoy in the current system. Many algorithms could ensure that a given set of judges and students, each with his or her own stated preferences, are matched up in a stable process (i.e., one that is both rational and Pareto-optimal). The algorithm described above, though, always results in the one stable match structure that is best from the point of view of the judges, since they make the offers.<sup>177</sup> The matching system thus produces results which are rational, Pareto-optimal, and stable, while also producing the best such result for judges.

### B. Efficiency

Foremost among reformers' goals is to increase the efficiency of the current system. Most observers and participants—even those who do

---

173. See Mortensen, *supra* note 171, at S218.

174. *Id.* at S218. The system would not be stable, though, if judges and students did not submit their true preferences to the algorithm. In order to guard against such manipulation, the system should require that neither judges nor students can break matches made in the program without the other's consent and perhaps without some certification that a good reason exists.

175. See Chambers, *supra* note 113, at 14. Indeed, the process was supposed to have worked this way in New York in 1990. See Sifton, *supra* note 170, at 2.

176. Such a system also would continue to require short-fuse decisions by students and would allow both students and judges to know approximately where they were ranked by others, negative characteristics that the proposed matching system avoids. See Wald, *supra* note 4, at 162 (noting the importance of confidentiality to judges' egos and, consequently, to judicial collegiality).

177. See Gale & Shapley, *supra* note 172, at 13-14; Mortensen, *supra* note 171, at S219. Another way to demonstrate how the system protects judges' preferences is to note that the algorithm works *down* judges' preference lists from most favorite to least favorite and *up* students' lists from least favorite to most favorite. Therefore, matches that are lower on judges' lists and higher on students' lists are less likely to result.

not worship at the temple of Law and Economics—would agree that “[a]ll things being equal, it is better to have a more efficient system than a less efficient one.”<sup>178</sup>

A serious disadvantage of the current system is the high number of interview trips students are sometimes required to make. The more trips required, the higher costs students pay in terms of skipped classes and travel expenses, and the more likely it is that the ability of a student to pay for a trip will influence the applicant's chances. Recognizing this, most proposed reforms established common dates for interviews to begin and/or offers to be made in an attempt to decrease the number of interview trips students must make.

The matching proposal does not require a common starting date for interviews, but since all preference lists are due on the same date it does imply a common date by which interviewing would be completed. If this date were set sometime during the fall of students' third year, judges would probably begin interviewing around spring break of students' second year, when law review elections have been held and three semesters of grades are available.<sup>179</sup>

Under a matching system, of course, both judges and students who are fearful that they will not get their top matches may feel compelled to engage in more rather than fewer interviews.<sup>180</sup> Increased interviewing, however, need not reduce efficiency. When students can rely on the fact that no offers will be made until a certain date, they will have greater freedom to plan their interview schedules to take advantage of advance purchase air fares and combine multiple interviews and destinations into a single, cheaper trip. Such trips could also be scheduled to coincide with interviews at law firms, who could cover the costs of the trips in whole or in part. Thus, enhanced opportunity for advance planning under a matching system should allow both students and judges to minimize the disruptive effects of interviews on their schedules.

Further, experience with the new system should reduce the number of interviews judges feel compelled to conduct. A de facto uniform date for the start of the interview season will allow and encourage professors to evaluate recommendees against one another, thereby improving the reliability of the information supplied to judges.<sup>181</sup> Judges would soon develop a feel for the number of interviews necessary to obtain the best group of clerks. And, knowing that the applications in hand on a certain

---

178. Kozinski, *supra* note 4, at 1713.

179. Kozinski refers to this period as the “breakpoint.” Kozinski, *supra* note 4, at 1710.

180. See Kozinski, *supra* note 4, at 1721 n.31; Wald, *supra* note 4, at 159-60.

181. Judge Kozinski fears that a uniform offer date would increase the number of professors that each student asks to write recommendations. See Kozinski, *supra* note 4, at 1714. But if judges were to accept only a limited number of recommendations, say three, students would not be likely to pester more than three professors. Furthermore, schools worried about the load on professors could institute limits on the number of recommenders per student.

date complete their application pool, judges may feel more comfortable making offers without interviews.<sup>182</sup>

A common interview period would also increase the flow of information to students. With more students meeting more judges and talking about them with each other and with professors and former clerks, students could better evaluate their prospective employers. They will also have more time to consider their options with loved ones.

