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The Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks

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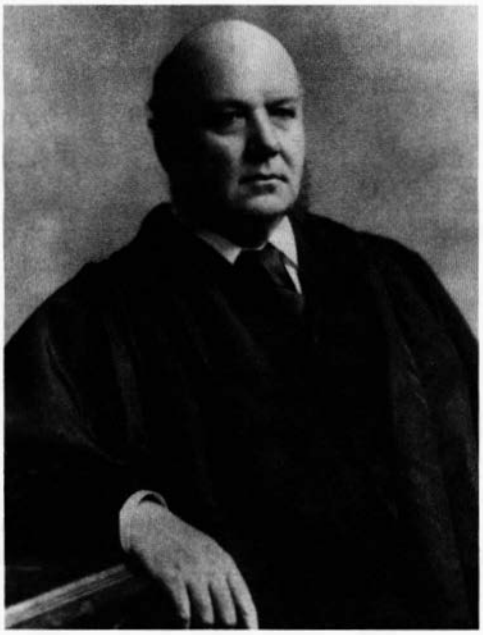

Justice Horace Gray (1882-1902) established the practice of employing a young law school graduate as a clerk.

The clerk connection: appearances before the Supreme Court by former law clerks

Former U.S. Supreme Court law clerks frequently use their unique experiences and knowledge to appear before the Court, and they participate more often than non-clerks with similar educational backgrounds.

by Karen O'Connor and John R. Hermann

Judicial scholars long have examined the external factors influencing U.S. Supreme Court decision making. Congressional[1] and executive[2] pressures, the Office of the U.S. Solicitor General,[3] attorney experience,[4] and the tactics of organized interests[5] all have been found to be influential.

Until McGuire,[6] the role of former U.S. Supreme Court law clerks as participants before the Court after completion of their clerkships has failed to garner much scholarly attention. The clerks' experiences as clerks gives them immediate stature within an elite segment of the bar. This is well illustrated by the high percentage of former clerks who are later hired by the U.S. solicitor general's office, the most frequent and prominent player before the Court. Law firms also recognize and exploit the clerk connection, as evidenced by the yearly competition to sign clerks that rivals the NBA draft. They offer clerks generous bonuses for their experience—as much as $35,000 on top of an $80,000 salary.[7] High-powered firms perceive that the clerk experience can give their clients a distinct advantage before the nation's highest court and that having former clerks on their staff increases their prestige.

There is no dispute concerning the role that clerks play in screening the more than 7,000 petitions that come before the Court each year for review. The clerks' experience in winnowing down these petitions to the 100 or so cases argued each year is invaluable. It gives clerks the opportunity to see firsthand what issues, facts, arguments, or forms of presentation styles appeal to their justice as well as to the other eight. One former Rehnquist clerk has gone so far as to publish an article titled "Teachings of the Rehnquist Court: The Chief's former clerk offers a dozen tips for presenting Cases to

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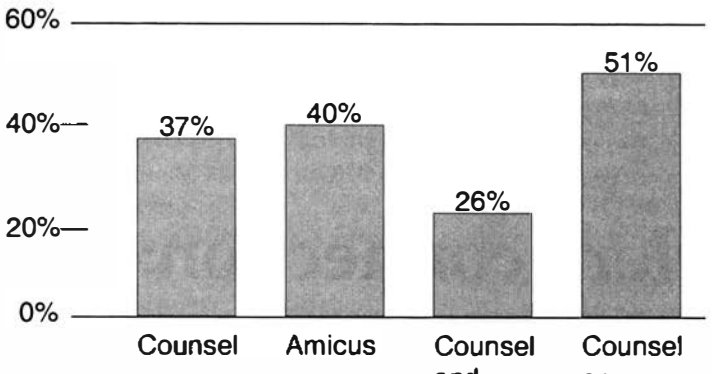
1. Murphy, CONGRESS AND THE COURT (Chicago: University of Chicago Press, 1967).
2. Scigliano, THE SUPREME COURT AND THE PRESIDENCY (New York: Free Press, 1971).
3. Salokar, THE SOLICITOR GENERAL: THE POLITICS OF LAW (Philadelphia: Temple University Press, 1992).
4. Galanter, *Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); McGuire, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY (Charlottesville, Va.: University Press of Virginia, 1993).
5. Tushnet, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (Chapel Hill, N.C.: University of North Carolina Press, 1987).
6. McGuire, *supra* n. 4.
7. Conlin, *Decisions, Decisions*, The Washingtonian, June 1990, at 65; Kerlow, *Supreme Court Payoff for Clerks: $35,000 Bonus*, Legal Times of Washington, September 17, 1990.

