

40 Sw. L. Rev. 473

Southwestern Law Review

2011

Articles

THE RHETORICAL POWER OF LAW CLERKS

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I. Introduction

“Many believe confession is good for the soul,”¹ so I confess: Bless me, Readers,² for I have sinned; the title of this article is a swerve.³ While a plain-meaning construction of my title might suggest that my topic is the rhetorical power wielded by law clerks when they draft opinions for their judges,⁴ my actual topic is not law clerks as masters of rhetoric but, rather, law clerks--or the idea of law clerks--as rhetorical devices employed by federal judges in their opinions. That is, I examine opinions in which judges have used their understanding of the role of the law clerk to make a point about something else, outside chambers and relevant to the case at hand.

***474** The purpose of this article is two-fold. My first goal is to showcase snappy judicial writing.⁵ Commentators too numerous to enumerate have criticized judicial writing for being dry, lifeless, and formulaic.⁶ While some attempts to counter that trend have drawn criticisms of their own,⁷ there is something to be said for a well-turned phrase, an apt metaphor, or a pithy example. The law-clerk references I highlight in this article certainly fall at least somewhat outside the rather small box that holds most judicial writing. My second goal is to turn the rhetoric around, using law-clerk references not to shed light on the world outside chambers--as the writing judge surely intended--but rather, to piece together a composite view of the institution of law clerking. There are, of course, plenty of simple, direct, declarative statements about what law clerks do, and what they should not do, but my approach has the advantage of burrowing just a little bit deeper, underneath the hornbook descriptions and platitudes and into the realm of what judges really think about law clerks and the role law clerks play in the judicial system.

In Part II, I describe opinions in which judges have analogized to the process through which they hire their law clerks. Part III is devoted to opinions in which judges have relied on descriptions of law-clerk duties to explain how something or another is supposed to work in the world inhabited by the parties before them. In Part IV, I discuss opinions in which judges have analogized to the termination of law-clerk employment. Finally, Part V describes opinions that deploy colorful law-clerk analogies that do not depend on any unique aspect of clerkship.

***475 II. Getting the Job**

Clerkships are difficult to get. Many apply;⁸ far fewer are hired.⁹ The scarcity of law-clerk positions helped Circuit Judge Leonard Moore explain why the district court correctly denied the plaintiff's request for a preliminary injunction in an employment-discrimination case:

As to “irreparable harm,” Dr. Faro is in no way different from hundreds of others who find that they have to make adjustments in life when the opening desired by them does not open. This situation is not confined to medical schools. Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the other nineteen were almost equally

well qualified. Fifty junior bank officers all aspire to become a vice-president--one is selected. And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many equally well qualified.¹⁰

Clerkships are not only scarce; they are so desirable that they pretty much sell themselves, a quality that Judge Janet Hall referred to in an opinion in a case in which the United States Department of Defense argued that on-campus recruiting at Yale Law School was essential to its success in raising an army:

It bears noting that approximately 50% of Yale law school students obtain employment as judicial law clerks, a recruiting process that does not use the CDO [Career Development Office] program or any form of on-campus recruiting. This would appear to undercut DoD's assertion that access to the CDO program is necessary to law student recruiting.¹¹

So far, then, the case law teaches us that clerkships are highly desirable and sought after by many qualified applicants. I'm sure glad we've got that out in the open.

How, then, do judges sort through all those qualified applicants? In a case in which a social worker licensed to practice as a "DUI evaluator" was *476 excluded from the list of DUI evaluators maintained by the Presiding Judge of an Illinois state court,¹² Judge Frank Easterbrook explained, in an opinion affirming the trial court's dismissal of the evaluator's constitutional claims under 42 U.S.C. § 1983, that "[w]hen appointing lawyers to represent indigent defendants (or for that matter when hiring law clerks) judges consider many factors that cannot be reduced to a neat, unidimensional index of merit."¹³ Those factors, indeed, can be subjective, as Judge Earl Veron pointed out in an opinion in a Title VII action brought by a number of school employees: In making this latter determination [i.e., whether someone applying to be a school principal would have the confidence of the public] a school board can find no guarantees in the fact that an applicant has the degrees and certificates required for the job. When a professional position is being filled, many if not all of the applicants will possess the required degrees or certificates. Such things do not tell an employer how well an applicant is likely to fit into a given work environment. To gain an insight on that question, an employer must evaluate an applicant on the basis of subjective factors such as the applicant's "knowledge of his subject, philosophy of life and education in general, appearance, references, leadership and aggressiveness." To school boards selecting principals, these considerations are no less important than they are to law firms or judges selecting associates and law clerks.¹⁴ Judge Fred Winner made a similar point when ruling for the defendant in another employment-discrimination case:

