OF LEAKERS AND LEGAL BRIEFERS: THE MODERN SUPREME COURT LAW CLERK

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I. INTRODUCTION

In the weeks leading up to the announcement of the Supreme Court's decision in the historic "Obamacare" case,[1] news commentators and legal scholars frantically searched for clues or leaks regarding the Justices' votes. Despite their spirited attempts to unearth information regarding the pending case, Harvard Law School Professor Jack Goldsmith suggested that the efforts were in vain.[2] In an article entitled *Temple of Silence: Why SCOTUS Leaks Less than the CIA*, which was published in the weeks before the Obamacare decision was announced, Goldsmith explained how the unique institutional rules and practices of the Supreme Court made it less likely to be the

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1. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566 (2012).

2. Jack Goldsmith, *Temple of Silence: Why SCOTUS Leaks Less than the CIA*, NEW REPUBLIC (June 23, 2012, 12:00 AM), http://www.tnr.com/article/politics/magazine/104219/jack-goldsmith-SCOTUS-Leaks-CIA.

victim of leaks than other federal branches and agencies.[3]

In his article, Goldsmith—a former law clerk for Justice Anthony Kennedy—declared that he was not worried that the young law school graduates, who assisted the nine individual Justices, might be seduced by the press into divulging secrets:

> The [J]ustices' law clerks are sternly warned against leaking each summer by Chief Justice John Roberts, and they are intensely loyal to their bosses, all of whom despise breaches of confidence. . . .
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> . . . .
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> Law clerks also have a personal incentive to keep quiet. After one year at the Court, clerks can fetch hundreds of thousands of dollars in signing bonuses from law firms and are all but guaranteed successful careers. Leaking the Court's decisions is one of the few ways to screw up these prospects. The leaker would have a hard time obtaining or keeping a license to practice law. And he or she would establish a reputation for irresponsible gabbing in a profession that places a super-high premium on the ability to keep confidences. No clerk wants to take these risks, especially since the chance of getting caught is relatively high.[4]

Curiously, Goldsmith did not acknowledge that the Court itself had taken a series of steps to combat leaks by law clerks, starting with an informal investigation of leaks in 1973 by Associate Justices William H. Rehnquist and Potter Stewart,[5] and culminating in the adoption of the code of conduct for Supreme Court law clerks in 1987.[6] Moreover, Goldsmith's analysis of the incentives against law clerk leaks failed to

3. *Id*.

4. *Id*. Even before the turmoil surrounding leaks about internal Court deliberations in the Obamacare decision, however, not everybody had completely subscribed to Goldsmith's arguments about law clerk incentives. *See* Christopher Shea, *Why Don't Supreme Court Clerks Leak?*, WALL ST. J. (June 27, 2012, 11:25 AM), http://blogs.wsj.com/ideas-market/2012/06/27/why-dont-supreme-court-clerks-leak/.

5. Memorandum from William Rehnquist and Potter Stewart, Assoc. Justices, to the Conference (June 18, 1973) (on file with the Washington and Lee Law School Library).

6. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 127 (Aaron Javsicas ed., 9th ed. 2011).

consider the unique circumstance in which a Justice might conceivably "instruct" his or her law clerk to leak information about internal court deliberations. Nor did it consider past instances when law clerks were believed to have leaked information regarding internal court deliberations in violation of the duty of confidentiality owed to their Justices.[7] Finally, Goldsmith seemed unaware of whispers that Supreme Court law clerks had already leaked information about the pending case.[8]

Based on this combination of institutional practices and individual incentives, Goldsmith concluded the "Marble Palace" would remain silent as a tomb: "Washington's most reliable keepers of secrets won't be its national security officials, but its [J]ustices."[9] Of course, Goldsmith did not argue that the Supreme Court never laid bare its secrets.[10] The implication, however, was that the Court guarded its secrets carefully and jealously, and that any information surrounding the pending decision or the Court's behind-the-scenes deliberations would remain within its impregnable walls.[11]

Those who read and agreed with Goldsmith's article could

7. *See generally* John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271 (2000) (discussing the most infamous example of an alleged leak of a pending case decision, which involved law clerk Ashton Fox Embry, the long-time law clerk to Justice Joseph McKenna). In more modern times, a former Blackmun law clerk wrote a tell-all book about his year at the Court. *See* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998). Several law clerks have leaked information about the Court's deliberations in *Bush v. Gore*. *See* David Margolick et al., *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 319–20, *available at* http://thewe.cc/thewei/&_/pdf/us_court_decision/bush_v_gore_1.pdf. Although the leak was a clear breach of the ethical rules surrounding law clerk confidentiality, one of the former clerks had a ready excuse: "We feel that something illegitimate was done with the Court's power, and such an extraordinary situation justices breaking an obligation we'd otherwise honor." *Id*. at 320.

