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THE ROBERTS COURT

A Sign of the Court's Polarization: Choice of Clerks

By ADAM LIPTAK

Published: September 6, 2010

WASHINGTON — Each year, 36 young lawyers obtain the most coveted credential in American law: a [Supreme Court](#) clerkship. Clerking for a justice is a glittering capstone on a résumé that almost always includes outstanding grades at a top law school, service on a law review and a prestigious clerkship with a federal appeals court judge.



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Ray Carson/University of Florida, via Associated Press

Justice Clarence Thomas, speaking in Florida in February, has never hired a clerk who had not worked for a judge appointed by a Republican president.

Justice [Clarence Thomas](#) apparently has one additional requirement. Without exception, the 84 clerks he has chosen over his two decades on the court all first trained with an appeals court judge appointed by a Republican president.

That unbroken ideological commitment is just the most extreme example of a recent and seldom examined form of political polarization on the Supreme Court. These days the more conservative justices are much more likely than were their predecessors to hire clerks who worked for judges appointed by Republicans. And the more liberal justices are more likely than in the past to hire from judges appointed by Democrats.

Each justice typically hires four clerks a year. Since Chief Justice [John G. Roberts Jr.](#) joined the court in 2005, Justice [Antonin Scalia](#) has not hired any clerks who had worked for a judge appointed by a Democratic president, and Justice [Samuel A. Alito Jr.](#) has hired only two. At the other end of the ideological spectrum, only four of Justice [Ruth Bader Ginsburg's](#) clerks on the Roberts court came from judges appointed by Republicans. The early data on [President Obama's](#) two appointees, Justices [Sonia Sotomayor](#) and [Elena Kagan](#), show a similar pattern.

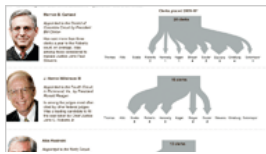
By contrast, Chief Justice Warren E. Burger, a conservative appointed by President [Richard M. Nixon](#) who led the court from 1969 to 1986, hired roughly even numbers of clerks who had worked for judges appointed by Democrats and Republicans. Judge [Richard A. Posner](#), a generally conservative judge appointed to the bench by President

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[Ronald Reagan](#), clerked for Justice [William J. Brennan Jr.](#), a liberal.

The recent divide in the selection of clerks amplifies the ideological rifts on a polarized court, one political scientists say is the most conservative in recent memory. And it echoes as clerks go on to prominent careers in government, the legal academy and major law firms.

David J. Garrow, a [University of Cambridge](#) historian, said the court had in this way started to mimic the political branches of government.

"We are getting a composition of the clerk work force that is getting to be like the House of Representatives," Professor Garrow said. "Each side is putting forward only ideological purists."

Supreme Court law clerks share the justices' chambers, do much of their work and influence their thinking. They make recommendations about which cases the court should hear, help prepare the justices for oral arguments, discuss the cases with them and draft major portions of the opinions and dissents.

"You can't possibly delegate as much as the justices do without turning over a degree of responsibility," said Lawrence Baum, a political scientist at [Ohio State](#) who has published empirical studies of Supreme Court clerks.

Influencing the Law

Indeed, the polarization among law clerks has had consequences for the development of the law, a 2008 [study](#) published in the DePaul Law Review found. The presence of clerks who identified themselves as Democrats made liberal votes from the justices for whom they worked more likely, the study found. The opposite was true, too.

A handful of federal appeals court judges known as feeder judges are gatekeepers. J. Michael Luttig, for instance, produced more than 40 Supreme Court clerks in his 15 years on the federal bench, with 33 of them going to work for Justices Thomas or Scalia. Mr. Luttig, now general counsel of the Boeing Company, said the justices' overall hiring practices reflected a fundamental shift.

"As law has moved closer to mere politics, political affiliations have naturally and predictably become proxies for the different political agendas that have been pressed in and through the courts," Mr. Luttig said. "Given this politicization, it should come as no surprise to learn that the more liberal judges tend both to hire clerks who would self-describe themselves as Democrats and to hire clerks from other judges who would likewise self-describe themselves as Democrats, and vice versa for the more conservative judges."

But ideological orthodoxy can dampen the robust discussions in chambers that clarify issues and shape rulings. Justice Scalia for instance used to seek out candidates from the opposite ideological camp when he served on a federal appeals court in Washington and in his early years on the Supreme Court.

"He made it a point of telling me that I was his token liberal," said E. Joshua Rosenkranz, who clerked for Justice Scalia in 1986, his last year on the appeals court. "To his credit, I'm sure it was largely because he wanted to be sure he always heard the arguments against the positions he was taking."