I and every other judge employ law clerks based upon a subjective judgment as to whether I think they will or they will not do a good job. A part of the judgment here is based upon statements made by the plaintiff as to her desire to participate in the packing phase of the assembly line work. The record has established that this is the simplest work and the most easily taught work done on the assembly line. Not surprisingly, Western Electric starts its assembly line workers on the packing job.

The plaintiff here said she wasn't very interested in doing the work of packing, that she would rather do something else and she wouldn't work at that very long. This affected the supervisor's judgment in much the same *477 way my judgment was affected when I had a law clerk tell me he didn't believe in the Vietnam war and he wouldn't work on any draft cases. I didn't hire the law clerk.¹⁵

To be hired, a potential law clerk must demonstrate a willingness to do the job.

Potential law clerks must also demonstrate the discretion necessary to serve in chambers. In an opinion affirming the trial court's determination that the U.S. Department of Defense was not liable for interference with an employment contract when it

denied security clearance to a cook employed by a private concessionaire, Judge Barrett Prettyman observed that “it is obvious that no one has an unqualified right--inherent, statutory or constitutional--to enter upon such employment as he chooses.”¹⁶ When explaining that security is a valid concern to employers, he noted: “[A] law clerk applicant may be a legal giant; he may have a most engaging personality; but, if he cannot be entrusted with judicial secrets, no judge would consider him suitable for appointment. The same principle obviously applies in all branches of the Government.”¹⁷ Finally, in a dissenting opinion in a case involving a challenge a new background-check procedure at the Jet Propulsion Laboratory, and in particular “the ‘open-ended’ inquiry into ‘any other adverse matters,’” Judge Andrew Kleinfeld wrote:

Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like. It is hard to imagine an espresso stand hiring a barista without some open-ended questions to throw light on his reliability, honesty with cash, customer service, and ability to get along with coworkers and supervisors. I doubt if a person cleaning homes for a living hires an assistant without first finding out something about the assistant. Without open-ended questions, it is hard to know what potential problems might need an explanation. Of course some answers will be irrelevant or silly. But without the open-ended questions, any employer gets stuck with people who should not have been hired, and even, occasionally, people who are dangerous.

Under the panel opinion, our federal government cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring. No revival of McCarthyism is threatened by allowing as much inquiry for hiring a Jet Propulsion Lab engineer as a barista.¹⁸

*478 I'll drink to that!

III. Doing the Job¹⁹

The lion's share of the hypothetical references to law clerks I found were instances in which judges referred to the nature of the duties performed by their law-clerk cubs to underscore points they were trying to make about the role of an actor on some other stage. Thus, most of the law-clerk references in this Part are essentially analogies in which judges have determined that the duties and obligations of law clerks are, or are not, similar to those of persons filling positions outside the friendly confines of judicial chambers. I begin with opinions in which judges have determined that the law-clerk analogy fits, and then move on to opinions in which judges have found the analogy to be a bit tight at the waist, or too long in the sleeves.