8. *See* Mark Tushnet, *Reasons for Thinking that Law Mattered*, BALKINIZATION (July 3, 2012, 8:35 PM), http://balkin.blogspot.com/2012/07/reasons-for-thinking-that-law-mattered.html (suggesting a law clerk leaked information regarding status of Affordable Care Act decision).

9. Goldsmith, *supra* note 2.

10. *See id*.

11. *See id*.

not have been more astonished when, in the days after the Supreme Court announced its healthcare decision, a historic breach of Court confidentiality occurred. In a scoop that sent cable news shows abuzz, CBS news reporter Jan Crawford revealed that Chief Justice John G. Roberts, Jr. had changed his mind in the Obamacare decision and decided to join the liberal block of the Court in upholding the federal legislation.[12] What made Crawford's report so remarkable was the amount of information she obtained. Not only did Crawford provide details about the Chief Justice's decision to change his vote, but also the internal lobbying which took place by conservative Justices—primarily Anthony Kennedy—to woo back the wayward Chief.[13] All-in-all, the story represented one of the most detailed leaks about the behind-the-scenes operations of the Supreme Court since the publication of Bob Woodward and Scott Armstrong's book, *The Brethren: Inside the Supreme Court*—a journalistic *tour de force* which rocked the Supreme Court.[14]

With the release of Crawford's scoop, Washington insiders, journalists, and bloggers turned their attention to solving the tantalizing mystery of who leaked the Court's secrets. The chief suspects included Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, Ginni Thomas (the wife of Justice Thomas and a conservative political activist), and the law clerks themselves.[15]

12. *Face the Nation* (CBS News television broadcast July 1, 2012), *available at* http://www.cbsnews.com/8301-3460_162-57464549/robertsswitched-views-to-uphold-health-care-law/.

13. *Id.*

14. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

15. *See* Sam Baker, *Supreme Court Healthcare Ruling Leaks Have DC Buzzing: Who is the Culprit?*, HEALTHWATCH (July 4, 2012, 6:00 AM), http://thehill.com/blogs/healthwatch/legal-challenges/236197-supreme-court-talk-has-dc-buzzing-who-is-the-leaker; Orin Kerr, *Who Leaked?*, THE VOLOKH CONSPIRACY (July 1, 2012, 5:43 PM), http://www.volokh.com/2012/07/01/who-leaked/; Charles Lane, *Slimy Leaks about John Roberts at Supreme Court*, WASH. POST. (July 3, 2012, 11:18 AM), http://www.washingtonpost.com/blogs/post-partisan/post/slimy-leaks-about-john-roberts-at-supreme-court/2012/07/03/gJQAPq9mKW_blog.html; Matt Negrin, *Roberts' Switch on Health Care Signals a Leaky Supreme Court*, ABC NEWS, July 2, 2012, http://abcnews.go.com/Politics/OTUS/chief-justice-john-robertss-switch-obamacare-health-care/story?id=16698557#.UDkC_EL3DR0; Elspeth Reeve, *Seven Theories About*

While we are likely never to know the source of the leak, the consistent focus on the law clerks as potential culprits raises an interesting question for students of the Supreme Court—who are these clerks, and how did they rise to such levels of access and influence?

