

Keynote Address: Secret Agents: Using Law Clerks Effectively

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KEYNOTE ADDRESS

SECRET AGENTS: USING LAW CLERKS EFFECTIVELY*

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Recent scholarship discusses the role of law clerks and their role in influencing the courts on which they work. This Keynote Address discusses the nuts and bolts of law clerks, including how they are selected, what role they play on various courts, and their potential opportunities for influence.

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I. INTRODUCTION

So what I really wanted to talk about—and I thought deeply about what I wanted to say—the purpose of my discussion is to provoke further research, to provoke questions. I’m going to talk about some normative conclusions that you can draw, but my primary focus is in being descriptive. I thought that maybe one of the reasons why Professor Oldfather picked me to address this group was because of my varied experience.

* This is a lightly edited version of the Keynote Address delivered on April 11, 2014, at Marquette University Law School’s conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*. The footnotes were added to support the assertions made throughout the address.

I've clerked on the Ninth Circuit; I've clerked on the Fourth Circuit; and I've clerked on the U.S. Supreme Court. And now, as Professor Oldfather mentioned, I'm the employer of law clerks. I've had varied experiences. I can't tell you anything about what trial courts do, other than in my capacity as an appellate judge. But I can tell you a whole lot about different approaches to dealing with law clerks in the appellate-court setting.

So I'm going to march through various courts and talk about the experiences I've had and how they have differed. Now, I do want to use one disclaimer ahead of time. Everything that I'm going to talk about—with the exception of the description about my chambers, which I can make the decision to talk about—all of the information is publicly available. Now, I'm going to give my own take on that publicly available information. But I'm not talking about anything—and I'm trying to be very careful not to talk about anything—that will breach clerk confidentiality. All of this is publicly available, and you should feel free to talk to me if you want any of the information or documents to which I refer here.

II. UNITED STATES SUPREME COURT

We're going to start at the top of the pyramid in part because there's just more information out there about the U.S. Supreme Court than any other court. There's just more scholarship; there's more information. You have the Blackmun Papers, the Marshall Papers—there are a variety of different sources.

We'll start with the Supreme Court. Each Justice hires four law clerks. Technically, the Chief Justice can hire five.¹ But in recent memory, the Chief Justice has not hired five; the Chief Justice has just hired four.² Prior to 1970, the Supreme Court Justices had two law clerks, and the allotment changed to three in 1970 and then to four in

1. Todd C. Peppers & Artemus Ward, *Introduction* to IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 1, 5 (Todd C. Peppers & Artemus Ward eds., 2012).

2. See, e.g., David Lat, *Supreme Court Clerk Hiring Watch: Are Any Spots Left for October Term 2014?*, ABOVE THE LAW (May 7, 2014, 5:33 PM), <http://abovethelaw.com/2014/05/supreme-court-clerk-hiring-watch-are-any-spots-left-for-october-term-2014>, archived at <http://perma.cc/M3VR-F5NY>.

1974.³ So, there was a rapid expansion of the number of law clerks at the Court over those four years.

Applying for a clerkship. There are literally file cabinets full of applications for clerkships in each chambers. We reviewed some of them when I was clerking. I'm estimating, but there had to be six, seven, eight hundred applications. I don't know if they were all from one year, but there are a lot of applications and most of the applications were serious applications—candidates who had done a federal circuit court clerkship, finished at the top of their class, were on the law review. So, there are a lot of applications.

Where do the law clerks come from? This has changed. In the 1970s, 1980s, and even into the 1990s, the Justices would occasionally take a law clerk from a state supreme court justice, or even from a federal district court judge. That is no longer the case. Usually, a candidate will have clerked for a federal circuit court. And so, the hiring practices have changed. But there are two aspects of law-clerk hiring that I think are particularly interesting. One is the dominance of the elite schools—and you will be blown away by the table that I'm going to display shortly—and the other is the importance of feeder judges. With respect to the dominance of elite law schools, the numbers in Table 1 are from October Term 2003 to October Term 2013, and these are Brian Leiter's statistics from his website.⁴ One hundred and one law clerks came from Harvard, 89 from Yale; the next highest is Stanford, going all the way down to Boalt and Northwestern at 9 apiece. And then there were a number of very good law schools that had 0 or 1.⁵

These law schools—the elite law schools—dominate law clerk hiring. It's something that you might expect, but these numbers were a surprise to me. I did not think that the elite four, five, or six law schools were this dominant in Supreme Court hiring until I put together this table. It really is striking.

3. See John Bilyeu 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, 1291 & n.24 (1979).

4. Brian R. Leiter, *Supreme Court Clerkship Placement, 2003 Through 2013 Terms*, BRIAN LEITER'S L. SCH. RANKINGS (Sept. 10, 2013), http://www.leiterrankings.com/new/2013_SCCLerkshipPlacement.shtml, archived at <http://perma.cc/LBA6-FWNY>.

5. *Id.*

Table 1
U.S. Supreme Court Law Clerk Hiring by School,
October Term 2003 to October Term 2013

Law School	Number of Clerks	Rate (% of grads)
Harvard	101	1.7%
Yale	89	4.5%
Stanford	33	1.9%
University of Chicago	25	1.3%
University of Virginia	25	0.7%
Columbia	16	0.4%
NYU	14	0.4%
Michigan	11	0.3%
Georgetown	10	0.1%
Northwestern	9	0.3%
Boalt	9	0.3%

Table 2
Top Feeder Judges to the U.S. Supreme Court from 1962 to 2002

Judge	Period	Number of Clerks	Per Term Average
J. Skelly Wright	1962–1988	31	1.15
J. Michael Luttig	1991–2002	30	2.73
Laurence Silberman	1985–2002	30	1.76
Harry T. Edwards	1980–2002	28	1.27
Alex Kozinski	1985–2002	28	1.59
James L. Oakes	1971–2002	26	0.84
Abner J. Mikva	1979–1994	26	1.50
Stephen F. Williams	1986–2002	21	1.31
J. Harvie Wilkinson	1984–2002	21	1.11
Patricia Wald	1979–1999	19	0.90
Guido Calabresi	1994–2002	17	2.13

Feeder judges—this comes from the Ward and Weiden book, *Sorcerer's Apprentices*, in which they looked at feeder judges from 1962 to 2002.⁶ The dominance of feeder judges has only increased over time. These numbers are also striking. J. Skelly Wright, over twenty-six years, placed 31 clerks,⁷ but that is nothing compared to how well feeder judges have done over the past twenty or so years. Really, feeder judges have become more, not less, important to Supreme Court clerk hiring. But then, maybe in an improper delegation to my law clerk, my law clerk looked at these tables and said to me, “You know what? These numbers on the previous table are really old. They’re like 15 years old—almost 15 years old. So, why don’t you come up with some new numbers?” And so, he went to *Above The Law*, which tracks some of these things, and without any approval from me went ahead and put together this table.⁸ [laughter] You can see how things happen in my chambers. But I was happy to have the help, because this is a terrific table.

6. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 84 tbl.2.10 (2006).

7. *Id.*

8. See *List of Law Clerks of the Supreme Court of the United States*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States (last modified Oct. 24, 2014, 4:31 PM), archived at <http://perma.cc/8GY9-HRHX>; David Lat, *Supreme Court Clerk Hiring Watch: The Updated Official List for October Term 2013, and a Request for Tips*, ABOVE THE LAW (Nov. 5, 2013, 6:07 PM), <http://abovethelaw.com/2013/11/supreme-court-clerk-hiring-watch-the-updated-official-list-for-october-term-2013-and-a-request-for-tips/>, archived at <http://perma.cc/VP53-3GAG>; David Lat, *Supreme Court Clerk Hiring Watch: The Justices Are Done for October Term 2012*, ABOVE THE LAW (June 14, 2012, 3:35 PM), <http://abovethelaw.com/2012/06/supreme-court-clerk-hiring-watch-the-justices-are-done-for-october-term-2012/>, archived at <http://perma.cc/CS8E-WX5L>; David Lat, *Supreme Court Clerk Hiring Watch: The Official List for October Term 2011*, ABOVE THE LAW (July 13, 2011, 12:27 PM), <http://abovethelaw.com/2011/07/supreme-court-clerk-hiring-watch-the-official-list-for-october-term-2011/>, archived at <http://perma.cc/TJ6N-KQSD>; David Lat, *Supreme Court Clerk Hiring Watch: The Official List for October Term 2010*, ABOVE THE LAW (July 16, 2010, 6:30 PM), <http://abovethelaw.com/2010/07/supreme-court-clerk-hiring-watch-the-official-list-for-october-term-2010/>, archived at <http://perma.cc/7PUL-LNYX>; David Lat, *Supreme Court Clerk Hiring Watch: The Official List*, ABOVE THE LAW (Aug. 21, 2009, 12:03 PM), <http://abovethelaw.com/2009/08/supreme-court-clerk-hiring-watch-the-official-list/>, archived at <http://perma.cc/5FTQ-X5PY>.

Table 3
Top Feeder Judges to the U.S. Supreme Court,
October Term 2009 to October Term 2013

Judge	Number of Clerks	Per Term Average
Brett M. Kavanaugh*	16	3.2
J. Harvie Wilkinson, III*	16	3.2
Merrick B. Garland*	16	3.2
Jeffrey Sutton	10	2
Alex Kozinski*	9	1.8
Robert A. Katzmann*	9	1.8
David S. Tatel	8	1.6
Diarmuid O'Scannlain	7	1.4
Thomas B. Griffith	7	1.4
Douglas H. Ginsburg	6	1.2
Neil Gorsuch	6	1.2
Stephen Reinhardt*	6	1.2
William A. Fletcher*	6	1.2

Brett Kavanaugh, J. Harvie Wilkinson, and Merrick Garland are absolutely dominant in sending their clerks to U.S. Supreme Court Justices. And when you look at the per-term average, that's unbelievable. A lot of these judges hire four law clerks, and more often than not, at least three of their law clerks go to the Supreme Court—out of the four that they hire. And sometimes all four do. In one recent term, Tom Griffith had five clerks, including one from a previous year, who clerked at the Supreme Court during a particular term.⁹ So these are really, really—compared to the numbers in Table 1—these are striking. And these numbers are from a five-year period. Remember, J. Skelly Wright's numbers were compiled over twenty-six years; this is happening over a five-year period, and these numbers are almost half as high as the numbers that we saw in the previous table.

All right, so what do the clerks do? Let's start with petitions for certiorari. Table 4 shows the numbers for the last five or so years from the Harvard Law Review.¹⁰

There is a cert pool. A lot of you are familiar with it. With the exception of Justice Alito now, it used to be Justice Stevens, everybody participates in the cert pool, and the clerks write memos to the entire Court—with the exception of Justice Alito—discussing whether a case is cert-worthy.¹¹ When the cert pool was first instituted, and I think this is an interesting fact, four Justices didn't participate: Justices Douglas, Brennan, Stewart, and Marshall.¹² That is no longer the case, obviously.

9. See David Lat, *Supreme Court Clerk Hiring Watch: Color Commentary on the October Term 2012 Class*, ABOVE THE LAW (June 15, 2012, 5:17 PM), <http://abovethelaw.com/2012/06/supreme-court-clerk-hiring-watch-color-commentary-on-the-october-term-2012-class/>, archived at <http://perma.cc/Y997-6LGK>.

10. *The Supreme Court, 2012 Term—The Statistics*, 127 HARV. L. REV. 408, 416 tbl.II(A) (2013) [hereinafter *2012 Term—The Statistics*]; *The Supreme Court, 2011 Term—The Statistics*, 126 HARV. L. REV. 388, 395 tbl.II(A) (2012) [hereinafter *2011 Term—The Statistics*]; *The Supreme Court, 2010 Term—The Statistics*, 125 HARV. L. REV. 362, 369 tbl.II(A) (2011) [hereinafter *2010 Term—The Statistics*]; *The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 418 tbl.II(A) (2010) [hereinafter *2009 Term—The Statistics*]; *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 389 tbl.II(A) (2009) [hereinafter *2008 Term—The Statistics*].

11. See WARD & WEIDEN, *supra* note 6, at 126; Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert Pool.'* N.Y. TIMES, Sept. 26, 2008, at A21.

12. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 272–73 (1979).

Table 4
Petitions for Certiorari Disposed of by the U.S. Supreme Court,
October Term 2008 to October Term 2012

October Term	Petitions
2012	7,616
2011	7,643
2010	7,830
2009	8,087
2008	7,823

I don't know how the retired Justices' law clerks work in the cert pool. We didn't have any retired Justices when I clerked, so I really have no idea how that works. I assume they're part of the cert pool, and I assumed for purposes of this address that they were. But if we assume that there are thirty-five clerks in the pool, which includes the retired justices but excludes Justice Alito's clerks, the average clerk writes a pool memo in 222 cases per year — a little less than one per day. That's a lot of pool memos. It sounds like a lot more than it really is, but I'll talk about that in a second.

There are two types of petitions. The first are paid petitions. These petitions make up approximately 80% to 90% of the Court's grants.¹³ These are ones in which the parties have paid the filing fee. The other type are IFP petitions, *in forma pauperis*. These make up anywhere from 10% to 20% of the plenary docket.¹⁴ But the numbers are skewed the other way when you look at the total number of petitions filed. IFP petitions outnumber paid petitions about four to one on a yearly basis, even though the number of granted paid petitions outnumber the

13. See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 493–94 (8th ed. 2002).

14. See *id.*

number of grants on IFP petitions about four to one.¹⁵ An average law clerk writes a pool memo in approximately 177 IFP cases per year and forty-five paid petitions per year—about one per week for the paid petitions.