A. Law Clerk: Judge:: This Guy: That Gal

Judges have used their understanding of law clerking to describe any number of other employment relationships. This section is organized as a nest of concentric circles. I start in the center, with analogies to other courthouse denizens, and work my way outward, through the rest of the legal system, down the halls of government, and, finally, I fly all the way out into the private sector.²⁰

1. Inside the Courthouse

District Judge Robert Porter was apparently rather miffed by the manner in which discovery had been conducted in *Fino v. McCollum*.²¹ *479 Mining Co., but rather than spewing a mouthful of bile, he began his order with a twinkle in his eye and a spring in his step:

Currently pending before the Court are several motions brought in behalf of the Defendants in this action which arise out of the less than sincere efforts of counsel to this action to proceed with discovery in a reasonable manner. I have oftentimes wondered whether the liberal federal discovery rules have the capability of turning the administration of justice into “trial by ordeal,” and the facts and occurrences of

this case add support for the theory. Nevertheless, as I must, I address the merits of these discovery motions with the zeal and zest of a twenty-six year old law clerk.²²

Whether Judge Porter's "zeal and zest" survived the rigors of *Fino*, I dunno. In *In re Lewis*,²³ an employment-discrimination case, Judge Damon Kieth also analogized himself to a law clerk, and then described the environment in which he, and his law clerks, typically unleashed their zeal and zest:

The group manager did not reduce his instructions to writing, but Mr. White heard what was said, just as Mr. Machovec did. The fact that these instructions were oral rather than written hardly means that the store manager and his staff were at liberty to ignore them. Appellate judges, like law professors and law clerks, spend much of their time in a world made of paper; perhaps we sometimes need to remind ourselves that there exists a larger world where that which is real is not confined to that which is written.²⁴

But, of course, should the opus oralis ever fully supplant the opus paperis (don't bother trying to look it up), then the poor toner-stained law clerk will more than likely go the way of the dodo.²⁵ In any event, *Fino* and *Lewis* are the only two cases I found that express the following counter-intuitive but somehow satisfying proposition: Judge = Law Clerk.²⁶

***480** Moving one cloud down from the pinnacle of the judicial firmament, several judges have drawn an analogy between law clerks and magistrate judges. For example, in *Keiper v. Cupp*,²⁷ in which a petitioner for a writ of habeas corpus "contend[ed] that the district court failed to examine the state court record,"²⁸ the court of appeals disagreed, noting that "the state court record was examined initially by the United States Magistrate for the District of Oregon [who] . . . made a report to the district judge recommending a denial of appellant's petition."²⁹ According to the court of appeals, the magistrate judge's review did not run afoul of the rule barring magistrate judges from holding evidentiary hearings in habeas cases because "the Magistrate's memorandum amount[ed] to nothing more than his analysis of the state court record and the district court pleadings, all entirely in writing,"³⁰ a work product the court of appeals "likened to a law clerk's memorandum."³¹ In *Bowman v. Bordenkircher*,³² another habeas petitioner objected to a procedure by which the magistrate judge reviewed his petition and submitted a report and recommendation (denying the ***481** petition) which was filed and approved by the district judge.³³ In response, the court of appeals ruled:

(1) No judicial power was delegated to the magistrate; he was asked to do and did no more than judges' law clerks customarily do.

(2) The magistrate did not decide any substantive issue of law, but recommended to the judge how the issues should be decided, again as law clerks customarily do.

....

(4) Where, as in this case, the only material considered by the magistrate was the material submitted by petitioner, there is no more reason for the judge to submit the magistrate's recommendation to the petitioner than there would be for the judge to submit his law clerk's recommendation to the petitioner.³⁴

In a dissent in a case in which the majority ruled that it was not unconstitutional for the Federal Magistrate Act to permit magistrate judges to try civil cases, with the consent of the parties, Judge Richard Posner explained: "Nor does the magistrate judge in a section 636(c) case merely write a draft of an opinion explaining the reasons behind the district judge's decision, as the judge's law clerk might do; that would not be problematic either."³⁵ Finally, in a case involving the Speedy Trial Act, and the statute's automatic thirty-day exclusion for matters under advisement by the court, the Seventh Circuit held that the statute did not "permit an automatic exclusion of 60 days just because the judge seeks the advise of a magistrate."³⁶ In rejecting the government's argument to the contrary, Judge Frank Easterbrook stated that "[t]he argument that the magistrate's efforts simply

put the judge in the position to decide could be made equally well of the time consumed by the parties in preparing motions, or even the time consumed by the judge's law clerk in doing research.”³⁷