II. A BRIEF HISTORY OF THE RISE OF THE SUPREME COURT LAW CLERK

Supreme Court law clerks have not always been a permanent part of the Court, and they certainly were not institutional actors who held any position of authority during the Supreme Court's first 150 years of existence. In fact, the resources allocated to the Supreme Court during its first decades seemed to confirm Alexander Hamilton's claim that the Court was the "least dangerous branch" of the federal government.[16] From 1810 to 1860, the Court itself was housed in a "small, damp, and poorly lighted" chamber in the basement of the Capitol building, and the entire Court staff was composed of the clerk of the Court, the official Court reporter, and the marshal of the Court.[17] While the Justices finally got a new home in the old Senate chambers in 1860, and were given personal servants (eventually called messengers) in 1867, the Court remained a small institution throughout the nineteenth century.[18]

In January of 1882, Horace Gray, former Chief Justice of the Massachusetts Supreme Judicial Court, was confirmed as the newest member to the United States Supreme Court.[19] Gray

Who the Supreme Court Leaker Was, ATLANTIC WIRE (July 3, 2012), http://www.theatlanticwire.com/politics/2012/07/seven-theories-about-supreme-court-leaker/54174/; Felix Salmon, *When the Supreme Court Leaks*, REUTERS (July 2, 2012), http://blogs.reuters.com/felix-salmon/2012/07/02/when-the-supreme-court-leaks/; Sabrina Siddiqui, *John Roberts' Switch on Obamacare Sparks Fascination with Supreme Court, Possible Leaks*, HUFFINGTON POST (July 2, 2012, 8:53 PM), http://www.huffingtonpost.com/2012/07/02/justice-roberts-obamacare-supreme-court-leaks_n_1644864.html.

16. THE FEDERALIST NO. 78 (Alexander Hamilton).

17. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 118–19 (Kermit L. Hall ed., 2d ed. 2005).

18. *Id.*; 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–1864 (1974).

19. TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND

could not have been pleased by the conditions of his new post, with the Court's elderly Justices staggering under the weight of its rapidly expanding docket while having their public demands for assistance ignored by Congress.[20] Following his practice on the Supreme Judicial Court, Gray immediately dug into his own purse and hired a Harvard Law School graduate to work as his law clerk.[21] The young man's name was Thomas Russell, and he was selected by Gray's half-brother, Harvard Law School Professor John Chipman Gray, to work for the Justice.[22]

Until his retirement in 1902, Gray continued to hire Harvard men on a yearly basis.[23] Former Gray law clerk, Samuel Williston, who subsequently achieved fame as a contracts professor at Harvard Law School, explained that "[t]he secretary was asked to do the highest work demanded of a member of the legal profession—that is the same work which a judge of the Supreme Court is called upon to perform."[24] The clerks reviewed the case materials and legal briefs filed with the Court, and after oral argument, met with the Justice to discuss the pending cases.[25] The clerks were not expected to merely parrot back Gray's own views.[26] Williston recalled that the Justice "invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views,"[27] while former Gray law clerk, Langdon Parker Marvin, added that Gray "rather astonished me early in the year by saying 'How do you think it ought to be decided.'"[28]

INFLUENCE OF THE SUPREME COURT LAW CLERK 43–44 (2006) [hereinafter COURIERS OF THE MARBLE PALACE].

20. *Id*. at 39–42.

21. Todd C. Peppers, *Birth of an Institution: Horace Gray and the Lost Law Clerks*, *in* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 19, 24–25 (Todd C. Peppers & Artemus Vard eds., 2012) [hereinafter *Birth of an Institution*].

22. *Id*. at 17, 24–25.

23. *Id*. at 47.

24. Samuel Williston, *Horace Gray*, *in* 8 GREAT AMERICAN LAWYERS 158–59 (William Draper Lewis ed., 1909).

25. *Id*.

26. *See Birth of an Institution*, *supra* note 21, at 20–21.

27. SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 93 (1940).

28. THE REMINISCENCES OF MARY V. AND LANGDON P. MARVIN (1972), *microformed on* Oral History Collection (on file with the Harvard College

In 1886, Congress finally authorized the individual Justices to hire stenographers to assist with the work of the Court, and by the 1890's all nine Justices had used the allocated funds to hire personal assistants.[29] For the majority of the Justices, however, the assistants (often older attorneys or stenographers) were assigned secretarial, rather than legal duties, and remained with the Justices for years.[30] Few followed the "Gray model" of hiring recent law school graduates on a yearly basis to do legal research and writing.[31]