The politics do not stop when clerks leave the court. Though a clerkship is a ticket to a law firm job that can include a \$250,000 signing bonus, many former clerks take positions consistent with their former bosses' ideological leanings in the legal academy, the government and elsewhere.

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[Laura Ingraham](#), the conservative political commentator, served as a law clerk to Justice Thomas, for instance. So did [John C. Yoo](#), the Bush administration official who provided legal advice about interrogation practices.

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Amanda Cox contributed reporting.

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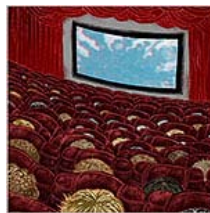
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The clerks who do join law firms often form ideological clusters. According to a study published last year in the Vanderbilt Law Review, several of the leading firms — Kirkland & Ellis, Sidley Austin and Jones Day — have largely hired clerks from the more conservative justices. Others — including Wilmer Cutler Pickering Hale & Dorr and Jenner & Block — have tended to hire from the more liberal justices.

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The rise of "politically oriented practice groups," the study said, reinforces the impression that the court is "a superlegislature responding to ideological arguments rather than a legal institution responding to concerns grounded in the rule of law."

For his part, Justice Thomas has said that choosing clerks is like "selecting mates in a foxhole."

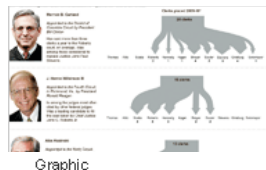
"I won't hire clerks who have profound disagreements with me," he said at a luncheon in Dallas a decade ago. "It's like trying to train a pig. It wastes your time, and it aggravates the pig."

Three members of the current court — Chief Justice Roberts and Justices Kagan and Stephen G. Breyer — are themselves former Supreme Court clerks. So were Justice John Paul Stevens, who retired in June, and Chief Justice William H. Rehnquist, who died in 2005.

Sometimes it seems that a Supreme Court clerkship has become a prerequisite to a seat on the court. The three candidates on President Obama's short list to replace Justice Stevens — Justice Kagan, who joined the court in August, and Judges Merrick B. Garland and Diane P. Wood — had all served as Supreme Court clerks (and all to liberal justices).

Indeed, if Justice Kagan's recent hiring is any guide, a Supreme Court clerkship may even be a prerequisite for a Supreme Court clerkship. Three of her four clerks have completed clerkships with other members of the court, Justices Ginsburg, Breyer and Anthony M. Kennedy.

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Justice Kagan's hiring is telling and savvy. It immediately aligns her with the two more senior justices on the court's liberal wing — Justices Ginsburg and Breyer. And her hiring of a clerk who worked for Justice Kennedy will provide insights into the methods and thinking of the court's swing justice.

Delegated Duties

"The reason why the public thinks so much of the justices," said Justice Louis D. Brandeis, who served from 1916 to 1939, "is that they are almost the only people in Washington who do their own work."

These days, respect for the court must be grounded on other factors. Opinion writing is largely delegated to clerks, and Chief Justice Rehnquist candidly acknowledged that the justices' chambers were "a collection of nine autonomous opinion-writing bureaus."

With the departure of Justice Stevens, it appears that none of the justices routinely write first drafts of their opinions. Instead, they typically supervise and revise drafts produced by their clerks.

A few decades ago, the court decided 150 cases a term. That number has dropped by about half, meaning each justice must write about eight majority opinions a term. Yet the practice of entrusting much of the drafting to clerks remains entrenched.

"We have created an institutional situation where 26-year-olds are being given humongous legal authority in the actual wording of decisions, the actual compositional choices," Professor Garrow said.

The justices forbid their current clerks to talk to the press, and most former clerks refuse to discuss the work they performed for living justices in any detail. But Artemus Ward and David L. Weiden received responses from 122 former clerks to a question concerning the drafting of opinions for their 2006 book "Sorcerers' Apprentices." Thirty percent of the clerks said their drafts had been issued without modification at least some of the time.

Reviewing the book in The New Republic, Judge Posner, a close student of the court, wrote that "probably more than half the written output of the court is clerk-authored."

Justice Ginsburg, a famously hard-working justice, described her own habits in an interview with Todd C. Peppers, who teaches public affairs at Roanoke College, for "Behind the Bench: Portraits of [United States Supreme Court](#) Law Clerks and Their Justices," a book to be published next year by the [University of Virginia](#) Press. Justice Ginsburg said she was an energetic supervisor and editor who made sure the final product faithfully reflected her views. But the initial draft, she said, is prepared by a clerk.

"I write the opening," Justice Ginsburg said. "It will be anywhere from one to three paragraphs. It's kind of a press release, and it will tell you what the issue was and how it was resolved."

Then she said she provided a law clerk with a detailed outline. "Sometimes, to my delight, they will give me a draft that I can make my own version through heavy editing, but I don't have to redo it," Justice Ginsburg went on. "I'd say it's a good year if I have two law clerks that have that skill."