*482 In *In re Brooks*,³⁸ the District of Columbia Circuit was faced with deciding “whether [a] Special Master should have been recused from . . . contempt proceedings” against participants in a case he was overseeing.³⁹ In ruling that the district court erred by failing to grant a motion to recuse,⁴⁰ Judge Douglas Ginsburg noted that “if Balaran could properly serve as special master advising the district court whether to initiate contempt proceedings, then it would seem equally permissible for a judge presiding over a criminal proceeding to dispatch his law clerk to visit the scene of the crime, take fingerprints, interview witnesses, and report back to the judge about his findings.”⁴¹

The question in *In re Palmisano*⁴² was whether the Executive Committee of the U.S. District Court for the Northern District of Illinois was entitled to conduct judicial business, even though the court's clerk sat as an ex officio member of the Executive Committee.⁴³ The court of appeals held that it was:

No one foisted the Clerk on the Court; he was included at the judges' option and may be as easily removed. It is no more objectionable for judges to allow the Clerk to participate in deliberations than it is for judges to confide in and receive advice from their law clerks. Only the judges vote, and the Executive Committee therefore may exercise judicial power.⁴⁴

As Judge Walter Cummings demonstrated in *McMillan v. Svetanoff*,⁴⁵ the law-clerk analogy retains its vitality all the way down the letterhead. In that case, “[t]he question before [the court] [was] whether the act of firing a court reporter implicate[d] the judicial decisionmaking process.”⁴⁶ Rejecting the argument that the decision to fire the court reporter involved judicial discretion because “[t]he administrative act of firing [the court reporter] will . . . assist the judge in interpreting the law or exercising *483 judicial discretion in the resolution of disputes,”⁴⁷ Judge Cummings explained:

Certainly the court reporter assists the judge in his or her official capacity, but so does everyone else employed within the judge's chambers--the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor--they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions.⁴⁸

In what is perhaps the least surprising law-clerk analogy I found, Judge Edward Filippine concluded that “the position of staff attorney [in the St. Louis County Juvenile Court's legal department], especially a newer staff attorney, vis-à-vis the Juvenile Court Judge, was more akin to that of ‘just . . . a law clerk.’”⁴⁹ While some staff attorneys might bristle at being thought of as “just a law clerk,” the staff attorney in *Marafino* surely did not; it is that very employment status that allowed her to maintain a cause of action under Title VII.⁵⁰

2. Elsewhere Within the Legal System

Legal assistants of a variety of sorts have been likened to law clerks. In *Weisner v. Nardelli*,⁵¹ Judge Harold Baer ruled that an unsuccessful New York bar applicant was not denied his federal due process rights when the Appellate Division of the New York State Supreme Court declined to “provide [him] with the Appellate Division's law assistants' reports” on his application.⁵² According to Judge Baer, “[d]efendants correctly note that [providing the law assistants' reports] would be akin

to providing a litigant with bench memoranda prepared by law clerks.”⁵³ Judge Ronald Longstaff also adopted a party's law-clerk analogy when he ruled that an arbitrator's assistant is entitled to immunity from being subpoenaed by a party seeking to vacate the assistant's boss's decision and award:

***484** Neither party to this action has offered authority on an arbitrator's assistant's immunity. None has been discovered by this court. However, counsel's analogy regarding the subpoena of this court's law clerk concerning judicial decisional matters is persuasive. Assistant Wright's role in the arbitration proceedings must necessarily have been one of strictest confidence. Her position must be described as an extension of the Arbitrator. The same concerns and interests which compel this court to provide an arbitrator with limited immunity must certainly control this court's decision regarding the subpoena of an arbitrator's assistant. Therefore, unless some objective basis exists for a reasonable belief that an arbitrator has engaged in misconduct, an arbitrator's assistant is similarly immune.⁵⁴

In an opinion in which the Federal Circuit reversed a decision of the Merit Systems Protection Board denying attorneys' fees for work done by the lead attorney's associate, Judge Oscar Davis explained:

The other ground given in the initial opinion--duplication--is likewise wanting. An associate's function is usually to help his principal, to do research and “scut work,” to make suggestions and to prepare first drafts. This is not at all duplication but an aid to his principal's functioning--quite comparable to that of a law clerk to a judge.⁵⁵

