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Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk

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BOOK REVIEW


Reviewed by Harvey Gee*

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I. INTRODUCTION

For many attorneys and law students, the opportunity to clerk for a Justice at the U.S. Supreme Court is an opportunity of a lifetime. These highly coveted and sought after clerkships offer keys to the doors of power. In Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk (hereinafter “Marble Palace”), Professor Todd C. Peppers, who teaches public affairs at Roanoke College, reiterates these sentiments as he explains why a Supreme Court clerkship is an invaluable stepping-stone to future glory. As he points out, “[f]ormer law clerks have held cabinet-level positions in presidential administrations, authored textbooks read by generations of law school stu-

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dents, assumed the stewardship of our nation's oldest law schools, and donned the black robes of a Supreme Court justice.\textsuperscript{2}

In \textit{Marble Palace}, Peppers offers a comprehensive look at the role that these clerks play at the Court. This well-written book is illuminating, by not only revealing insight into the nuts and bolts of serving as a Supreme Court law clerk, but also by providing insight into the workings of the Judicial Branch of the Federal Government, which remains a mystery to many around the world today. It is against this backdrop that Peppers offers a rare opportunity to learn about the specific functions of Supreme Court law clerks.

At the outset of the book, Peppers explains that one of the obstacles that he faced in obtaining information for his book was negotiating the code of confidentiality that law clerks are sworn to uphold concerning their work.\textsuperscript{3} Not to be discouraged, Peppers insightfully covers the hiring of individual clerks, the work of clerks on important decisions, and how opinions may or may not have been shaped by them.\textsuperscript{4} Peppers closes his volume by positing that a Supreme Court clerkship will remain "a highly contested prize," but that as workload pressures increase, and as staff expansions accrue, it is inevitable that clerkships will become "more bland and less memorable," and that the traditional "bonds of affection and intimacy" between the Justices and their clerks will slowly erode.\textsuperscript{5}

The book is well-organized. Each section of \textit{Marble Palace} is concise, and each chapter leads logically into the next. This allows the reader to skip to sections of particular interest. In this Book Review, I will examine the role of a Supreme Court law clerk in Part II, how Professor Peppers details the selection process in Part III, the evolution of the law clerk in Part IV, the law clerk's influence in Part V, and finally, what I perceive to be an oversight in not addressing the law clerk culture at the Court, in Part VI.

II. \textbf{INTRODUCTION TO THE ROLE OF A SUPREME COURT LAW CLERK}

While all judicial clerkships with the federal bench are prestigious, and the competition of securing any federal clerkship is great, a Supreme Court clerkship remains at the top of the hierarchy. For example, some serious Court watchers have even become so enamored with Supreme Court clerkships that they have created websites devoted to information, rumor, and gossip about the Justices' incoming and outgoing clerks.\textsuperscript{6} Peppers explains that the elite group of Supreme Court law clerks are selected from the best law schools, and are often

\textsuperscript{2} \textit{Id.} at 17.
\textsuperscript{3} \textit{Id.} at 18.
\textsuperscript{4} \textit{Id.} at 17-37.
\textsuperscript{5} \textit{Id.} at 212.
expected to have trained for their clerkship by first clerking with well-known and trusted federal appellate court judges (referred to by Peppers as "feeder court" judges). Peppers points out that more recently, law clerks have also come from top law firms or elite government posts between clerkships with lower federal court judges and Supreme Court Justices. For example, Justice Samuel A. Alito, Jr.'s current law clerks are former Supreme Court clerks and come from high-ranking Department of Justice positions, or have large corporate law firm experience.

Today, each Justice has four law clerks. A law clerk routinely edits, drafts, and revises judicial opinions; reviews, analyzes, and summarizes certiorari petitions; and prepares bench memoranda. Undoubtedly, given these important responsibilities, the modern law clerk has become an integral part of the Supreme Court.

A law clerk's job is daunting. The Supreme Court today is continuing toward its downward trend of hearing fewer cases per year. Nevertheless, Supreme Court law clerks work longer hours today than they did forty years ago, even though the Court hears fewer cases. Peppers offers insight into what we do not already know about law clerks. Drawing from dozens of interviews, correspondence with former clerks and other Court insiders, information found in the personal papers of former Justices, judicial biographies, historical accounts, law clerk personal anecdotes, law review and periodical articles, and oral histories, Professor Peppers traces the evolution of the clerk's role from a stenographer in the later nineteenth century to an integral assistant with many responsibilities today.