The form of pool memos. Again, I'm relying on publicly available information—Lee Epstein has a wonderful database with which many of you are familiar.¹⁶ She examined several years of Justice Blackmun's papers, and scanned or photographed the pool memos. The pool memos basically have the following five sections: summary, facts and decisions below, contentions, discussion, and recommendation.¹⁷ Those headings are consistent across the pool memos from different chambers. The pool memos are anywhere from two to twelve pages in length, with the average length being about five or six pages.

What do law clerks look for? A lot of you are familiar with this—I'm not going to repeat it. This is from Stern and Gressman, the *Supreme Court Practice* book.¹⁸ Basically, is there a circuit split? Is the case fact-bound? Is there a vehicle problem? Does the opinion below conflict with a prior ruling of the Court? One thing that scholars talk about that a lot of people aren't aware of, because it's not listed in Supreme Court Rule 10, is whether there is good lawyering so that the Court can get quality briefs and argument in the case. That's something that various sources identify as an important criterion that the Court considers at the cert stage.¹⁹

15. See, e.g., JOHN G. ROBERTS, JR., 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 12 (2013) (noting that there were 6,005 IFP filings and 1,504 paid filings during the 2012 Term), <http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf>, archived at <http://perma.cc/U9GD-N29C>; see also ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 2013, at tbl.A-1 (2013) [hereinafter JUDICIAL BUSINESS], <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/A01Sep13.pdf>, archived at <http://perma.cc/42PA-GF34>; STERN ET AL., *supra* note 13, at 493 n.4.

16. See LEE EPSTEIN, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE DIGITAL ARCHIVE OF THE PAPERS OF JUSTICE HARRY A. BLACKMUN (2007), <http://epstein.wustl.edu/blackmun.php?p=3>, archived at <http://perma.cc/XTP3-KX5K>.

17. See, e.g., Preliminary Memorandum for Cullen v. Trainor (No. 93-10) (Sept. 27, 1993), in EPSTEIN, ET AL., *supra* note 16, available at <http://epstein.wustl.edu/research/blackmunMemos/1993/Denied-pdf/93-10.pdf>, archived at <http://perma.cc/X99-BZRA>.

18. STERN, ET AL., *supra* note 13, at 219–285.

19. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008); Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, J. KAN. B. ASS'N, Apr. 1995, at 25; Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, LITIGATION, Spring 1998, at 25.

The plenary docket—I’ve written about this before—the plenary docket is the lowest it’s been in a long time, and it’s been that way for about the past fifteen years. One year recently—I don’t remember which year it was—the Court heard the lowest number of plenary cases since the Civil War.²⁰ The Court is not hearing nearly as many cases as it used to hear. It’s rising a little bit. I think the low is right around sixty-eight or sixty-nine cases a few years ago. It’s now up to between seventy-five and eighty-seven cases, which is a little higher than it’s been in the recent past.

The clerk workload. It’s no surprise; I’m not letting the cat out of the bag by saying that many, many judges and justices use their clerks for bench memos. It’s been alluded to today on other panels. I was able to obtain Justice Powell’s briefing notes from a colleague, and his briefing notes set forth the specific requirements for bench memos.²¹ And they’re fascinating, and I’m happy to share them with any of you.

The average clerk, setting aside those working for the retired Justices, will write about twenty bench memoranda during his or her clerkship. Average length, from what I can tell from the files, is about fifteen to twenty pages.

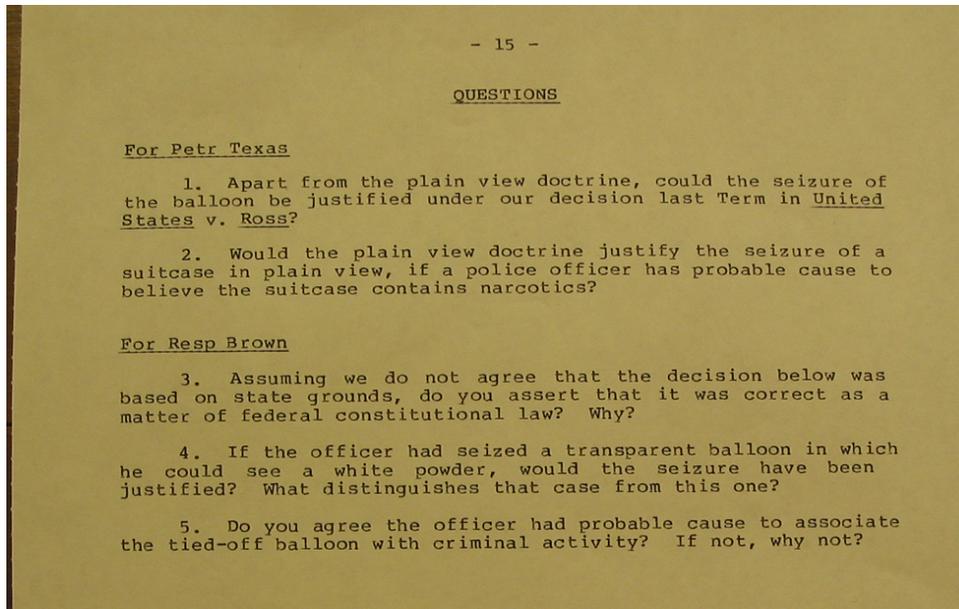
Now we’re going to start talking about specific Justices, including the role of Justice Blackmun’s clerks. Justice Blackmun, as you know, has the biggest set of publicly available files. I think there’s something in the neighborhood of 1,600 boxes at the Library of Congress; they can be difficult to search, given that Justice Blackmun literally kept everything—little notes about stuff that had nothing to do with the Court, correspondence from people that had nothing to do with the Court—but they provide useful information as well. The bench memos from Justice Blackmun’s clerks were approximately fifteen pages in the orally argued cases on average, but, at that time, the Court was hearing anywhere from 120 to 150 cases a year. Now, interestingly enough, Justice Blackmun—and this is going to be the basis of an article that Tim Johnson, Ryan Black, and I are writing, probably for the

20. See David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 152 (2010).

21. Memorandum from Justice Lewis F. Powell, Jr. to Law Clerks (Sept. 11, 1984) (on file with author) (instructing clerks on writing style); Memorandum from Justice Lewis F. Powell, Jr. to Law Clerks 7–8 (Sept. 10, 1984) (on file with author) (describing expectations for bench memos); see also TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 188 (2006) (“Preexisting rules regarding the style of opinion writing were crafted by Powell to guide his clerks.”).

symposium²²—actually had his clerks prepare questions, written questions for him to ask during oral argument. It's a little-known fact. And they looked something like Figure 1.