Judge Ernest Torres, in an explanation of how he regarded memoranda of law submitted in support of motions, went one step beyond “Associate: Partner:: Law Clerk: Judge” and landed here: “Counsel: Judge:: Law Clerk: Judge.” From the left side of that analogy, I can plainly hear, in my mind's ear, a rather loud groan. To elicit that imaginary expression of audile angst, Judge Torres wrote: “The principal purpose of the memorandum requirement is to assist the judge in identifying the statutes and legal precedents that may be applicable in deciding the motion. In that respect, counsel's memoranda are similar to memoranda of law prepared by the judge's law clerk.”⁵⁶

Criminal practice has proven to be a rich source of law-clerk analogies. In *United States v. Dockery*,⁵⁷ the D.C. Circuit held “that it was not a denial of due process for the trial judge in sentencing to rely upon the presentence investigative report without disclosing its entire contents to appellant.”⁵⁸ In so holding, in a per curiam opinion, the court noted that “the Committee on ***485** Rules of Practice and Procedure of the Judicial Conference of the United States [was] tentatively suggesting a change in Rule 32(c) to give defendants and their counsel an expanded opportunity in more cases to be advised of a larger portion of the material set forth in the presentence investigative reports,”⁵⁹ but went on to note that “[t]hose opposed to increasing the burden of disclosure feel that the Probation Officer who makes the report is an arm of the court, much the same as is the judge's law clerk, and that judges can be relied upon to properly evaluate the information supplied.”⁶⁰ Similarly, when confronted with a criminal defendant's argument that “a probation officer cannot lawfully present a petition for revocation of supervised release directly to the Court,”⁶¹ Judge Wayne Alley pointed out that “[p]robation officers are people with whom the judges may properly confer ex parte in connection with decisions based on probation reports--the same kind of conference as might be done with an elbow law clerk, for example--which cannot be done ethically with police or with the United States Attorney.”⁶² And, in a variation on the same theme, Judge Michael Mills recently held that “[p]resentence reports [prepared by U.S. Probation Officers] are intended for the court's private consideration . . . and are thus comparable to a law clerk's memorandum to the court,”⁶³ but that “[p]resentence letters [to the court], by contrast, are written by members of the general public, rather than the court's staff . . . [and] are more comparable to amicus briefs, and . . . should not . . . enjoy the same level of confidentiality as presentence reports.”⁶⁴

*486 The issue in *Buckley v. Fitzsimmons*⁶⁵ was whether a prosecutor was entitled to immunity from damages for conduct during preparation for trial.⁶⁶ In a per curiam opinion, the Seventh Circuit held that in such circumstances, prosecutors are entitled to absolute immunity,⁶⁷ explaining, along the way:

It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to unprepared events at trial! Allowing evasion through litigation about preparation for trial would make no more sense than undermining judicial immunity by entertaining a suit against the law clerk who participated in the preparation of the opinion.⁶⁸

In another criminal case, Judge Robert McNichols observed that “[i]t could hardly be argued that sentencing discretion has now shifted from the judiciary to the executive branch.”⁶⁹ He then shifted into full lamentation mode:

Suffice it to say that by deciding what to charge, how to charge, and what aggravating factors to present or withhold, the United States Attorney knows from the day of drafting the indictment what sentence he wishes to impose and what sentence will in fact be imposed. That presents policy concerns.

Regardless of which political party holds sway, the process for selecting federal judges is much the same. Nominees are hung out like fresh meat to be poked, prodded and examined in minute detail as to every aspect of their personal and professional lives. The first step is to gain the confidence of a nominating senator who will conduct such investigation as he deems appropriate. Then the FBI, Department of Justice, the American Bar Association, and the Judiciary Committee get into the act. Only after surviving scrutiny that far will the Senate consider granting its stamp of approval. One need only harken back to President Nixon's well publicized failures to appreciate that the selection process is rigorous and demanding. Judges may (and we know from recent impeachment proceedings do) occasionally ascend the bench without the basic qualifications to serve, but when the system fails in that manner, it is aberrational in the extreme.