Thus, the match system will maximize preferences for both judges and students, decrease costs for students, and improve the flow of information for both groups, at the tolerable risk of requiring judges to hold more interviews until they acquire some experience with the system.<sup>183</sup>

### C. Orderliness

The matching system would result in a more dignified and collegial clerk recruitment process because it would provide few incentives or opportunities for manipulation of the process. Some participants may wink at each other while indicating that they will be each other's top choice, but those who rely on such signals may pay for their naivety. Preference sheets will not be disclosed, and any matches made will be binding.<sup>184</sup> Furthermore, judges who believe they will fare better in the secondary market or who submit lists calculated to produce no matches will risk losing the best prospects to judges who participate honestly.<sup>185</sup> When no one who plays by the rules gets burned, judges—of all people—will be likely to follow the rules. As a result, both students and judges

---

182. In some state courts, a single judge has done the screening for his colleagues in exchange for a reduced caseload. See, e.g., Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 VAND. L. REV. 1197 (1973). Furthermore, in a system with set interview dates, judges who share a courthouse could pool their resources in receiving applications and responding to them. See Fitzpatrick, *supra* note 101, at 34.

183. Of course, the program itself has direct costs, which have been estimated at \$150,000 to \$200,000 per year. See FEDERAL JUDICIAL CTR., PRELIMINARY ANALYSIS OF THE TECHNICAL FEASIBILITY OF AN AUTOMATED LAW CLERK MATCHING PROGRAM 3 (1990). This is the equivalent of about six clerks' salaries, a small amount to pay compared to the approximately \$65 million spent annually on salaries for law clerks chosen in the current haphazard system.

184. See NATIONAL RESIDENT MATCHING PROGRAM DIRECTORY, *supra* note 168, at 10 (describing how a medical program director will "regret his overconfidence" in ranking only those few students who indicate that his program is their first choice). Applicants may be less likely to mislead judges than vice-versa, given that future attorneys anger judges at their peril. See Wald, *supra* note 4, at 162. But in the end, those "unscrupulous" judges who make such agreements "would get the unscrupulous law clerks they needed to help them do their unscrupulous work, while the rest of us would have to be satisfied with the honest and ethical remainder." Charles P. Sifton, *In re Clerkships: The Answer to Last Month's Quiz*, N.Y.L.J., Apr. 18, 1990, at 2.

185. In any case, if such tactics became a problem, Congress (or its designated implementing body) could design remedies or prophylactic measures. For example, before funds would be released to pay the salary of a clerk hired outside the matching system, both the student and the judge could be required to sign affidavits that they have not attempted to circumvent the matching process. For all their shenanigans in the law clerk recruitment process, judges are likely to be careful about what they sign.

will be able to evaluate each other based on their records rather than on their ability to "respond to the pressure of the current selection process."<sup>186</sup>

#### *D. Equal Opportunity*

Some judges have expressed concern that the matching system would somehow alter the unique relationship between judge and clerk, "the most intense and mutually dependent one . . . outside of marriage, parenthood, or a love affair."<sup>187</sup> Judge Kozinski, for one, fears that the matching process will "undermine the judge-clerk relationship in subtle but important ways."<sup>188</sup> How it will do this is unclear. Each judge will almost certainly continue to interview applicants to determine whether they will get along with the judge and the judge's other staff members. Each judge will have as much latitude as ever to choose the clerks she wants, subject to their availability. In fact, the matching proposal would not diminish any—and might improve some—of the important factors mentioned by Judge Kozinski: "[t]he time the judge spends talking to professors and reading draft law review notes; the student's efforts devoted to reading the judge's opinions; the time judge and clerk spend in interviews; the weighing of competing possibilities. . . ."<sup>189</sup>