Figure 1
Sample Bench Memo from Blackmun Papers



The questions are from the last page of a bench memo drafted for Justice Blackmun by his clerks. Basically—I don't do this, and I don't know a lot of judges who do this—but Blackmun basically had his law clerks who were most familiar with the record and the issues in the case draft questions for him before oral argument. One question we hope to answer is whether he actually used some version of these questions during the oral argument? So we will go back and look at the oral argument transcripts and figure out, did he actually use these questions? Very interesting question. I don't have any data on that yet.

The opinion. Justice Powell as a case study. He says this is the most important part of a Justice's work. And it is because it is the work

22. Timothy R. Johnson, David R. Stras & Ryan C. Black, *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 MARQ. L. REV. 21 (2014).

product that is publicly available. The public doesn't see the bench memos that your law clerks produce. They don't see the pool memos until fifteen or twenty years later at the earliest. And so the opinion is the most important product.

In Justice Powell's chambers, the "responsible clerk" originated the first draft of an opinion. The draft was then discussed with Justice Powell individually and with another clerk who served as an editor. The editor's job was to edit, particularly the first draft, but also to review Justice Powell's changes to the opinion. All of the clerks then, at some point, read the draft before it was circulated among the chambers. Justice Powell employed a formal process in the drafting of his opinions.

I am relying on a publicly available source to support my next comment. *Sorcerer's Apprentices* talks about the fact that, during the Rehnquist Court, only Justices Stevens, Scalia, and Souter regularly drafted their own opinions.²³ For those Justices who don't draft their own opinions, and this has changed since the Court has been hearing eighty cases versus 150 cases per year, the average law clerk will have primary responsibility for drafting two opinions—two majority opinions—per term, and of course that figure is half as much as it was twenty to twenty-five years ago.

Concurrences and dissents. One of the things that I'd like to study at some point, if I can somehow fit it in around my day job, is the total number of concurrences and dissents. I think they're rising. That's my sense; it's anecdotal just from reading the Court's opinions. We're seeing a lot more fragmented opinions.

23. WARD & WEIDEN, *supra* note 6, at 222–23.

Table 5
Separate Opinions of the U.S. Supreme Court,
October Term 2008 to October Term 2012

October Term	Number of Concurrences	Number of Dissents	Number of Opinions of the Court	Total Opinions
2012	40	52	78	170
2011	34	51	75	160
2010	50	50	82	182
2009	73	56	87	216
2008	43	77	78	198

This table shows the number of concurrences and dissents over the past few years, but I think it's notable that, when the Court is hearing seventy-five or seventy-eight cases, in 2009, you have 216 total opinions.²⁴ That's almost three per case. That's really notable—that's a lot of separate opinions, and of course there are some 9–0 cases too, so that means some of the cases have four or five separate opinions, which I find to be a really striking statistic.

The average number of separate opinions per term: 105.2. Each law clerk will draft approximately three separate opinions per term, resulting in a total number of drafted opinions, on average, of five per term for each clerk. The figure of course varies by Justice. My old boss, Justice Thomas, his numbers are higher. He just writes more separate opinions. The separate opinions can range from a full-blown opinion that is of similar length to the majority opinion to just a sentence or a paragraph. Recent statistics—the *Harvard Law Review* puts this

24. 2012 Term—*The Statistics*, *supra* note 10, at 408 tbl.I(A); 2011 Term—*The Statistics*, *supra* note 10, at 388 tbl.I(A); 2010 Term—*The Statistics*, *supra* note 10, at 362 tbl.I(A); 2009 Term—*The Statistics*, *supra* note 10, at 411 tbl.I(A); 2008 Term—*The Statistics*, *supra* note 10, at 382 tbl.I(A).

together — the journal calculates the average length of opinions by each Justice. So for Chief Justice Roberts, I think it was something like fourteen or fifteen pages per majority opinion.²⁵ The average concurrence looks to be about four pages long, and I did a rough average based on the last five years. The average dissent is about twelve pages long.

When I clerked, I never thought about my workload. I just knew that it was a lot of work. This is the first time I've ever done this. And it's just because I found it really interesting based on the statistics I had compiled. So the page production per law clerk per year: 888 pages of pool memoranda. That's a lot. Three hundred pages of bench memoranda. Thirty pages of first-draft majority opinions, assuming that the clerks do the first drafts of majority opinions. And twenty-four pages of first-draft separate opinions.

What it shows is that the clerks are spending a lot more time on the front end of the process on writing. They're spending a lot of time doing pool memos; it's a big part of the job. They're spending a lot of time doing bench memos. And they're spending less time working on opinions in terms of the total allocation of pages that are being produced by a clerk each year. I just find that interesting. These numbers are in tension with some of the general themes this morning about improper delegation because, if what we're really worried about is clerks writing opinions and throwing stuff in there that their judge may not notice or may not change, it's hard to say that's happening when the clerks are doing so little of the opinion drafting as a percentage of their total workload. And one would hope that the Justices are spending a lot of time looking over those first-draft opinions, given the smaller caseload that the Court has now. I don't know that to be the case, but I would hope that it would be the case.

III. MINNESOTA SUPREME COURT

My court. We don't have enough clerks. We have — the Minnesota Supreme Court — has ten total law clerks. Two go to the chief justice, I get my own, and then I share a clerk. I have one and a third law clerks. We don't cut a clerk into thirds. That obviously would not work. But I do share a clerk with two other justices. Now, our hiring procedure is really strange. I've never experienced anything like it. Our candidate

25. See 2012 Term—*The Statistics*, *supra* note 10, at 415 tbl.I(F) (reporting Chief Justice Roberts's average opinion length as 14.6 pages).

selection involves about 225 or 250 applications, something like that. Then we meet as a group one day in August and we vote for which candidates we're going to interview as a group. Usually it takes three votes to get an interview, and each member of the court may vote for up to twenty-five candidates. We then invite those selected few to an interview with the entire court. I think it's quite unpleasant. It might be even cruel and unusual punishment, but the candidates are required to meet with the court as a whole. We don't wear our robes, so that's a good thing. The candidates come in, we sit down, and we ask them questions. It's really kind of chaotic because one justice might just dominate the conversation, and so I put less weight on these group interviews. I do my own interviews afterwards; I call references.²⁶ I bring people back because, frankly, it's much easier to get to know a candidate in an individual conversation, and I get a much better feeling for the candidate. When they're one-on-one with you, you can really ask the questions you're interested in and get more honest answers without the candidates being intimidated by the fact that they're sitting with seven Minnesota Supreme Court justices.

Making offers is similarly formal. We do a draft. Our draft is, essentially, the chief justice selects first, and then we go in order of seniority, and you can't deviate from the order of selection. So even if I wanted to hire outside of the process, I could, but I have to wait until the next most senior justice above me has selected. The formality of our process is creating a real issue given the breakdown of the federal hiring plan, because potentially there are candidates who are going to be off the market by the time we interview in August or September. The shared clerks are picked last.