When Oliver Wendell Holmes, Jr. replaced Horace Gray in 1902, Holmes followed Gray's example and continued to hire Harvard Law School graduates (initially selected by Professor John Chipman Gray, then Harvard Law School Professor Felix Frankfurter) as his "personal secretaries."[32] The young men reviewed certiorari petitions and prepared memoranda regarding the appeals, but they also helped Holmes with basic accounting and bookkeeping matters and served as social companions to the Justice.[33] Holmes' former legal secretary, Harvey Hollister Bundy, once explained that the Justice "wanted some gaiety and youth around. He wanted his secretary to dine out every night and come back and tell him the latest gossip. That's right, it was one of the ways he had of keeping young."[34] And when Louis D. Brandeis joined the Supreme Court in 1916, he also adopted the Gray model—perhaps not a surprising decision given the fact that Brandeis himself clerked for Gray on the Massachusetts Supreme Judicial Court—and had his law clerks perform legal

Library).

29. *Birth of an Institution*, *supra* note 21, at 18–19.

30. *Id*. at 23.

31. *Id*.

32. *See id*. at 19, 23; I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks*, 11 YALE J.L. & HUMAN. 119, 133–48 (1999).

33. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 56–60. For a wonderful account of the unique relationship that the legal secretaries enjoyed with Justice Holmes, see Messinger, *supra* note 32.

34. THE REMINISCENCES OF HARVEY H. BUNDY (1972), *microformed on Columbia University Oral History Collection* (1972) (on file with the Butler Library, Columbia University).

research and assist in drafting opinions.[35] However, Brandeis insisted that he alone review certiorari petitions since it involved deciding on the merits of the case.[36]

Additionally, resources were allocated to the Supreme Court in 1919, and each Justice was authorized to hire both a law clerk and a stenographer.[37] With this new institutional resource, the Justices, facing an ever-growing docket, slowly started changing their chamber practices and started assigning more substantive job duties to their clerks.[38] In the 1930s and 1940s, more Justices started asking their law clerks to review certiorari petitions and prepare memoranda regarding the appeals, and by the late 1950s, the drafting of certiorari memoranda had become a regular part of the law clerks' daily lives.[39]

A norm still existed, however, regarding the drafting of judicial opinions, and those Justices who had their law clerks prepare opinion drafts—including Tom C. Clark, Frank Murphy, and Fred Vinson—were considered to be the weaker members of the Court, whose reliance on their clerks was snidely commented on by the other Justices.[40] The institutional norm regarding opinion writing weakened, however, as new Justices joined the Court. By the 1960s, only a few of the older Justices—such as Hugo Black and William O. Douglas—were preparing their own opinion drafts;[41] by the 1980s, the practice had virtually died away.[42]

Only a handful of Court watchers seemed concerned about the changing role of the law clerks or its impact on the work of the Court, and they were, ironically, themselves former Supreme Court clerks. They included William Rehnquist, who clerked for

35. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 62–66. S*ee also*, Todd C. Peppers, *Isaiah and His Young Disciples: Justice Louis Brandeis and His Law Clerks*, *in* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 67–87 (Todd C. Peppers & Artemus Ward eds., 2012).

36. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 63.

37. *Id*. at 84.

38. *Id*. at 84–87.

39. *Id*. at 143 Table 4.1.

40. BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 53 (1996).

41. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 143 Table4.1.

42. *Id*. at 190 Table 5.1.

former Supreme Court Justice Robert H. Jackson before becoming a private practitioner in Phoenix, Arizona, and John Frank, who had once clerked for Justice Hugo Black.[43] For Frank, law clerk participation in opinion writing produced bland legal opinions which lacked "the Holmes epigram, the Black way with facts, the Frankfurter vocabulary, the Brandeis footnote, [and] the Stone pragmatism."[44] For Rehnquist, requiring the clerks to review certiorari petitions and draft certiorari memoranda raised the possibility that liberal law clerks might try to manipulate their conservative Justices in voting in a more liberal fashion.[45]

Collectively, the worries of Frank and Rehnquist encompass the different types of influence that law clerks might potentially wield. At one end of the spectrum is stylistic influence—where the clerks review the work product of the Justices and make edits regarding grammar, word choice, and sentence structure.[46] At the other end is substantive influence—where the clerks affect how the Justices vote and how constitutional doctrine is crafted.[47] Not all substantive influence is troubling. Law clerks can act as sounding boards for their Justices, and they certainly can serve as conduits for new ideas bubbling up from law schools.