Polarized 'Feeder Judges'

There are about 160 active federal appeals court judges and more than 100 more semiretired ones, yet more than half of the clerks who have served on the Roberts court came from the chambers of just 10 judges. Three judges accounted for a fifth of all Supreme Court clerks.

There is ideological polarization among the feeder judges just as there is in the larger population. Judge Garland of the District of Columbia Circuit, appointed by President [Bill Clinton](#), has sent 21 clerks to nine justices in the Roberts court years, but 17 of them went to members of its liberal wing.

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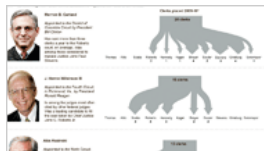
On the other hand, Judge Alex Kozinski of the Ninth Circuit, in San Francisco, appointed by President Ronald Reagan, sent 13 clerks to the court in those years, but only one to the court's liberal wing.

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In a 1998 interview published in The Green Bag, a law journal, Judge Kozinski, a generally conservative judge on a court with a reputation for liberal decisions, said he took account of ideology in hiring clerks, giving "an extra measure of consideration to conservative and libertarian law students" in considering whom to hire.

"There are a lot of liberal judges out there," he added.

Judge J. Harvie Wilkinson III, appointed to the Fourth Circuit in Richmond, Va., by President Reagan, has sent clerks to justices across the ideological spectrum.

"I've tried in my own hiring on the circuit court level not to put an ideological litmus test on anyone I've hired," Judge Wilkinson said in an interview. "Law is a craft and profession that in many ways transcends philosophy."

Some 1,000 people apply for Supreme Court clerkships each year, and the usual practice is to apply to all of the justices. Put another way, justices cannot tell anything about applicants' ideological leanings from the fact that they applied.

Lacking other information on that score, the justices seem to look to the ideology of the feeder judge. Professors Baum and Corey Ditslear wrote in a study published this year in The Justice System Journal.

"The identity of the judge with whom a clerk works has become more valuable as a source of information about the clerk's proclivities," they wrote.

Nonpartisan Past

The stark political divide among the clerks is recent.

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“The Supreme Court clerkship appeared to be a nonpartisan institution from the 1940s into the 1980s,” according to detailed data in the Vanderbilt study.

Over the Roberts court years, by contrast, none of the five more conservative justices — Chief Justice Roberts and Justices Thomas, Scalia, Alito and Kennedy — hired more than 20 percent of their clerks from judges appointed by Democrats. Three of the more liberal justices — Justices Stevens, Ginsburg and Sotomayor — hired 12 percent to 35 percent of their clerks from judges appointed by Republicans.

Only Justice Breyer hired roughly half of his clerks from judges appointed by presidents of each party.

The Justice System Journal study, which considered the 10 years ending in 2005, found “a growing polarization in the system.” In particular, those data “suggest a high level of bipartisanship for Breyer and a lack of bipartisanship for the relatively moderate Kennedy.”

The ideological divisions continue after clerks leave the court, another recent development.

Clerks from conservative chambers are now less likely to teach, according to the Vanderbilt study, which looked at data through 2006. If they do, they are more likely to join the faculties of conservative and religious law schools. Republican administrations are now much more likely to hire clerks from conservative chambers, and Democratic administrations from liberal ones. Even law firm hiring splits along ideological lines.

Political polarization among Supreme Court clerks may be curious, but is it consequential?

According to the DePaul study, by Professor Peppers and Christopher Zorn, the political leanings of law clerks influence the votes of Supreme Court justices. The study used information about political party affiliations collected from more than 500 former clerks and standard measures of judicial ideology.

“Over and above the influence of the justices’ own policy preferences,” the study concluded, “their clerks’ policy preferences have an independent effect on their votes.”

Everything else being equal — the justice, the year, the case — the presence of additional liberal clerks in a given justice’s chambers makes a liberal vote more likely, the study said, while the presence of additional conservative clerks pushes justices in the opposite direction.

Judge Guido Calabresi, who sits on the federal appeals court in New York and has placed some 30 clerks with the justices, overwhelmingly with the more liberal ones, said he “has no litmus test” and hires “clerks who are conservatives and clerks who are liberals.”

At the Supreme Court, Judge Calabresi continued, the ideological leanings of clerks may sometimes have an impact.

“To the extent that justices are really strong, it doesn’t matter,” he said. “To the extent that justices are uncertain or weak, it can make a difference.”

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Amanda Cox contributed reporting.

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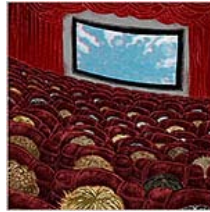
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