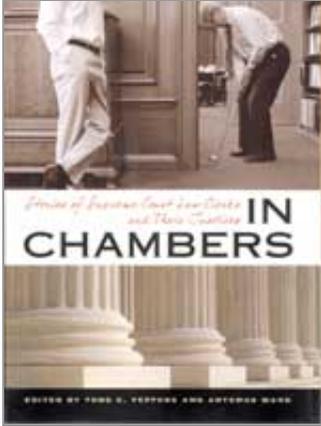


'In Chambers' pulls back curtains at Supreme Court

by Alex G. Philipson

Published: May 24th, 2012



A U.S. Supreme Court justice stands in his august chambers concentrating on his latest project while a law clerk looks on in admiration. Is the subject a petition for certiorari that seeks to upend decades of constitutional precedent? Hardly. All attention is on a golf ball that Byron White is poised to putt across his carpet in an attempt to best his clerks in a contest of athletic prowess.

So does the cover photograph advertise "In Chambers: Stories of Supreme Court Law Clerks and Their Justices."

The playful subtitle, giving the clerks top billing, foretells a collection of essays by scholars and former Supreme Court law clerks — including such luminaries as Alan Dershowitz (who clerked for Arthur Goldberg), and J. Harvie Wilkinson III (who clerked for Lewis Powell) — about the personal aspects of the justice-clerk relationship, how clerks have historically been

selected, and the sundry duties they have performed since becoming fixtures at the court.

Forgiving some repetition among chapters and occasional unevenness in depth of discussion, "In Chambers" leaves the reader richly informed and entertained about the roles, legal and extralegal, that law clerks have long played at the highest court in the land.

The mystique of clerking for the Supreme Court has captured the imagination of lawyers and laypeople alike for decades, particularly since 1979, when "The Brethren" offered a then-new revealing look at the court's inner workings.

And so it is easy to forget that the court operated for its first century without a single law clerk. It was only in 1882 that Horace Gray first brought a clerk to the court. Gray continued the practice he had established as chief justice of the Massachusetts Supreme Judicial Court of hiring recent Harvard Law graduates, one of whom was Louis Brandeis, on the recommendation of his half-brother, Professor John Chipman Gray.

Congress provided no funds to pay law clerks until 1886, when it authorized money for each justice to hire one "stenographic clerk," or "law secretary."

Until then, Gray paid his clerks out of his own pocket. He needed them to help him perform the exhaustive research he thought necessary to write meaningful opinions and to enable him to refine his views through discussion.

Any drafting of opinions done by his clerks was meant only as a teaching tool: The "ultimate destiny of such opinions was the waste-paper basket."

Nor did Gray ask his clerks to write bench memos or analyze petitions for certiorari, duties that occupy much of modern clerks' energies. He did expect them, though, to serve as his chauffeur!

The Supreme Court lacked its own building until 1935, and so the first 50 years of clerks worked at the justices' homes, blurring the lines between the professional and the personal.

Oliver Wendell Holmes Jr. (who followed Gray's path from the SJC to Washington) acquainted his clerks with his vast personal library, encouraging them to study more than just law by reading novels, history and philosophy.

Holmes used his clerks not for legal advice or for drafting opinions, but to minister to his needs. A Holmes clerk might balance the justice's checkbook at one turn, and provide a sounding board for Holmes' thoughts on fellow justices or the politics of the day, at another.

Holmes' replacement on the court, Benjamin Cardozo, similarly had little need for research and writing assistance. But he relied on his clerks for the equally important purpose of companionship.

Cardozo had left an amicable New York Court of Appeals for a tension-filled, unfriendly group at the Supreme Court. Because of the lack of camaraderie of his fellow justices, Cardozo sought closeness from his clerks, who fulfilled the need splendidly.

His last clerk was so devoted that he postponed his career to help choose living arrangements and medical treatment for his ailing mentor and to read stories by Cardozo's bedside.

But not all justices were so close with their clerks. William Douglas infamously terrorized his, once telling a fellow justice that law clerks were "the lowest form of human life."