Figure 1 Participation rates of former Supreme Court law clerks before the Court



Years of clerk service: 1958-85
Participation years: 1979-92
N=738

Table 1 Former clerk participation rates in cases orally argued before the Supreme Court, 1979 term

Clerk participation	Number of cases	Percentage
Yes	23	17.29
No	110	82.71
Total	133	100.00

Years of clerk service: 1958-85

the Nine."[8] While this article is undoubtedly helpful to practitioners, it cannot replace the firsthand experience of serving on the Court. Said one former clerk, "Being a clerk is most helpful, I think, in the certiorari process—knowing how petitions are reviewed, what role law clerks play versus the justices, or knowing who's your audience and what are the constraints on your audience."[9]

The purpose of this analysis is to determine the frequency with which former U.S. Supreme Court law clerks appear as direct and third parties before the Court. It also examines whether the clerk experience triggers higher rates of participation before the Court than non-clerks with similar educational backgrounds.

Data on the 738 U.S. Supreme Court law clerks who served during the 1958-85 terms was obtained from the Supreme Court. Using Lexis, the name of each clerk was entered to determine if the clerk had participated as counsel, amicus curiae, or both before the Court during the 1979-92 terms.[10] To ensure the reliability of these findings, every tenth clerk included in the data base was rechecked to confirm that the same results were yielded. A clerk was considered to have participated as counsel or amicus if his or her name appeared on the brief submitted to the Court. In addition, for the 1979 term, all cases orally argued before the Court were examined.[11]

Table 2 Individual justices' clerk participation rates

Justice*	Number of clerks	Participated as: Counsel	Amicus	Counsel and amicus	Counsel or amicus
Mean	44	.38	.39	.27	.51
Black	25	.44	.36	.36	.44
Blackmun	56	.41	.46	.29	.59
Brennan	81	.47	.48	.35	.60
Burger	66	.40	.33	.24	.48
Clark	28	.29	.14	.14	.29
Douglas	31	.35	.32	.23	.45
Harlan	31	.58	.58	.48	.68
Marshall	64	.39	.52	.25	.66
O'Connor	20	.25	.40	.20	.45
Powell	53	.36	.42	.28	.49
Reed	18	.44	.28	.22	.50
Rehnquist	43	.35	.35	.26	.44
Stevens	26	.46	.58	.27	.77
Stewart	60	.37	.47	.28	.55
Warren	37	.19	.22	.14	.27
White	67	.34	.40	.25	.49

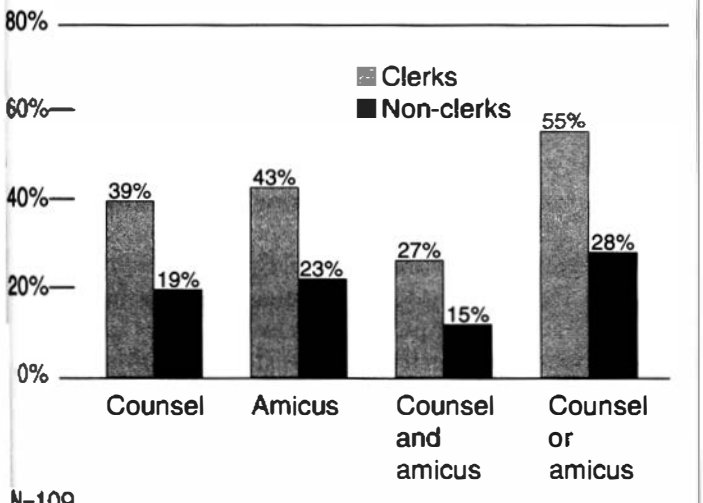
*Justices Burton, Fortas, Goldberg, and Whittaker were excluded because each had fewer than 10 clerks during their tenures.
Participation years: 1979-92

Participation rates

As Figure 1 illustrates, clerks are clearly active participants before the

8. Guiffra, *Teachings of the Rehnquist Court*, The Recorder, Oct. 17, 1991.
9. McGuire, *supra* n. 4, at 162.
10. Lexis established its data set with 1979 as the beginning term. Where questions arose concerning common names, *Martindale-Hubbell* was cross-referenced, and as a last resort, individuals were contacted personally to ascertain their status.
11. No data base exists for counsel who orally argue cases. Although only one term was examined, Caldeira and Wright argue that there appears to be no reason to believe that the findings would be much different for any other term. *See* Caldeira and Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 Am. Pol. Sci. Rev. 1109, 1123 (1988).