It may be that judges are concerned that they will be handicapped in obtaining the clerks they prefer. But each judge will continue to have great latitude to choose preferred applicants, subject only to their availability in a system that better reflects the preferences of the entire group of judges and applicants. Indeed, because the matching system will not significantly alter the steps of the recruitment process, it will not reduce (or remedy) the power of judges to choose clerks based on factors that are not relevant to performance. A judge who wanted to hire the less than brilliant son of his law school classmate could probably do so just as easily through the matching system. In fact, proponents of reform have taken pains to show that the matching system would not prevent a judge from selecting a "balanced" group of clerks, however the judge defines "balanced." There seem to be four major ways in which the program could incorporate such preferences.

First, and most simply, a judge could submit separate lists for each

---

186. Kozinski, *supra* note 4, at 1718.

187. Wald, *supra* note 4, at 153.

188. Kozinski, *supra* note 4, at 1723.

189. *Id.* Oberdorfer and Levy note that Kozinski identifies "only one true advantage that the current anarchy will always have over a matching system: the judge and the student personally witnessing that 'electrifying' moment of acceptance." Oberdorfer & Levy, *supra* note 6, at 1107-08 (citing Kozinski, *supra* note 4, at 1723). But even this need not be eliminated: judges could be notified of their matches a few days before students, so that the (probably few) romantics on the federal bench could offer positions directly in order to hear "the [thrilling] words: 'Yes, judge, I accept.'" Kozinski, *supra* note 4, at 1723.



slot. This would work well for "judges who prefer to think of their staffing needs in terms of three separate positions."<sup>190</sup>

A second way would have each judge rank preferred combinations—triplets for circuit judges and pairs for district judges—so that judges are matched to their highest ranked available combination. Kozinski claims that a judge who had interviewed 25 or 30 candidates for three positions would have to rank 2300 to 4000 possible combinations.<sup>191</sup> In reality, argue Oberdorfer and Levy, almost all judges could fill their slots by ranking combinations of only their top six candidates,<sup>192</sup> which would number 20 sets at most. Ranking 20 sets would require some effort (comparable, in fact, to students' chores in arranging their course schedules), but it seems a small cost to pay to ensure a more equitable and efficient selection of law clerks.

A third method would be to allow judges to provide "complicated sets of constraints and super-preferences that might modify a judge's 'primary' list of preferences."<sup>193</sup> Oberdorfer and Levy provide an interesting example of this approach, but they do not explain how such rules would be processed by a computer program. Such constraints might be accommodated by data entry operators or programmers who translate the instructions into long lists of rank-ordered combinations; alternatively, such flexibility may require the development of more complicated algorithms that border on artificial intelligence. A matching system would be able to incorporate such constraints on preferences to the extent available technology allows.

Absent such technology, however, the fourth and final possibility for accommodating diversity in judicial preferences would be to conduct three rounds of computer matches. In the first round, judges and students would submit their lists of preferences, and each judge would be matched with one clerk. The judges would then be notified of the resulting match as well as the names of the clerks on their original list that were no longer available. The judges would then submit a second list, which would be matched against the students' original lists, and this would be repeated a third time for the circuit judges. Clerks would not be told who was chosen first, second, or third, and judges would have a chance after each round to consider their options and their desired mix.

This method is technically feasible, does not require judges to consider remote possibilities, and allows judges to express preferences over a period of time. But, it would also require a longer processing period with corresponding increases in the time that judges must devote to monitor-

---

190. Oberdorfer & Levy, *supra* note 6, at 1107. Some legal and dental matching programs work this way. See *id.* at 1107 n.48.

191. See Kozinski, *supra* note 4, at 1722.

192. See Oberdorfer & Levy, *supra* note 6, at 1106-07.

193. *Id.* at 1107.

ing the process. Furthermore, if the matches for circuit judges are not completed before those of district judges are begun, the system could leave circuit judges with slim pickings for their final slot, as well as herd some students who would prefer district clerkships into circuit clerkships. Thus, it is not entirely clear that this approach would truly maximize participants' preferences.