Law school-wise, it's what you might expect. The University of Minnesota has the largest percentage of law clerk hires on our court, nearly 50%. William Mitchell and St. Thomas, both regional, do very well. Our hires from Columbia and Stanford are due in part to me because I've hired one person from Columbia and one person from Stanford. And then we have other schools that are scattered in there as well at one each. It's just interesting to see how much different these numbers are from the U.S. Supreme Court — they're very different.

26. See Panel Discussion, *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 447 (2014).

Table 6
Minnesota Supreme Court Law Clerk Hiring by School, 2010 to 2015

Law School	Number of Clerks	Percent of Total
University of Minnesota	22	44%
William Mitchell	9	18%
St. Thomas (MN)	5	10%
Northwestern	3	6%
Columbia	2	4%
Stanford	2	4%
7 Other Schools	1 (each)	14%

In terms of our docket, this is the legislature's doing, but we have mandatory appellate jurisdiction over three types of cases. We hear worker's comp cases, which was a compromise reached by the legislature when it created the intermediate appellate court, the court of appeals.²⁷ Tax cases and appeals from first-degree murder convictions are the other categories.²⁸ With respect to our original jurisdiction, we hear judicial-discipline, attorney-discipline, and certain election cases.²⁹ They come directly to us, and we usually appoint some sort of fact finder, like a referee, to hear those cases.

The most common type of case we hear comes from petitions for review, roughly equivalent to the petition for certiorari at the U.S. Supreme Court. A party can file a petition for review, and we have the authority to grant review, deny review, or dismiss the petition for review. We get about 750 of these per year, and we grant approximately

27. MINN. STAT. ANN. § 176.481 (West 2006).

28. MINN. STAT. ANN. § 271.10 (West 2007); MINN. STAT. ANN. § 632.14 (West 2009).

29. MINN. STAT. ANN. § 204B.44(d) (West 2009); MINN. STAT. ANN. § 481.15 subd.1 (West 2014); R. MINN. BD. JUD. STDS. 13 (West 2006).

75. Unlike the Supreme Court, in which your chance of getting a cert petition granted across the entire docket is less than 1% — in fact, it's more like 0.8% — the chances for getting a petition for review granted in our court is about 10%. So it's higher, as it should be.

Mandatory cases. The number of mandatory cases on our docket last year was 107, 135 the year before, 122 the year before that. These statistics are somewhat misleading because we summarily affirm in many of these cases. So of those 107, maybe we heard 35 or 40 of them on the merits. A lot of the others we summarily affirmed. Petitions for review range from 671–778.

Now, for the first time, I can introduce the concept of staff attorneys, and I'll talk about them in the context of the Fourth and Ninth Circuits as well. We have six staff attorneys who are part of our so-called Commissioner's Office. The staff attorneys preliminarily review the petitions for review, similar to the function of the cert pool, and assist the court with merits cases and motions in pending cases, among other duties. They're experienced attorneys; they usually have a subject-matter specialty. We used to have a staff attorney who dealt with worker's compensation cases and had actually litigated those types of cases at one time. We had a staff attorney who was once a tax partner at a law firm, who helped us with our tax cases. Less true now—I think more than ever, we're trying to just hire the best person for the job and then let them gain expertise through dealing with the cases, so we have less subject-matter expertise in our Commissioner's office now than we did before. The idea is that you get experienced attorneys so mistakes that might be made by justices who are unfamiliar with particular areas of the law, or by law clerks who are generally unfamiliar with almost every area of the law when they begin, don't get made. There's somebody experienced at the court to provide guidance; that's sort of the idea. You don't have that at the U.S. Supreme Court, which I think is interesting. I think that perhaps you can make an argument that the U.S. Supreme Court could benefit from subject-matter experts in certain categories of cases. Not to have primary responsibility for those cases, but to be people—maybe a staff of three or four outside of the Justices' chambers—that can serve as guides for the clerks and the Justices. I do think that there's an argument to be made, whether you buy it or not, that it would be beneficial to the Court.

The staff attorneys also help with rules changes. One of the things that shocked me when I was first appointed is that my job is not just about the cases. I never saw, when I clerked for the U.S. Supreme

Court—I never saw any of the Justices’ rule-making duties. I thought it was just about deciding the cases. It turns out that about 25% to 30% of my job is dealing with rules amendments and other administrative duties. Sometimes I serve on committees and evaluate rules with which I am not all that familiar—or in which I do not have much subject-matter expertise. Like right now, I’m the liaison to the rules of juvenile protection. Those rules do not touch on an area in which I’ve practiced or taught. And so we have subject matter experts who can help me in the Commissioner’s Office with that committee.

Opinion work. You can ask staff attorneys to draft opinions, but I’ll talk in a moment why I tend not to do that. I tend to use law clerks.

Bench memos. We are kind of like the Ninth Circuit. You heard it mentioned this morning—pooled bench memos. In our court, the cases are randomly assigned before the cases are orally argued. And if it is your chambers that is selected to prepare a particular case, your clerk has the responsibility of drafting the bench memo for the entire court. And each chambers receives one or two cases per month. Most months, the clerks will write only one bench memo, but sometimes they’ll write two. The bench memos may not exceed twenty-five pages. And that’s really a soft limit. I wish it was a hard limit, but it is a soft limit, in the sense that the responsible justice can give the clerk permission to exceed twenty-five pages, and some members of the court are a little more willing to give permission than others.

Opinion drafting. If you are assigned the bench memo and you’re in the majority, you’re the presumptive author, and you will write the majority opinion for the court, similar to the Ninth Circuit. My approach is generally to have the law clerk attempt the first draft. To me, the reason is obvious. I don’t have the time to look through boxes of documents and get really, really familiar with the record in all cases. I do in some cases; in the particularly important or hard cases, I’ll sit there with boxes of documents and look through them and try to figure out what the record says. But the clerks do have the time, and they’re expected to do that, and I ask them to do that, and I want them to be able, when I ask a question, “What does the record say about *X*?” I want them to be able to say to me, “The record says ‘*Y*,’” and therefore we can put that in the opinion, if it’s important. For me to do all of my first drafts, I don’t think that’s an efficient use of resources. I rely on the clerks for the facts and for the procedural history, and of course I’ll edit their drafts heavily. But at the same time, I think my work product ends up being better by virtue of the fact that the clerks are taking the first

stab at writing the parts of the opinion with which they are most familiar. And, of course, my edits are going to be heavier on the legal analysis than they will be on the facts. That's just the nature of what I use their expertise for—learning the facts. It's also just helpful to see what another smart person thinks about the case. I mean, really, more cooks in the kitchen can produce a better product when it comes to opinions, as long as somebody is the chef in charge. If you have mass chaos and nobody's in charge, then it wouldn't work so well.