III. THE SELECTION PROCESS

Peppers surveys the past 120 years during which law students have served individual Justices at the High Court. Based on his extensive research, Peppers explains that almost all law clerks are hired primarily on the basis of academic achievement. The clerks selected are seemingly the brightest of the brightest. These law clerks are almost always alumni of the top tiered law schools. Peppers offers statistical charts based on empirical evidence indicating that Harvard, Yale, University of Chicago, New York University, Stanford, and

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7 See Peppers, supra note 1, at 32.
8 Id.
12 See Peppers, supra note 1, at 18-20.
the Universities of Michigan and Virginia account for about eighty percent of the Court’s law clerks.\textsuperscript{13} Peppers says,

While the traditional law schools have retained their dominance over the clerkship corps, the number of law schools contributing graduates to the Supreme Court has increased over time . . . .

. . . .

The increasing number of law schools represented among the ranks of Supreme Court clerks, however, does not undercut the argument that the justices return again and again to the same schools for the majority of their law clerks.\textsuperscript{14}

Court observers have offered that the issue of political ideology plays a role in the selection process of clerks,\textsuperscript{15} and Peppers confirms that. The historical information available does suggest that, although there have been exceptions, Justices from either end of the political spectrum have tended to hire clerks sharing the same political views and judicial philosophies as the selecting Justice. Peppers points out, for example, that Justices Breyer and Ginsburg tend to hire clerks with a more liberal leaning, while Justices Scalia and Thomas tend to hire clerks who are more conservative.\textsuperscript{16} But some Justices, such as Burger, have occasionally hired one law clerk of a differing political philosophy from his own, in an effort to be inclusive.\textsuperscript{17} Peppers indicates that as for each individual Rehnquist Court Justice, the primary emphasis remained on selecting clerks from the most prestigious law schools.\textsuperscript{18}

Chapter Two shows that, historically, most Supreme Court law clerks have been white males. Only during the last few decades have Justices hired more women and racial minorities. Perhaps this trend is reflective of the pool of students at law schools; nonetheless, diversity among clerks remains lacking at the Court today. As a factual matter, Justice Douglas hired Lucile Lomen, the first female law clerk, in 1944. As Peppers points out, this was largely motivated by a shortage of male law students during World War II, rather than an effort to address equitable hiring. Justice Frankfurter hired William T. Coleman, Jr., the first African American during October Term ("OT") 1948. Justice

\begin{itemize}
  \item \textsuperscript{13} \textit{Id}. at 23-31
  \item \textsuperscript{14} \textit{Id}. at 24-25 (emphasis in original).
  \item \textsuperscript{16} PEPPERS, supra note 1, at 32.
  \item \textsuperscript{17} \textit{Id}. at 175.
  \item \textsuperscript{18} \textit{Id}. at 29-36.
\end{itemize}
Marshall hired Karen Hastie Williams, the first African American female law clerk during OT 1974.\textsuperscript{19}

Here, Peppers misses an opportunity to present a broader discussion of the issue of minority law clerk hiring. It would have been worthwhile if he had attempted to touch upon the attitudes of the Justices themselves concerning the need for greater diversity on the Court among clerks. Such discussions would have made his coverage much more deeply analytical and thorough. Likewise, a more detailed discussion concerning the efforts made by the Justices themselves to diversify their applicant pool would have been welcomed.

IV. THE EVOLUTION OF THE LAW CLERK: FROM STENOGRAPHER TO LEGAL ASSISTANT TO MODERN LAW CLERK

To begin, Peppers examines the early years of the Supreme Court and the early support personnel of the Court.\textsuperscript{20} He then proceeds to discuss Chief Justice Gray, the first U.S. Supreme Court Justice to hire a law clerk who recently graduated from law school. Chief Justice Gray was well-known for his aptitude for legal research, and demanded as much from his assistants. Peppers explains that during the summer of 1875, Chief Justice Gray initially began hiring Harvard Law School graduates to be his legal secretaries. It remains unclear what Gray’s true motivations were in hiring these graduates, but it is possible that they were hired to handle the increased workload of the Chief Justice position. The Chief Justice seemed benevolent because he personally paid his assistants’ salaries and treated them “as more than mere secretaries.”\textsuperscript{21}

From 1886 to 1919, each Justice could hire one stenographic clerk, and the utilization of these clerks varied among the justices.\textsuperscript{22} During this era Justices Gray, Holmes, and Brandeis had clerks perform legal duties,\textsuperscript{23} while Justices Waite, Fuller, and many other of the White Court Justices primarily used their assistants as stenographers and for administrative tasks. According to Peppers,