Congress (or a designated implementing body) could choose any of these four ways to accommodate the diverse preferences of judges, no matter what their basis. But the question remains whether these preferences should be indulged. Certainly there are legitimate factors other than class rank on which judges may rely to discriminate among applicants. For instance, few people would object to a preference for clerks with experience in the "real world" over those who have gone straight from college to law school to clerkship. But when does "balance" become reverse discrimination? Is it as improper to hire from only one school or region as to hire from only one race or gender? The question is further complicated by the fact that preferences for a certain school or region may incorporate race, gender, and other social class biases.

Although any reform of the clerkship selection process must encourage equal opportunity for all applicants, it cannot be expected to remedy the complex and difficult problem of discrimination in our pluralist society. Congress has at least partially addressed this problem by enacting protections for almost all employees from discrimination on the basis of race, sex, religion, national origin, or disability.<sup>194</sup> It is incongruous—even inexcusable—that federal judicial clerks are still vulnerable to such discrimination; Congress should provide protections for clerks that are similar to those for congressional and presidential aides.<sup>195</sup>

Even in the absence of such restrictions, the program proposed here may help equalize opportunities for applicants. When judges rank their preferences, they may become more aware of the selection criteria they rely upon. The lower travel costs made possible by a more flexible interview period will allow poorer students to participate more fully. And, perhaps most importantly, the matching system will dilute the influence of connections to the proverbial old-boy network by interposing a confidential and less than predictable algorithm between employers and applicants. Thus, although the four methods detailed in this section will allow judges to continue to differentiate among applicants on the basis of criteria not solely related to merit, the system may nevertheless work to inhibit illegitimate discrimination.

---

194. Congress may, and should, add "sexual orientation" to this list. See H.R. 431, 103d Cong., 1st Sess. (1993).

195. See *supra* note 50 and accompanying text.

## CONCLUSION

The modified match system described above will result in a Pareto-optimal matching of judges and clerks, will reduce costs and facilitate information flows, and will encourage judges to become more aware of their duty to make selections based on merit. But of course it will *not* create a judicial Utopia. As Judge Kozinski observes, "it is important to identify those problems that *no* system can solve."<sup>196</sup>

First, some judges will probably have to interview more applicants than they would like. This burden may simply reflect the price of identifying the best clerks in any system. Law firms, by comparison, certainly interview more than three or four applicants per slot. Judges simply need to reconcile themselves to the fact that, if all judges in the system are to obtain the best possible clerks, each judge must put in the time to interview and rank the applicants most suited to his chambers.

Second, there will continue to be plenty of uncertainty in the system. Although the common match date will diminish worries over what is happening in the chambers (or dorm room) across the hall, judges and students will still not know the preferences of others in the process. At the very least, the matching system ensures that upon a set date, a large majority of students and judges will know who they will be working with eight or ten months hence.

Third, there will always be a great deal of disappointment at the end of the process. Although advocates of the matching model have provided evidence that in other matching situations high percentages of participants are matched to their top choices,<sup>197</sup> this finding does not mean that disappointment levels will necessarily diminish under a matching system for judicial clerkships. In this system, depending on one's point of view, there are plenty of students and not many top clerkships, or there are plenty of clerkships and not many top students. Indeed, the proposed system may actually increase disappointment levels: applicants will no longer be able to blame rejection on the vagaries of the process. Nevertheless, disappointments in a matching system may be more easily accepted because they will result from a fair, impartial process.

Finally, there will probably continue to be a few mismatches; every year a few clerks or judges will fail to live up to the others' expectations. Although a longer period for interviewing and information sharing might diminish the number of mismatches, no system can prevent mistaken first impressions or second thoughts.

---

196. Kozinski, *supra* note 4, at 1713.

197. See Oberdorfer & Levy, *supra* note 6, at 1106-07 & n.47 (stating that if every judge has three positions, between 82% and 94% of them would be filled by applicants ranked sixth or better by the judge); Wald, *supra* note 4, at 162 n.9 (reporting that the Canadian law intern programs in Toronto and Vancouver have matched 73% of students and 76% of firms to their first or second choices).