43. William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 533 (1980); Myrna Oliver, *John Frank, Lawyer Behind* Miranda *Rights, Dies at 84*, SEATTLE TIMES, Sept. 15, 2002, http://community.seattletimes.nwsource.com/archive/?date=20020915&slug=obit15.

44. John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212, 224 (1953).

45. William H. Rehnquist, *Who Writes Decisions of the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74–75, *available at* http://www.usnews.com/opinion/articles/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence. After his initial article generated a backlash from other former law clerks, Rehnquist backtracked from his claims of undue influence by liberal clerks. *See* William H. Rehnquist, *Another View: Clerks Might 'Influence' Some Actions*, U.S. NEWS & WORLD REP., Feb. 21, 1958, at 116.

46. For articles which examine the stylistic influence of law clerks, see Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307 (2011); Paul J. Wahlbeck et al., *Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166 (2002).

47. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 13.

The concern over substantive influence arises when the Justices abdicate their judicial powers under Article III of the Constitution and permit their law clerks to make decisions about pending certiorari petitions or the merits of cases before the Court.[48]

As noted earlier, the question of law clerk confidentiality is a subject that has concerned the Court in recent decades.[49] This should not be surprising given the larger role that law clerks now play in the processing of the Court's work.[50] Historically, the individual Justices would establish rules for their own law clerks regarding the duty of confidentiality,[51] but today the Supreme Court has created the *Code of Conduct for Law Clerks of the Supreme Court of the United States*[52] (*Code of Conduct*). Composed of six canons, the *Code of Conduct* states that law clerks hold a position of "public trust" and owe "complete confidentiality, accuracy, and loyalty" to both the Court and their individual Justices.[53] Canon Three of the *Code of Conduct* stresses con-fidentiality:

> The relationship between Justice and law clerk is essentially a

48. For a more detailed discussion of the types of law clerk influence, *see id*. at 12–14; ARTEMUS WARD & DAVID WIEDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 144–47, 150–70 (2006).

49. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 12–14.

50. *Id*. at 143.

51. For example, former Warren law clerk, Dallin Oaks, recorded the following confidentiality instructions in his diary:

> [The law clerks] are to take orders from and be subject to persuasion or pressure from no one save [Chief Justice Warren]. Be sensitive from other clerks to influence him. OK to discuss matters freely with other clerks, but distinguish that from propagandizing by them or us. Improper to correspond with another Justice. OK to "drop in" on their request but use great care on such visits. Law clerk should feel responsible for good name of his justice both at present and for all time. Don't discuss Warren's views on unpublished matters with other clerks. If we have ideas for court or other justices route them thru Warren.

Id. at 150.

52. CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES (1989) (on file with author).

53. *Id*.

> confidential one. A law clerk should abstain from public comment about a pending or impeding proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain.[54]

Canon Three further discusses confidentiality in regards to the press: "The clerks should take care not to express to the press an opinion about the validity of a claim or issue before the Court or transmit any information not available to the public generally, particularly about the outcome of a case or the positions of particular Justices."[55] The relevance of the *Code of Conduct* to the leaks surrounding the Obamacare case is clear—even if a Justice authorized his clerk to leak information, the law clerk would be in violation of the *Code of Conduct* because the duty of confidentiality is owed to both the individual Justice and the Court.

The *Code of Conduct* is intended to bind the law clerk both during and after their time at the Court. A violation of its provisions during their employment can result in being terminated, but the punishment for former clerks who violate its provisions is less clear.[56] Despite the fact that the *Code of Conduct* represents a code of ethical duties for public servants, the Supreme Court has consistently refused to make copies of the *Code of Conduct* available to the general public.[57]

The question of their law clerks' education and training also became more relevant as their job duties increased.[58] While the Justices had no qualms about hiring law clerks from local law schools—such as the old National University Law School and George Washington—when the clerks were doing stenography and filing, the new work assignments meant that the Justices started turning to an elite handful of top American law schools—primarily Harvard, Yale, Stanford, University of Chicago, and

54. *Id*. at Canon 3(C).
55. *Id*. at Canon 3(E).
56. *Id.* Canon 6.
57. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 204.
58. *Id*. at 143.