After the first draft is done, what happens? I begin editing. For an average fifteen-page opinion, it takes me three days. Not always. Sometimes less, sometimes more, depending on the difficulty of the case. Once I do the rewrite—and usually about 50% of the draft has some sort of clerk influence—I'll send it back to the clerk. And in fact, my editing is so heavy that my first couple of years on the court, one of my clerks said to me, “You know, at some point during the year, can some of my words appear in the North Western Second reporter?” And I said, “Look, they're not your words, they're my words. So that's just the way it works.” But what I will do is I will then rewrite the fifteen-, twenty-, fifty-page draft, however long it is; I'll send it back to the clerks, and they have to edit my work. So we've set up a system, and not every judge does this, in which the clerks should feel free to tell me I'm flat wrong and that I need to change something or that a certain part of the opinion is ambiguous and it could lead to problems in the future. And sometimes we'll go through three or four rounds of that. Some judges think that their clerks should not be able to edit their work. I just disagree. You should use every resource at your disposal to make the opinion better, and if you find that the clerks are providing useful advice and editing, you should use them, and they do provide both. So, for a fifteen-page opinion, they will send me an average of fifty comments and/or edits to the opinion. I probably take 70% of them, so it does make the opinion better. The process can take a couple of days.

So, in addition to the three days I'll spend on a fifteen-page opinion, the clerks will spend approximately five to ten work days on the bench memo. One of the problems with a pooled bench memo process is it takes more clerk time. If a clerk was writing for me, I'd have a five- or ten-page bench memo, if that. In some cases, I wouldn't even ask for a bench memo at all. But, because they write twenty-five pages, and they have to reproduce all the facts and history of the case, it is a time drain for the clerks. Because they're writing for an audience that has different expectations than how I would have my law clerks write a memo for me, they spend about five to ten days on a bench memo. If I had my

druthers, it would be one to two days for each bench memo. The clerks spend five days on the first draft of the opinion, one additional day assisting me with the rewrite, and one more day reviewing the draft as an editor. On average, a clerk will write ten or eleven first-draft majority opinions during his or her clerkship, with the average opinion length being about fifteen pages in my chambers.

The process for a separate opinion is different. We don't have enough clerks. So with separate opinions in which I don't have to reproduce the facts, I often do my own drafting. Particularly the shorter ones, I will just sit down one afternoon and write it. It's just the most efficient thing to do, and it frees the clerks to do other things. For a separate opinion that I draft myself, the process is the same except the clerks don't produce a first draft. That's the only difference. But it's much more likely, because the facts aren't as heavy, that I'll do almost all of my own work with a separate opinion.

Onto the statistics.

Table 7
Separate Opinions of the Minnesota Supreme Court, 2009 to 2013

Calendar Year	Number of Concurrences	Number of Dissents	Number of Opinions of the Court	Total Opinions
2013	18	37	118	173
2012	10	45	111	166
2011	25	28	92	145
2010	24	24	115	163
2009	13	33	100	146

In 2013, we had 118 opinions of the court. We had a total of 111 in 2012. As you can see, our percentage of concurrences and dissents is much smaller than the U.S. Supreme Court. We just don't have as many. And I think that's a result of not having as many clerks, at least in part. Maybe you can argue it's collegiality. I think some of that plays into it as well. Maybe you can argue that we spend more time with each other, and we're less like individual silos than the Supreme Court Justices. I don't know if any of that's true, but I think primarily it's because we have fewer clerks. So you often have to make a tough decision. Can you live with the opinion and go along with it? Or do you want to write separately? And that's sometimes a decision you make, at least in part, based on the resources you have.

My statistics, they're a little bit skewed because of my first year on the court; I joined in the middle of the year, so I only had one majority opinion. But I had eleven the following year, and these statistics don't include—we have a lot of unsigned and per curiam opinions. They're still assigned to a single justice. Your name just doesn't appear on them, so the only types of cases that I'm including are those that went out under my name. I average about twenty to twenty-one opinions per year, of which about eleven or twelve are majorities.³⁰

The clerks play no role in screening at our court. The only time they ever play a role is if I ask them to do so. Sometimes I say, "I don't understand what the memo prepared by the staff attorneys is saying, so clerk *X*, I need your help." So that happens a few times a year when I just don't understand what's going on and I ask the clerks for a second opinion.

Plenary cases. Most of the preliminary work is done by the law clerks. For oral argument, unlike Justice Blackmun, the clerks play little or no role in my chambers. I can't remember a time when I asked the clerks for anything other than the bench memo in advance of oral argument. Maybe it's because we don't have many resources, but frankly I don't think I would ask them to help me with oral argument either way because I don't view oral argument as requiring an advance plan. I let the oral argument flow, and then I try to figure out if there are topics that arise during the oral argument that require me to ask questions. So it's more of a dynamic process for me.

30. Thank you to Professor Peter Knapp, Professor of Law at William Mitchell College of Law, for providing these statistics for me.

IV. THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

The Fourth and the Ninth Circuits. There frankly is not as much publicly available information about the courts of appeals, which makes it harder for me to say much interesting about them. Unlike the Minnesota Supreme Court and the U.S. Supreme Court, there is an appeal as of right in most cases. There are certainly exceptions, like an application for a certificate of appealability in a habeas case, in which there is not necessarily an appeal as of right, but most of the time there is an appeal as of right in other types of cases.

One of the interesting aspects of the staff-attorney position — we've talked about staff attorneys quite a bit today — the staff attorney's position was actually created in 1973.³¹ It's not that old, right? The law-clerk position was created almost 150 years ago.³² The staff-attorney position is a relatively new phenomenon. Yet most circuits, some more than others, rely on their staff attorneys to do a substantial amount of work.

There were 117 staff-attorney positions in 1980.³³ So in seven years, you went from zero to 117. That's notable. Now, there are approximately 400 staff-attorney positions. That statistic was as of about 2004. I have not — I was not able to find any new data. There was a report put out by the Administrative Office that said there were, I think at that point, about 380.³⁴ I would assume it's similar now, but I don't have new information on that. Staff attorneys in most circuits screen the appeals and put them down one of two roads. One road is full plenary consideration by a panel with oral argument. And usually the staff attorneys — though not always, it depends on the circuit — the staff-attorney involvement often ends there, once they've made that decision with those types of cases. The other road they can go down is towards a summary disposition, in which, in most circuits, the staff attorney will produce an unpublished-opinion draft of some type, present it to the panel at some sort of hearing, or in some circuits over

31. See Oakley & Thompson, *supra* note 3, at 1292 (discussing the development of a central staff at federal appellate courts).

32. See WARD & WEIDEN, *supra* note 6, at 24 (noting that Justice Horace Gray introduced the first law clerk to the Supreme Court in 1882).

33. David R. Stras & Shaun M. Pettigrew, *The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis*, 61 S.C. L. REV. 421, 443 (2010).