As the era of the White Court drew to a close, the majority of justices maintained the clerk-as-stenographer model. Simply put, the justices needed stenographers/secretaries to get opinions published and the office work processed. When Congress authorized a position for a second assistant in 1920, the justices had the luxury of selecting an assistant whose time could be de-

\textsuperscript{19} Id. at 20-22.
\textsuperscript{20} Id. at 38-39.
\textsuperscript{21} Id. at 44-45.
\textsuperscript{22} Id. at 83.
\textsuperscript{23} Id. at 70.
voted to other matters. Now, the institutional resources existed for the justices to hire a true legal assistant.24

Next, Peppers chronicles the evolution of the law clerk’s role at the Court after Congress officially authorized the Justices to hire a single law clerk in 1919.25 He notes that Chief Justice Taft’s clerkship practices revolved between the clerk-as-stenographer and clerk-as-legal assistant.26 Upon request of Chief Justice Taft, Yale Law School Dean Thomas W. Swan would forward to him the names of potential law clerks.27 Peppers also details the way Justices Brandeis and Stone hired and utilized their law clerks28 and points out that when Charles Evan Hughes was Chief Justice, there were two staff cultures at the Court: recent elite graduates from Harvard and Columbia who served as clerks for terms, and career secretaries who served the majority of the Justices.29 The use of career secretaries was eliminated by the end of the Hughes Court in 1941.30 Justices Reed, Frankfurter, Douglas, and Black are all reported to have adopted variations of the legal assistant model.31

Peppers clarifies that the methods for hiring and utilizing law clerks were as diverse as the Justices themselves. For example, he uses the illustration of Justice Hughes, who modified the usage of his law clerks in 1930 by having his stenographic assistants perform substantial duties, such as preliminary work in examining records and briefs and preparing copious memoranda. Justices Cardozo, Black, Reed, and Douglas discussed certiorari petitions that their law clerks reviewed. Justice Cardozo interviewed his prospective clerks before formally hiring them. Cardozo and his two clerks worked in the Justice’s apartment on Connecticut Avenue, reviewing drafts and performed legal research. Peppers explains that sometimes Justice Cardozo joined his clerks in taking and reviewing petitions. Until the days of his final illness, Cardozo preferred to write his own opinions, but he often used his clerks as sounding boards for differing thoughts and insights into a pending legal matter.32

24 Id.
25 Id. at 83.
26 Id. at 84. A particularly insightful account of the experiences of a Supreme Court clerk during this era is offered by John Knox, who served as private secretary and law clerk to Justice James C. McReynolds. See THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR’S WASHINGTON (Dennis J. Hutchinson & David J. Garrow eds., 2002).
27 See Peppers, supra note 1, at 85-86.
28 Id. at 89-92.
29 Id. at 93-98.
30 Id. at 93-96.
31 Id. at 99-102, 105-106, 114-15, 120-22.
32 Id. at 94-97.
When former solicitor general Stanley Reed was appointed to the Supreme Court by Franklin Roosevelt, the “movement toward the modern clerkship model was furthered.” Peppers explains that Reed’s first full-time law clerk was John T. Sapienza, a Harvard Law School graduate and former clerk for Judge Augustus Hand, and Justice Frankfurter selected him to clerk for Reed. After this selection, Reed’s subsequent clerks were based on recommendations by current law clerks, law school professors, and federal judges. Notably, Sapienza was one of the first law clerks to work at the new Supreme Court building. During his two decades on the Court, Justice Reed’s clerkship model “did not drastically change.”

Peppers states, “Of all the Hughes Court justices, [Justice] Frank Murphy adopted the most modern clerkship model.” Justice Murphy sometimes delegated to his clerks the preparation of judicial opinions and the responsibility of reviewing and summarizing certiorari petitions. Aside from his first law clerk, Harvard Law School graduate Edwin E. Huddleston, who was selected by Justice Frankfurter for Murphy, “[a]ll subsequent Murphy clerks were selected from the University of Michigan School of Law,” his alma mater. Peppers shows that Justice Murphy’s selection process originally focused on several qualities: the applicant’s personal character, intellectual abilities, and ideological orientation. The consensus among observers was that Justice Murphy “depended heavily upon his law clerks to draft his opinions,” but “retained . . . stylistic control over the opinion-writing process.” Although he assigned his law clerks the duties of reviewing and summarizing certiorari petitions, “he did not ask his clerks to draft bench memoranda.”