Columbia—for their law clerks.[59] These hiring patterns have remained consistent over the last fifty years.[60]

The Justices' myopic focus on elite law schools, combined with the lack of minorities amongst the law clerk corps, have sparked protests and calls for the Justices to promote academic and ethnic diversity in selecting clerks.[61] The Justices' responses to these demands have been, in a word, contradictory. While the Justices assert that they do not rely too heavily on their law clerks, they simultaneously claim that they cannot take a chance on hiring law clerks from less prestigious law schools.[62] This blunt message was best captured in comments that Justice Antonin Scalia made to an audience of American University law students in May of 2009.[63] In discussing his selection practices, Scalia candidly remarked:

> By and large . . . I'm going to be picking from the law schools that basically are the hardest to get into. They admit the best and the brightest, and they may not teach very well, but you can't make a sow's ear out of a silk purse. If they come in the best and the brightest, they're probably going to leave the best and the brightest, O.K.?[64]

The implication is that it is equally impossible to make a silk purse out of a sow's ear, and that the classrooms of second-tier law schools are filled with pigs' ears. To date, the increase in the hiring of minority law clerks or clerks from "lesser" academic institutions has been modest at best.[65]

59. *Id*. at 28 Table 2.4.

60. *See generally id*. at 69–76.

61. *See* Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How a Diverse Body of Clerks Can Aid the High Court as an Institution*, 23 HARV. BLACKLETTER J. 23 (2007). *See generally* Adam Liptak, *On the Bench and Off, the Eminently Quotable Justice Scalia*, N.Y. TIMES, May 12, 2009, at A13, *available at* http://www.nytimes.com/2009/05/12/us/12bar.html [hereinafter *On the Bench and Off*]; Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: 'The Cert. Pool,'* N.Y. TIMES, Sept. 25, 2008, at A21, *available at* http://www.nytimes.com/2008/09/26/washington/26memo.html [hereinafter *A Second Justice*].

62. *On the Bench and Off*, *supra* note 61.

63. *See id*.

64. *Id*.

65. *See* Todd Ruger, *Statistics Show No Progress in Federal Court Law*

III. THE MODERN SUPREME COURT LAW CLERK

Today, each Associate Justice of the Supreme Court is authorized to hire four law clerks (the chief justice is permitted to employ five clerks, plus administrative assistants).[66] The retired Justices are each allowed to hire a single law clerk, who also works for an active Justice if the clerk's workload permits.[67] The "modern" Supreme Court law clerk is fully involved in all aspects of the Supreme Court's work. During the final years of the Rehnquist Court, all the Justices—save Justice John Paul Stevens—were members of the cert. pool (certiorari petitions are equally divided between the eight chambers, each chamber prepares certiorari memoranda regarding said petitions, and the memoranda are then circulated to the other chambers).[68] While the cert. pool was originally designed to reduce the workload of the law clerks, some have argued that the pool has had the unintended effect of increasing law clerk influence over the certiorari process—especially if a single clerk is reviewing the certiorari petition for the entire Court.[69]

Clerk Diversity, NAT'L L.J. (May 2, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551008298&Statistics_show_no_progress_in_federal_court_law_clerk_diversity. As for academic diversity, the popular legal blog, Above the Law, has a partial list of the October Term 2012 law clerks. David Lat, *Supreme Court Clerk Hiring Watch: OT 2012 and OT 2013*, ABOVE THE LAW (Jan. 25, 2012, 7:02 PM), http://abovethelaw.com/2012/01/supreme-court-clerk-hiring-watch-ot-2012-and-ot-2013/. The clerks have been selected from a very familiar list of law schools, including: Yale (7), Harvard (5), Stanford (5), New York University (3), University of Chicago (2), Columbia (2), Duke (2), University of Virginia (2), George Washington University (2), Georgetown (1), and Northwestern (1). *Id*.

66. *See generally* 28 U.S.C. § 675 (2006) (authorizing Supreme Court Justices to appoint law clerks and secretaries).

67. *Id*.

