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DIVERSITY AND SUPREME COURT LAW CLERKS

BY TONY MAURO*

The topic of this conference is near and dear to my heart. The power and influence of Supreme Court law clerks has been a journalistic interest of mine since I first started covering the Supreme Court in 1979. That is not long after the publication of *The Brethren*—which itself highlighted the importance of the clerks.¹

The more I learned about the Supreme Court, the more fascinated I became with the role of law clerks, easily among the most important and least visible young—or mainly young—lawyers in the country.

I decided to explore the subject more deeply in the late 1990s and took about five months to research the subject and talk to former clerks from Kenneth Starr to Ronald Klain, Laura Ingraham to John Paul Stevens.

In addition to the power and influence of the law clerks, I was struck by how few clerks were women or minorities, or so it seemed. As I delved into the subject, nothing shook my impression that, to an overwhelming degree, it was white males who were capturing this brass ring, winning this almost guaranteed ticket to the upper echelons of the legal profession. But I wanted to be sure my speculation was accurate, so I embarked on the first demographic census ever of Supreme Court law clerks. What kind of people were helping decide which cases the Court would grant and helping Justices write their opinions?

Just as importantly, I wanted to assess the impact of the gender, racial, and ethnic make-up of the clerks; what perspectives might the Justices be missing if they were hiring mainly white males as clerks? For example, as far as I have been able to find out, there has never been a Native American law clerk at the Supreme Court. The Court often

* Tony Mauro is Supreme Court correspondent for *The National Law Journal*. This Essay is based on remarks he gave at Marquette University Law School's conference, *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks*, held on April 11–12, 2014.

1. See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

rules on issues of importance to that segment of the population—and often against those interests.

There had been some studies about the number of female clerks—which is somewhat easier, since the Court publishes the first and last names of the law clerks each year and you can generally tell the gender of the clerks from that information. But the Court does not track or publicize any other demographic and is not required to do so, as far as I could tell.

So I undertook the unpleasant task of asking former clerks what their racial backgrounds were, or I asked former clerks to recall their fellow clerks and give me this information. It was not easy, and there were some I called who objected to the whole endeavor of head-counting by race or ethnicity. Some hung up on me. But there was and is no other way to obtain this data.

But we finally compiled reliable information about the demographics of all 394 of the clerks hired by all of the Justices then on the Court during their entire tenures. The numbers were dramatic. This excerpt from the article, which was first published March 13, 1998, tells the story of the numbers and hints at the impact:

A first-ever demographic profile of the Supreme Court law clerks finds that fewer than 2% of the 394 clerks hired by the current justices during their respective tenures were African-American, and even fewer were Hispanic. About 5% were Asian. Women represent an increasing proportion of clerks, but they still amount to only one-fourth of the total.

....

Four of the nine justices—Chief Justice William Rehnquist and Justices Anthony Kennedy, Antonin Scalia and David Souter—never have hired a black law clerk. Rehnquist has hired 79 clerks since joining the Supreme Court in 1972, none of them black and only 11 female.

The statistics tell a stark story: Even though more than 40% of law school graduates now are women and nearly 20% are minorities, they largely have been bypassed for the most prestigious work a young lawyer could have. As a result, law clerks' powerful dual jobs of screening cases and drafting opinions—which often have dramatic effect on race and gender relations, among many other issues—remain mostly in the hands of white men.

“A case that doesn't look important to a white male clerk from the Northeast may be important to a woman from California,” says Catawba College professor Martha Swann, who

has studied the court's clerk hiring process. "If you have all white males from Harvard as clerks, they won't intentionally be biased, but they will be."

"It's like a closed shop. The concept of fair representation has not taken hold at the Supreme Court," says Howard University law professor J. Clay Smith Jr., author of a history of black lawyers in America. "That job is a ticket to a lot of things—wealth, academia, elite government jobs—and you don't get that job if you're not part of the club."

In fact, the number of women and minorities among Supreme Court clerks is low enough that if the court were a company, the statistics alone would prove illegal discrimination, says Stetson University law professor Mark Brown, who once worked at the court and has studied the gender breakdown of law clerks.

"Clerks are (the justices') emissaries to the world," Brown says. "People of different backgrounds bring in some different thinking for the justices. If they are all white males, you just perpetuate the dominance of males in the legal profession."²

The stories caused a bit of a stir and some, including other reporters on the Supreme Court beat, thought the stories were unfair to the Justices. They said I had implied that the Justices were racists, when in fact they were merely victims of the lack of diversity in the supply chain—the feeder judge system that brings potential candidates for clerkships to the Justices' attention.