During the author’s discussions of Justice Murphy’s practice of delegating the responsibility of opinion-drafting to clerks, though it may have been beyond the scope of the book, it would have been worthwhile if Peppers had included a discussion of the contribution of Justice Murphy’s law clerks to his famous dissent in *Korematsu v. United States*, where the Court upheld a World War II government exclusion order calling for the evacuation and internment of 112,000 Japanese Americans on the West Coast. In his dissent, Justice Murphy rejected the majority’s reliance on the government’s unsubstantiated finding that Japanese Americans posed a real danger of espionage as he famously wrote:

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33 *Id.* at 98.
34 *Id.* at 98-99.
35 *Id.* at 109.
36 *Id.* at 109-111.
37 *Id.* at 110.
38 *Id.* at 109-111.
39 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).
40 *Id.* at 219.
This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.  

Moreover, such a discussion could have strengthened any indications offered by Peppers that clerks are often selected because they have political and social ideologies that mirror their respective Justices.

Other justices emulated the modern clerkship model used by Justice Murphy. William O. Douglas began his long tenure on the Court in 1939, when he was appointed to the Court by President Franklin Roosevelt. After he began his career on the Court, Justice Douglas was not much involved in law clerk selection. Instead, he relied on former law clerks and law school faculty to submit names to his clerkship committee comprised of one or more former Douglas law clerks. Peppers points out that it is unclear if Douglas gave the selection committee appropriate selection criteria, but it is certain that his clerks came "almost exclusively" from law schools within the Ninth Circuit. Douglas also expected his staff to work hard. According to Peppers,

William O. Douglas adopted a clerkship model that was quickly becoming the institutional norm in the 1930s and 1940s. During his entire time on the bench, law clerks never assisted in the drafting of important majority opinions, although they might be given a single, inconsequential opinion to draft. The clerks, however, were given the responsibility for reviewing and summarizing all cert. petitions—although, unlike clerks in other chambers, the Douglas clerks did not discuss the memoranda with their boss.

Justice Black followed suit. He was not very concerned with the political ideology of his hires and for years, Black hired only one law clerk, although he could have hired two. In later years, he hired two clerks, perhaps (Peppers suggests) due to the increased caseload, although Black also stated that a Supreme Court clerkship would be a tremendous opportunity for a recent law school graduate. Peppers explains that,

[Throughout Black's career on the Court, he remained constant in his clerkship model: law clerks prepared short, precise cert.

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41 Id. at 233 (quoting an unattributed source).
42 PEPPERS, supra note 1, at 112-13.
43 Id. at 114.
44 Id. at 120.
memoranda and assisted in the drafting, revising, and editing of opinions. Black had specific rules regarding the cert. memo-
randa. They were one page in length and typed on a six-by-
eight-inch piece of paper. The memoranda contained a sum-
mary of the appellate court’s decision, the case facts, and a re-
commended disposition. Black would take the certiorari memo-
randa to conference and make notes on the back of the memo-
randa regarding the justices’ comments and votes. Because of
the tight space limitations on the cert. memorandum, law clerks
became “masters of abbreviation.”

Finally, it was the Warren Court that changed the institutional rules for
law clerks. From the 1950s through the 1960s the law clerk transformed into a
full-fledged attorney or law firm associate involved in all aspects of chamber
work, and was someone who mastered “complex areas of law” and someone
relied upon to write “complex legal documents.” Following Chief Justice
Warren’s lead, all Justices at this time adopted the new “law clerk as associate
model.” As with the other Justices, Justice Warren’s hiring practices varied and
evolved. Warren initially relied on trusted law school professors’ recommenda-
tions, and then he looked to his law clerks for recommendations. But in Chief
Justice Warren’s early years on the Court, he did not consider female appli-
cants, whereas Justice Marshall did hire female law clerks. Justice Mar-
shall’s law clerks made up his selection committee, and they screened appli-
cations, interviewed candidates, and often made final selections. First and for-
cest, Marshall’s committee “sought out clerks who would be loyal and person-
ally compatible with the justice.” Peppers also notes that almost all of Justice
Marshall’s clerks declined to offer information about their work in chambers.
But of the details given, Justice Marshall’s law clerks seem to have shoulder
much of the workload in chambers.