And yet Douglas' history with law clerks was not without a bright spot: He hired the first woman clerk, Helen Lucile Lomen, in 1944. Lomen came at the recommendation of a trusted law school dean who noted that no men from Lomen's class came close to her caliber.

Many years would pass, however, before women would be hired in numbers anywhere comparable to men; even Ruth Bader Ginsburg was rejected for a clerkship by Felix Frankfurter.

But Frankfurter, the first justice to rely on "feeder" judges as well as law professors' recommendations, brought in the first African-American clerk, William Thaddeus Coleman Jr., in 1948. Coleman graduated at the top of his class at Harvard and clerked on the 3rd Circuit before arriving at the court.

Despite his accomplishments, Coleman could not escape the racism of the time. A law clerks' lunch had to be rearranged when a restaurant at the Mayflower Hotel refused to serve Frankfurter's distinguished clerk.

Racism also sullied Thurgood Marshall's tenure. During summertime, Marshall dressed informally at the court, and visiting tourists once mistook him for an elevator operator and demanded that he take them to the second floor.

Marshall's preference for dressing down during the summer exemplified his disregard for pompousness and pretense, which contrasted with Chief Justice Warren Burger's style. Marshall got a kick out of ruffling Burger's feathers by greeting him with, "What's doing, Chief baby?"

Law clerks for Marshall were entrusted to draft opinions, subject to Marshall's instructions and review. But the justice never abdicated his role. He once told a clerk who suggested a change to an opinion that the clerk raised a good point but was missing two things: "nomination by the president and confirmation by the Senate."

The increased use of clerks in opinion-drafting arose in part because, in 1950, Chief Justice Fred Vinson shifted from assigning opinions based on how quickly the justices could produce them to assigning an equal number of opinions to each justice. The slower justices had to rely more heavily on their clerks to keep up.

In any event, the ultimate responsibility for the court's decisions has always fallen at the justices' feet. Even blunders.

When a new member of the court issued a memo to his colleagues saying that his clerk had wrongly circulated a draft opinion with material that should have been omitted, William Brennan told his colleague that only justices make mistakes. A new memo was quickly issued noting that it was the justice who had made the mistake.

On the other hand, law clerks could let their egos get the best of them. White often lamented that clerks were "rarely in doubt and often in error," while the justices were "often in doubt and rarely in error."

And William Rehnquist, recalling his clerkship for Robert Jackson in the early 1950s, said that "it would be all but impossible to assemble a more hypercritical, not to say arrogant, audience than a group of law clerks criticizing an opinion circulated by one of their employers."

When Rehnquist later joined the court as a justice, however, he actually expanded the responsibilities

of law clerks by helping start the cert. pool, during the 1972 term. The pool reduced the court's workload by relying on one chamber instead of all of them to review each petition, a practice that remains in use today by all of the justices except for Samuel Alito.

A sometimes overlooked but potentially significant aspect of cert. review discussed in the book is the practice of publishing dissents from decisions to deny cert. One example provided the impetus for the ACLU and NAACP to join forces in establishing a highly influential death penalty litigation project.

The book brings the reader up to date with a chapter on Ginsburg and her clerks. Ginsburg explains the lack of permanent law clerks at the court as attributable to the intensity of the work: It is "like a treadmill that gets faster and faster, and I think that you reach a burnout point."

As with her colleagues, Ginsburg uses her clerks to prepare first drafts of opinions. But she is happy if a draft comes to her in good enough shape that she can make it her own with heavy editing.

Through enlightening and varied accounts, "In Chambers" shows why many law clerks consider their contributions to the Supreme Court the height of their legal careers.

Alex G. Philipson is founder of the appellate boutique Philipson Legal in Newton Centre.

"In Chambers: Stories of Supreme Court Law Clerks and Their Justices"

Edited by Todd C. Peppers and Artemus Ward

University of Virginia Press

472 pages; \$34.95

Complete URL: <http://masslawyersweekly.com/2012/05/24/in-chambers-pulls-back-curtains-at-supreme-court/>