34. *Id.*

the telephone, and the members of the panel will either adopt or not adopt the recommendation. In routine appeals, therefore, the staff attorneys prepare the unpublished opinions for the panel.

Number of law clerks. It's interesting because my law clerk didn't believe some of the numbers, and I'll tell you what he didn't believe, but they're absolutely true. Each circuit judge is allocated five staff members, which the judge can then allocate between administrative assistants and law clerks. I'd say most circuit judges today, in my experience having talked to them, have four law clerks and one administrative assistant. Particularly as we're moving toward electronic filing and electronic documents, I think you're seeing less emphasis being placed on administrative staff. My law clerk did not know why I said that there could be three law clerks and two administrative assistants. But the reason is, when I clerked fifteen years ago, that was how most judges did it. Most judges had three law clerks and two administrative assistants. Particularly in the Ninth Circuit, where there is a higher percentage of orally argued cases³⁵, the judges need more administrative help to keep the paper organized, to deal with the e-mails, to deal with the fact that there are multiple opinions coming from multiple panels per day, and you need help in printing those off and putting them in the appropriate place for the judge and the clerks. I think we've moved the other way now, as there are generally more law clerks than administrative staff.

The function of law clerks. Again, there's no screening role because these are courts that hear appeals as of right. So it's bench memos and opinion drafting primarily. And again, the bench memos depend on the circuit, and in the Ninth Circuit, you have a pool process. In the Fourth Circuit, at least when I clerked, you did not. You wrote your bench memo for your judge.

I spent about 40% of my time on bench memos while clerking. In the Fourth Circuit, I wrote about seven bench memos per month out of the twenty or so cases that my judge would hear during the week in Richmond. The Ninth Circuit, as I said, used pooled bench memos. That didn't necessarily reduce my workload by a whole lot because, as I just mentioned, the Ninth Circuit hears oral argument in more cases than other circuits do. As a matter of fact, I ended up writing about four

35. See JUDICIAL BUSINESS, *supra* note 15, at tbl.S-1, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S01Sep13.pdf>, archived at <http://perma.cc/P9Q8-MH5A>.

pooled bench memos per month because the number of cases per week of argument on average in the Ninth Circuit was higher. It was something like thirty-five cases, and so just by virtue of the numbers, I was writing more than half as many bench memos in the Ninth Circuit as I did in the Fourth Circuit. Again, I'm not disclosing something that is confidential because the pooled-bench-memo practice has been discussed on a number of blogs and in academic articles.³⁶ Because the Ninth Circuit has a greater number of oral arguments compared to other circuits, I just have to say that the average case in the Ninth Circuit was more straightforward than the average Fourth Circuit case because some cases that would have been screened out in other circuits were placed on the oral argument calendar in the Ninth Circuit. So my cases in the Fourth Circuit ended up being harder, on average, because all the easier cases were screened out.

Opinions. Working on opinions took about 60% of my time. In the Fourth Circuit, my judge was assigned approximately seven opinions per month. Again, you could figure this out by looking and seeing when those cases were orally argued and which judge wrote the majority opinion in each case. I'm not disclosing anything confidential here. I would have primary responsibility for working on two to three opinions per month. Now remember that, unlike the Minnesota Supreme Court and the U.S. Supreme Court, some cases are unpublished even after they go to the panel for full plenary consideration. Some opinions are going to be a little easier and more straightforward than others.

In the Ninth Circuit, my judge was assigned about twelve opinions per month and each clerk would take primary responsibility for about four per month, the ones in which you wrote the bench memo for the panel. They almost always corresponded—as you heard about this morning—with the bench-memo assignments from the pool process. Some of the opinions were unpublished and others were published. Incidentally, the Ninth Circuit and the Fourth Circuit called their unpublished opinions something different. The Ninth Circuit called them memorandum dispositions, and that label actually appeared on the caption. The Fourth Circuit simply called them unpublished opinions. I don't know why that it is. I couldn't tell you. I don't know why different circuits name their opinions different things; they're all the same animal. But yet they have different names for them.

36. See, e.g., Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 SETON HALL CIRCUIT REV. 19, 52 (2008).

Separate opinions. I actually find this really fascinating and I want to know the reason why, but intermediate appellate courts tend to have fewer separate opinions. They just do and I don't know the reasons why. I've never sat on an intermediate appellate court, so I have very little insight. My judges never talked to me about writing separate opinions or why they made a decision to write in some cases and not in others. But there are just fewer separate opinions on intermediate appellate courts. Now I have several hypotheses or theories. I would guess that one reason is that the docket is much larger, and therefore, in terms of the allocation of resources, it's more difficult to write separately. There are more routine cases; maybe that's part of it. Workload considerations, intermediate appellate courts hear more cases than a court of last resort, so the docket is just bigger. Collegiality, I think Judge Posner has written about this, he talks about when you're on an intermediate appellate court, when there's the possibility of review later, maybe you just go along with a few more opinions that you otherwise might have dissented from if it were the last stop.³⁷ Part of it is maybe a concern about collegiality. I don't know if that's true or not; I just throw it out there.

What is the impact on the clerks? If you are a clerk on an intermediate appellate court, you're just going to work on fewer dissents and concurrences. I worked on very, very few while I was clerking at the Fourth and Ninth Circuits. I do think that, if this is an area that could be measured empirically, it is ripe for further research. I really do, because I want to know the reason why there are fewer dissents and concurrences on the intermediate appellate courts. Maybe there's research out there and I don't know about it, but I just think it's a really interesting question.

V. CONCLUSIONS

Normative conclusions. I'm not going to make a lot of them, because it puts me in an awkward position, so I'm going to make the ones that I can comfortably make. The advantages of pooling: one is efficiency. It's always more efficient to have one person working on a case than three or nine. It just is; I mean the fact of the matter is that there is going to be some duplication of efforts, no matter what you do. As scholars have reported, there are clerks in nine different chambers of the U.S. Supreme Court writing bench memos, each of which has its

37. RICHARD A. POSNER, *HOW JUDGES THINK* 142-43 (2008).

own facts section. It may be more efficient for everyone to pool their resources and for only one clerk to do the facts section for all the chambers. I do think pooling also creates greater unanimity. I have never seen an empirical analysis, but if members of a court start from the same place—a single bench memo—my prediction is that there's going to be more unanimity on a particular court, unless the judges on the panel or on the court regularly think outside the box.

An advantage is you now have a single expert in a pooled process. If my clerk is writing seven bench memos per month or ten bench memos per month, he or she is just going to have to allocate time to each bench memo. But if he or she is working on one bench memo per month, that clerk is now the court's expert on that particular case. The clerk should know literally everything there is to know about that case, and that can be an advantage. But pooling can also present disadvantages, as we'll talk about shortly.