68. The cert. pool was created in the early 1970s when Justice Lewis F. Powell, Jr. suggested that scarce judicial resources might be better used if the Justices "pooled" the certiorari petitions amongst the chambers and had the law clerks from each chamber review only a portion of the certiorari petitions. *See* WARD & WIEDEN, *supra* note 48, at 117–28. Under this system, the law clerks from a specific chamber review their proportionate share of certiorari petitions, draft memoranda, and then circulate the memoranda to all participating chambers. *See id*.

69. David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 947 (2007).

The majority of the Rehnquist Court Justices also had their law clerks prepare bench memoranda prior to oral argument, memoranda which summarized the lower court record, the salient legal arguments of the parties and the amici curiae (if any), and offered both the clerks' recommended disposition as well as questions for the Justices to ask.[70] As for judicial opinions, Justice Stevens was the only Rehnquist Court Justice to still prepare the first drafts of opinions.[71] When asked why he wrote the first draft, Stevens replied, "I'm the one hired to do the job."[72] He explained the opinion writing process allows him to continue to learn about the factual and legal issues in the case.[73] Justice Stevens added that there is also a more practical reason why he prepares the first draft—he typically produces a draft that is shorter and cleaner (less citations and flowery verbiage) than the ones prepared by his law clerks.[74]

Historically, there has been less concern about law clerks wielding influence over how the Justices vote on the merits of the case. Simply put, it is difficult to conceive of a young, freshly-minted lawyer being able to hold sway over the firmly-held doctrinal and ideological preferences of a veteran jurist. A recent study, however, has found evidence that law clerk policy preferences may have a separate and independent impact on how Justices decide to vote.[75] While the study offers only a rudimentary model of judicial decision-making, it clearly demonstrates a strong correlation between law clerk ideology and case outcomes, which is suggestive, but not conclusive, of law clerk influence.[76]

While I have not had the opportunity to survey the newest members of the Roberts Court, it is likely that Justices Samuel Alito, Sonia Sotomayor, and Elena Kagan have also followed the "new" institutional norm of having law clerks prepare opinion

70. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 190–205.

71. *Id*. at 195.

72. *Id*.

73. *Id*.

74. *Id*.

75. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008).

76. *Id*.

drafts. As for certiorari petitions, all Justices—save Justice Alito—are members of the cert. pool.[77] Justice Alito has not publicly stated why he decided not to join the pool.[78]

IV. CONCLUSION

At the end of the October 2011 Term, the Justices fled from the heat of Washington for their traditional whirl of overseas trips, legal seminars at exotic locations, and visits to vacation homes.[79] It is difficult to predict the toll that the leaks in the Obamacare case will have on judicial collegiality come October Term 2012, but it is clear that the leaks have thrust the Supreme Court law clerk back into the spotlight. While once the law clerks remained hidden in the shadows of the Marble Palace, today the law clerks are understood to be important institutional actors.[80] More than ever, legitimate questions remain unanswered regarding how Supreme Court law clerks are selected and utilized. While members of the executive and legislative branches openly discuss the roles their young staffers play in the policy-making process, the Supreme Court still promotes the fiction, once articulated by Supreme Court Justice Louis D. Brandeis, that "[t]he reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work."[81] The nine Justices of the modern Supreme Court do not do their work alone, and it is time that the Justices answer some fundamental questions about the "junior justices" in a complete and transparent fashion. The public release of the *Code of Conduct* might be a good start. Not only would the release be a symbolic gesture toward transparency, but it would help educate the press and the public on the institutional constraints which are designed to limit law

77. *A Second Justice*, *supra* note 61.

78. *See id*.

79. Associated Press, *Supreme Court Justices' Summer Plans Point to Big Decisions by Late June*, FOX NEWS (May 27, 2012), http://www.foxnews.com/politics/2012/05/27/supreme-court-justices-summer-plans-point-to-big-decisions-by-late-june/.

80. COURIERS OF THE MARBLE PALACE, *supra* note 19, at 143.

81. CHARLES E. WYZANSKI, JR., WHEREAS—A JUDGE'S PREMISES: ESSAYS IN JUDGMENT, ETHICS, AND THE LAW 61 (1965).

clerk influence and misadventures; thereby helping to restore confidence in "the least dangerous branch."