V. LAW CLERK INFLUENCE

In the last chapter, Peppers presents the main thrust of Marble Palace,
by focusing on the central debate over how much influence a law clerk has over
his or her Justice, and in turn, by discussing how law clerks affect the decision-

45 Id.
46 Id. at 145.
47 Id. at 145-47.
48 Id. at 21.
49 Id.
50 Id. at 172-174.
51 Id. at 206.
trigue that Supreme Court watchers have had about these law clerks, which has stemmed from the issue of whether these clerks wield an inappropriate amount of influence over these Justices. He reminds the reader that Americans "love a good conspiracy theory, and the idea that unelected, unaccountable young law school graduates are the puppet masters of infirm and elderly justices is too irresistible to ignore."\(^{52}\) In spending the majority of the book explaining the relationship that the Justices have with their law clerks, Peppers uses the principal-agent theory, borrowed from agency law, to suggest that law clerks serve instrumental roles for their respective Justices, but also that the Justices themselves still make the final determinations in deciding case outcomes. He explains that law clerks work under the authority of a Justice and must conduct themselves according to the "written and unwritten rules" of the Supreme Court. Based on his research, Peppers observes that they are not autonomous actors.\(^{53}\)

As Peppers notes throughout the book, during the term of the clerkship, Justices and their clerks, as mentors and mentees, develop personal bonds and professional relationships that last a lifetime. Justice Frankfurter, like some of the other Justices, developed very strong personal bonds with his clerks. He was known to have long, drawn out conversations with his clerks, who drove the Justice to and from his residence to the Court.\(^{54}\) The clerks worked five-day weeks but "would receive weekend calls or visits from the justice."\(^{55}\)

Even though some Justices have vested their law clerks with substantial authority to decide how to reach the preferred outcome, Peppers insists that there is "no evidence that any justices have abdicated their authority to make" the final decision.\(^{56}\) Such a finding rebuts claims made by Edward Lazarus in his book, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, \(^{57}\) that clerks can exercise improper and undue influence over their Justices, and shape the outcome of Court decisions. On this issue, Peppers earlier in the book refers to a former Brennan law clerk who was asked "whether Brennan's law clerks wielded any influence over the justice's decision making,"\(^{58}\) to which the former clerk replied that "law clerks did have some influence" with their Justice, but that it was "an influence that involved exposing the justice to salient facts in the record rather than an influence that changed the justice's mind once all the facts were before him."\(^{59}\)

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\(^{52}\) *Id.* at 206.
\(^{53}\) *Id.* at 10-11.
\(^{54}\) *Id.* at 104-05.
\(^{55}\) *Id.* at 108.
\(^{56}\) *Id.* at 209.
\(^{58}\) Peppers, *supra* note 1, at 158.
\(^{59}\) *Id.*
Even so, sometimes Justices try to influence the clerks of other Justices, a fact that Peppers does not mention. For example, Daniel A. Rezneck, senior counsel at the Office of the Attorney General of the District of Columbia, and former law clerk to Justice William J. Brennan, Jr. recalls that while he was a clerk, Justice Frankfurter came into Justice Brennan’s chambers to greet him and another law clerk. According to Rezneck, “[t]he real purpose of the visit, I believe, was to try to ingratiate himself with us and thereby have some influence over Brennan, which he had not been able to have through the direct persuasion of Brennan.” In the end, readers may find that Peppers’s conclusion would be more convincing had he offered more information from outside secondary sources that support his determinations. But this omission is understandable and Peppers may be forgiven because of the governing confidentiality rules.

VI. CONCLUSION

As a final assessment, it was surprising to find that the book lacks a section that addresses the law clerk culture at the Court. In particular, Peppers should have spoken about the relationships that clerks form with clerks from different chambers. As a former federal law clerk myself, I had specific questions: I wanted to know about how the law clerk culture compares between the past and present. Are law clerks cordial to one another, or do clerks from one chamber consider themselves more elite than others? I was also curious about the recruiting process of law clerks who move on to law firms after the end of their clerkships. In particular, it would have been illuminating to learn about how former Supreme Court law clerks are treated in law firms, compared to other associates who did not clerk at the nation’s highest court. Do most of the former clerks become part of the Supreme Court practice group, or otherwise become litigators? Despite these minor contentions, on the whole, Marble Palace succeeds in unraveling some of the mystery about the Court and its clerks, and it is recommended reading for anyone interested in the important role that law clerks play at One First Street.

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60 See Legends in the Law, WASH. LAW., Jan. 2007, at 29.
61 Id.