The stakes in this debate are too high for students, professors, and lawyers to remain uninvolved in reform efforts. Judges distribute two thousand federal clerkships each year, and their clerks perform a great many influential functions. A congressionally-enforced matching system will not solve all the problems of the current chaotic process. It will, however, ensure that judicial clerks are selected in a respectable, orderly, and fair manner that enables the judiciary as a whole to hire the best candidates and to preserve judges' reputation for doing justice.

# California Law Review

---

VOL. 81

MAY 1993

No. 3

---

Copyright © 1993 by California Law Review, Inc.

## BOARD OF EDITORS

1992-93

### *Editor-in-Chief*

THOMAS L. FREEDMAN

### *Managing Editor*

STEVEN CHERENSKY

### *Senior Articles Editor*

RHONDA R. TROTTER

### *Senior Executive Editor*

WILLIAM H.D. FERNHOLZ

### *Senior Notes & Comments Editor*

DANIEL J. CLOHERTY

### *Articles Editors*

DAINA C. CHIU  
W. STUART HIRSCHFELD  
JOEL S. JACOBS  
ANDREW E. NAGEL

### *Executive Editors*

NICOLE ANDERSON  
GREGORY MITCHELL  
JEFFREY P. RAKE

### *Notes & Comments Editors*

STEVEN DE SALVO  
ROBERT A. HOLLAND  
STEPHANIE L. SIEGEL

### *Book Review Editor*

KYLE HOFFMAN

### *Production Editor*

ROBERT M. SHORE

### *Research & Topics Editor*

ANN CHIGA

### *Associate Editors*

BRADLEY A. BENBROOK  
ELIZABETH A. DI COLA  
GARY GOLD  
JAY HARKER  
CHRISTINE L. HOANG  
ANN H. KIM

BRIAN C. LEE  
CHRISTOPHER R. LESLIE  
J. KEITH ORVILLE  
EUGENE PAK  
JULIA PARRY

KARL A. SANDOVAL  
MICHAEL B. SCHWARZ  
CLINT N. SMITH  
MICHAEL S. UMANSKY  
CRAIG VARNEN  
DAVID S. WELSH

### *Members*

JESSE BERG  
DANIEL P. DOPORTO  
BENJAMIN L. DOUGLAS  
CHERYL DYER  
DAVID T. EMERSON

BRIAN J. FOLEY  
SUSANNAH T. FRENCH  
GWYNETH E. HAMBLEY  
SHARON L. IRVING

JEFFREY KUPOR  
TIMOTHY A. PORTER  
MICHAEL PROUGH  
JESÚS G. ROMÁN  
MITCHELL J. STEINBERGER

JAMES M. AQUILINA  
FABIO ARCILA JR.  
ERIK BABCOCK  
JEFF CARLISLE  
FRANK CIALONE  
NANCY COMBS  
ANUJ R. DESAI  
VIVIAN B. DISTLER  
ERIC DOBMEIER  
ROGER DOUGHTY  
LISA FINLEY  
JODY FOSTER  
TRACY FRIEDMAN  
STEVE GEARY  
DAVID E. GOLDSTEIN

ANDREW HACKBERT  
JAMES KNOX  
L. JAY KUO  
SYLVIA LEONG  
MATT LEVETT  
BEATRICE B. NGUYEN  
TODD NOONAN  
CRAIG NORRIS  
JENNIFER OCHS  
CATHY J. OSTILLER  
THOMAS J. PECKHAM  
DANIEL PINES  
RICK E. RAYL  
FLAVIO ROSE  
ELLEN J. RUBIN

NICOLE M. RYAN  
DAVID W. SIMON  
DAN S. SOKOLOV  
FRANK SOLOMON  
RUSSELL SOMMERS  
MOLLY S. STUMP  
KATHRYN E. SUAREZ  
CHRISTINE H. SUH  
PHILIP C. TENCER  
MARSHA TODD  
JAN TOMSKY  
BRIAN M. TORRES  
TIMOTHY J. WALSH  
GEORGE L. WASHINGTON, JR.  
SARAH C. WILSON

### *Office Manager*

KAREN E. FASS