Figure 2 Clerks' vs. non-clerks' participation rates



N=109
Years of clerk service: 1969-79
Participation years: 1979-92

Supreme Court. More than half of the clerks from the 1958-85 terms later participated as either counsel or amicus at least one time before the Court. Moreover, 37 percent of the clerks have been listed as counsel on briefs filed before the Court, 40 percent have filed an amicus curiae brief, and 51 percent have participated in one or the other activity. As Guiffra Jr. has noted, clerks are well suited to file briefs at the Court because they enjoy unique knowledge of the internal dynamics of the justices' and the Court's decision-making processes.[12] Clerks probably know which "buttons to push" to persuade individual justices as well as the Court as an institution to review their cases. The Court itself appears well aware of this clerk advantage. Court rules dictate that former clerks cannot file briefs or appear before the Court for two years after they leave their clerkship.

Another measure that illuminates the important role former clerks play in the Supreme Court bar is the frequency in which they actually appear before the Court to argue their cases. As Table 1 illustrates, for example, former clerks orally argued 17 percent of the 133 cases heard by the Supreme Court during the 1979 term. Former clerks are not only active participants as counsel or amicus before the Court, but they also frequently argue cases.

Thus far, former clerks' participation rates have been examined. While this inquiry examines clerk participation in general, it does not offer insights about the activities of individual justices' clerks. As Table 2 illustrates, the former clerks of Justices Blackmun, Brennan, Harlan, and Stevens generally had average or higher than average participation rates. In contrast, clerks who worked for Justices Clark, Douglas, O'Connor, Rehnquist, Warren, and White generally participated at rates lower than the mean participation rate. This finding suggests that the participation rates of the clerks might be explained by the orientation toward litigation clerks have learned from working with a particular justice. It may be that some justices stress the importance of appellate work or encourage their clerks to seek employment in environments where the chances of participating in Supreme Court litigation are greater.[13]

Clerks versus non-clerks

To test whether former Supreme Court law clerks participate as counsel or amicus at greater rates than their counterparts with similar educational backgrounds, non-random matched pairs were used. Using the 1969-79 terms, one clerk who served with each justice each term was matched with a non-clerk. The examination was narrowed to a 10-year period since using a much larger sample is not likely to result in any appreciable difference.[14]

Non-clerks were selected for inclusion based on three criteria: First, to ensure comparable educational prestige, each non-clerk had to graduate from the same law school as his or her matched clerk. Second, to ensure similar education success, each non-clerk had to serve in the highest possible editorial position on his or her respective law school review or journal.[15] Third, the non-clerk's service on the editorial board had to occur two years prior to the date of the law clerk's service on the Court. This final measure was obtained by averaging the aggregate period from the clerks' law school graduation dates to the time the clerks worked on the Court.

As Figure 2 illustrates, former clerks were more active before the Supreme Court than non-clerks. Individuals who clerked during the 1969-79 terms were almost twice as likely later to serve as counsel or amicus than those who had not clerked.

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The fact that an individual clerked for a justice of the U.S. Supreme Court increases the probability that the clerk will later serve as either counsel or amicus before the Court by nearly 100 percent. Clerks clearly become part of an elite Supreme Court community. The clerks understand the internal decision-making processes of the justices as well as the Court. With this in mind, both government and private law firms actively recruit clerks to act later as players before the Court.

Clerk participation before the Court warrants more scholarly attention. Future studies might examine how often each clerk participates as a direct and third party and their respective success rates. It is likely that the insider knowledge of the clerks endow them with the mind of "repeat player" status that only many years of participation and practice afford to others. By examining participation and success rates of clerks before the Court, a more sophisticated understanding of the factors influencing the Court's decisions may be developed.

12. Guiffra, *supra* n. 8.

13. For purposes of this analysis, individual justices must have had at least 10 clerks work during their tenure. This step was taken to ensure that participation rates did not occur by chance, but were part of a systematic pattern. Thus, four justices were eliminated: Burton, Fortas, Goldberg, and Whittaker.

14. To ensure that all clerks had an equal opportunity of being matched with a non-clerk, beginning with the 1969 term the first clerk listed alphabetically for each justice was recorded. For the 1970 term, the second individual who clerked for each justice was chosen, and so forth. This method yielded 109 clerks.

15. For example, if clerk X was editor-in-chief, the second ranking editor of the *Y Law Review* was selected, making that person the match. Conversely, if clerk X was not the editor-in-chief, the editor-in-chief was selected as the match.