In fact, I had not implied that the Justices were racist, and I wrote about the mainly white and male law clerk pipeline. And yes, there were many pieces to the puzzle of why so few women and minorities were Supreme Court law clerks. For whatever reason, the number of minorities in the upper ranks of the student body at Harvard and many of the other prime feeder schools was very low. Academic officials pointed the finger of blame further down the pipeline, to colleges and public schools.

In addition, the few minority students who were in that upper tier had many opportunities other than first clerking for an appeals court judge at low pay and then taking a seven-day-a-week job at the Supreme Court for low pay for a year—even though it held many rewards later on.

2. Tony Mauro, *Corps of Clerks Lacking in Diversity*, USA TODAY, Mar. 13, 1998, at 12A.

As an example, during my research several people at Harvard told me about the African-American student a few years earlier who “got away” — a top student who would have been a great law clerk but turned it down in favor of other opportunities.

In 2008, I checked back with some of those sources and found out from retired Judge Abner Mikva and Harvard law professor Laurence Tribe that the Supreme Court clerk candidate who “got away” was a student named Barack Obama. He turned down a clerkship with Judge Mikva that would have easily turned into a Supreme Court clerkship. Instead, Obama chose to return to Chicago in pursuit of a different career path.

So there were a lot of reasons why it was difficult to hire enough minority law clerks to come close to matching the demographics of the United States.

But I felt then, and I still feel now, that that analysis lets the Justices off the hook a little too easily. They have enormous power in clerk hiring, as in every other aspect of their work. I am quite sure that if the Justices took a look at the list of clerk candidates that their feeder judges and friends in academia submit to them and said, “This is not acceptable. I want to see more women and minorities on the list,” the feeder judges would snap to attention and give the Justices what they wanted — highly qualified women and minorities. Over time, the whole pipeline would become sensitized.

So, what has happened since 1998? One Justice told me, off the record, that the controversy did open a lot of eyes on the Court and in the clerk “pipeline.” I tracked the demographics for several more years and there were occasional spikes in the number of minority law clerks, but not really a consistent trend. There were still years the number of African-American clerks was one or zero.

I have embarked on an updated survey of the demographics of the law clerks of the Roberts Court. At the time of the publication deadline for this issue of *Marquette Law Review*, I had not finished the tally.

I can report some general findings, however, from looking at the clerks for the last few years.

The percentage of clerks who are women has gone from about one-quarter to one-third. Of the 342 law clerks employed by the Justices of the Roberts Court, 111 were female. Fifty-seven percent of the clerks hired by the four female Justices who served during the Roberts Court were male, while seventy-two percent of the clerks hired by male Justices were male.

But the number of minority clerks, especially those who are not of Asian heritage, still appears to be low.

Another trend of interest: an uptick in the hiring of clerks who have had law firm, Executive Branch, and other experiences before coming to the Court. The typical sequence had been law school, followed by an appeals court clerkship and then followed immediately by clerking at the Supreme Court, without any work experience in between.

Ever since the 1998 articles, members of Congress have routinely asked about the demographics of the law clerks during annual or nearly annual Supreme Court budget hearings.³

The reflexive answer from the Justices has typically been some variation of “I can’t afford to take a risk. My clerks need to hit the ground running.” That somehow is supposed to explain why the Justices draw from the ranks of white males from Harvard or Yale when hiring clerks. It implies, inappropriately, that hiring minorities is risky business.

Even if one were to credit the “risky business” excuse, the books about Supreme Court clerks through history by Todd Peppers and Artemus Ward have shown that Justices have taken risks with white males for a long time.⁴ Southern Justices often favored graduates of southern law schools, and some Justices would hire sons of friends, sight unseen. Sometimes they worked out, sometimes not. But the Court did not crumble, and the Justices were able to do their work.

It could be argued that the job of Supreme Court law clerk has become more important and more intense in recent decades, even though the Court’s caseload has significantly decreased. So the “hit the ground running” factor may well be more prominent in the minds of current Justices than in the more relaxed past.

But again, it is hard to view that as a credible reason for not hiring minority law clerks. I still believe that Justices could set the tone and set

3. *E.g., Financial Services and General Government Appropriations for 2014: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov’t Appropriations of the H. Comm. on Appropriations*, 113th Cong. 27–28 (2013) (statements of Anthony Kennedy and Steven Breyer, Associate Justices, Supreme Court of the United States), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg80953/pdf/CHRG-113hhrg80953.pdf>, archived at <http://perma.cc/AN68-EJMZ>.

4. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 20–21 (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 87–93 (2006).

the criteria in such a way that their feeder judges and friends would seek out and find a much broader palette of candidates who could be highly effective clerks and bring new perspectives and backgrounds to the important tasks that face them.