Disadvantages of pooling. I really think it can create groupthink. If you're starting from the same document, there is a tendency to end up in the same place, or at least more of a tendency to end up in the same place. I think it leads to lower-quality preparation in advance of oral argument. This is particularly true of courts with a geographic dispersion, but less true if all the judges are in the same building because, for example, I can literally walk down the hall and talk to the clerk who worked on the case. But if I have to call somebody in San Francisco, for example, to talk about the case, someone I've never met and never seen, that's going to be a potential deterrent for contacting the clerk. If there is nobody in your chambers to talk to about a case, it leads to lower-quality preparation. I think the lower-quality preparation can lead to lower-quality opinions. Part of the reason is, it's what I just talked about, but also the fact of the matter is you don't have anybody independently looking at the case other than your colleagues, who you know don't have the amount of time that a clerk might have to examine the issues in the case. So, I think it could lead to a lower-quality work product.

Almost every clerk I've ever dealt with has only wanted to reach the right answer, but you hear stories, and you've seen stories. Edward Lazarus was going to come talk about some of those stories, in which clerks had a particular agenda, and I think a pool process empowers clerks who have an agenda because there's no check in the process. There's nobody to look over their shoulder and say, "Hey, this is wrong." You see a little bit of that with the cert pool, but I think the stakes are—the cert pool—the stakes are a bit lower because you're

dealing with the screening of cases. I think the stakes are higher when you're talking about deciding the merits of the cases.

So I think pooling is more appropriate for screening. I think there are problems with using a pooled process for screening, but I think it's more appropriate in screening just because the stakes are lower. Granting a case you shouldn't have or not granting a case you should have is not as big of a mistake as getting a case wrong. Getting a case wrong has a long-lasting impact on a court, particularly for a court of last resort.

But I think pooling is far less appropriate, and can even be dangerous in some situations, in a court of last resort and the court pools resources on merits cases. I think that's when pooling becomes the most dangerous. I'm not saying it's inherently bad, because some courts simply have fewer resources. The budgets are lower, there aren't as many clerks, and you have to make do with the resources you have. I just think as a normative matter, right? We're talking normative here. As a normative matter, it's better not to have pooling in those situations.

Selecting between staff attorneys and law clerks. Advantages of staff attorneys, we've heard about them today—subject-matter experience, writing experience. The disadvantages of staff attorneys. I think they sometimes lack creativity. In some cases, they've been in that position a long time. You heard the dean talk a little bit about that this morning.³⁸ Sometimes they could have an agenda. It may be the case that they've seen the case law develop over time. And they want the case law to develop in a particular direction in the future. So I think there can be a real lack of creativity in some of my dealings with staff attorneys. I don't get the same creativity, in terms of how they approach the opinion, and the same amount of thorough research that I do from a law clerk. I think, potentially, depending on how the court's process is set up, it can create a situation with competing loyalties because a staff attorney is going to have many competing obligations and he or she may not be able to turn to your work first. You may be waiting for three or four weeks for an opinion, whereas if you talk to your law clerk you can get it done the next day or have him or her working on it the next day.

Staff attorneys are expensive; they are—they're more experienced. Staff attorneys cost about twice as much as law clerks. So for every staff attorney we have, we give up two law clerks. There's a real trade off

38. Cf. Joseph D. Kearney, *A Truth About Career Law Clerks*, 98 MARQ. L. REV. 13 (2014).

there. One advantage of law clerks is the loyalty involved in clerking—you don't have competing loyalties; you have someone who is willing to do your work when you say it needs to get done. When I want to be able to look at a draft, I can tell my law clerk I need it by a particular day. I can't do the same thing with staff attorneys, necessarily.

You control the flow of work, I talked about that, with your law clerks. However, law clerks, potentially, are a bigger time commitment. I don't mind it because I used to be a teacher and I like new graduates and law students, but for some people it's a real hassle to work with law clerks. It takes a lot of time and energy, and you have to mentor them. So there's a real time commitment involved in mentoring a law clerk, in working with law clerks. Law clerks lack knowledge. Even a law clerk who took a particular course in law school, and became an expert in environmental law—or whatever the area may be—is still going to come into the clerkship not knowing everything about that area of law. They're going to ask you questions like, "Why did the district court grant summary judgment here? I don't understand it." It may be obvious to you as a judge because you see enough of these cases, but because they haven't been out in the real world yet—in many cases—they don't know why the district court granted summary judgment. So there's a real gap there.

Tips for effective use of law clerks. These are all my own. First, draw on the core competencies of your law clerks. They are excellent researchers. It took me a while to figure out how to use WestlawNext just because I was used to the classic Westlaw. The clerks picked it up really quickly. They're really good at research. They're often familiar with newer developments in the law because they were taught those newer developments by their professors, who have time to study them. The clerks are a great source of fresh ideas. They think outside the box. Their inexperience and lack of knowledge allows them to think outside the box. They're not cynical. They haven't been informed by all these years of practice and doing things a particular way, and so they may suggest something that doesn't correspond to the way things are done, but it's actually quite brilliant. So fresh ideas—they're not always right, but I like having their fresh ideas. It's really helpful to me.

I view my clerks a bit like a general counsel. If I write something that's too strong—this just happened last night. I used a word that could come off too strongly and I said, "Is this too strong?" and my clerk said, "Yes, it's too strong, I'd change it to this." It's really useful to look to your law clerks for advice. They don't have the same skin in the game as you do, necessarily, and so they can be a little more objective.

Cooperation, this is one of the reasons why I don't like pooling. The work of the court benefits when multiple law clerks work together. You get that at the United States Supreme Court; you don't get that in the Ninth Circuit, necessarily, or when you are a member of a court in which there's pooling.

I think the single biggest advantage of law clerks, in terms of their core competency—and this is why I look for law review experience of some sort—is their editing skills. They are excellent editors. I talked about this before: my clerks edit my work and they do a great job at it. I don't always agree with them, but they are excellent editors. They know the Bluebook really well—I don't know the Bluebook anymore—they know the Bluebook so they fix my citations. And certainly it's humbling when your law clerks point out that you got something wrong. But it's much better for your law clerks to catch the mistakes than for them to be in Northwest Second or in the Supreme Court reports or for your colleagues to see them. I have seen mistakes made in opinions that perhaps would never have seen the light of day had the law clerks reviewed the opinions before they were circulated or published.

I didn't know that the conference was actually going to focus on law clerks as junior judges. So I actually wrote this before I was aware of the title of the conference; my presentation just happened to dovetail nicely with the theme. But law clerks are not—and you've got to remember they're not—junior judges. It is not appropriate to delegate the core functions of your job to your law clerks. It's going to produce poorer quality work from your chambers, and clerks need supervision. And part of it is making the time commitment to mentor your clerks—to spend time with them so that they know what to expect from you and you know what to expect from them. But as long as you remember that they're new law graduates in many cases, and you make that effort to mentor them, they will be an asset to you.