*487 Compare that with the process whereby one becomes an Assistant United States Attorney:

United States Attorney, Eastern District of Washington, is anticipating three-four openings for the position of Assistant United States Attorney in the Spokane and Yakima Offices. Applicants should have a minimum of two to five years' experience in criminal and/or civil litigation. Successful applicants will be required to undergo extensive FBI background check. Interested parties should send letter, law school transcript, resume and writing sample to: Screening Committee, Office of the United States Attorney, P.O. Box 1494, Spokane, WA 99210.

Spokane Bar Association, Calendar Call, December 11, 1989.

Congress has thus shifted discretion from persons who have demonstrated essential qualifications to the satisfaction of their peers, various investigatory agencies, and the United States Senate to persons who may be barely out of law school with scant life experience and whose common sense may be an unproven asset.

One might say “Whoa there, your honor, a United States Attorney undergoes much the same stringent scrutiny as do judges. Can't we trust that he will delegate his authority only to responsible individuals?” The short answer is “no.” Such delegation is no different in kind or effect than would be the case if judges delegated sentencing discretion to their law clerks.

There is one difference. In the judicial arena every decision is subject to review. Every decision rendered must be grounded on articulated facts and legal theories stated on the open record. An error in either regard is subject to appeal and reversal. When the decision is made by the prosecutor, there is no public proceeding, there are no enunciated facts, and legal theories become irrelevant. Whatever the decision, it is absolutely unreviewable. No matter how wrong, it cannot be corrected.⁷⁰

Judge McNichols did soften things at least a bit by dangling this footnote under his description of the qualifications of AUSAs: “So that no one misconstrues the point, this is an abstraction. The AUSA assigned to this matter has some years of experience under his belt, both in his current position, and previously as an assistant public defender.”⁷¹

In the bankruptcy context, Judge Constance Motley had quite a bit to say, none of it good, about a committee of receivers that allowed its legal advisors to act as litigants against a party with a claim before it:

***488** The Committee, in effect, argues that it would be permissible under United States law for a judge to permit her law clerk to render “impartial” advice to the judge and draft judicial opinions in a proceeding before the court, while at the same time acting as an adversary against a party in that proceeding concerning the very same issues of fact and law. The Committee simply is wrong. Such conduct is not countenanced in the United States and this court will not countenance such conduct elsewhere.

No judge of this Court would condone a proceeding where the judge's law clerk at once assists the judge in deciding a case and represents one of the parties to that case. Yet this is precisely what has been occurring in Dubai. The net effect of this charade is that Refco is forced to litigate its claim before the Committee, who finally determines the claim, while litigating against the Committee in this proceeding and in Dubai through the Committee's advisors who have actively taken positions adverse to Refco. The Committee miserably fails to avoid even the appearance of impropriety. Indeed, the cards are so stacked against Refco that Refco cannot be afforded a fair hearing.⁷²

In another area of the law with specialized tribunals, the Seventh Circuit rejected an argument, made by an alien seeking asylum, that the Board of Immigration Appeals violated his due process rights by summarily affirming the decision of an immigration judge.⁷³ In the words of Judge Easterbrook:

The premise of Guentchev's argument is that, by affirming on the opinion of the immigration judge, the Board has concealed from the reviewing court what the Board thinks of the case--if, indeed, the Board has thought about the case. Perhaps some summary dispositions obscure ***489** the Board's reasons, or hide the lack of reasons. What the Board's order says, however, is that the Board agrees with the immigration judge's reasons, and we have no greater reason to doubt that statement than we have to doubt that the explanation in an elaborate opinion is an honest recapitulation of the reasons for decision. To adopt someone else's reasoned explanation is to give reasons. The risk that adoption hides intellectual laziness, or intellectual dishonesty, is no greater than the risk that a judicial opinion drafted by a law clerk befogs the judge's thoughts. District judges regularly adopt the reports of magistrates; some appellate courts adopt the work of commissioners. Writing imposes mental discipline, but we lack any principled ground to declare that members of the Board must use words different from those the immigration judge selected. It is therefore no surprise that this court has repeatedly held that the Board fulfils its duty by summarily affirming an immigration judge's opinion.⁷⁴

Finally, in one of the more unusual law-clerk analogies I found, Judge William Young likened a court-appointed expert technical advisor in a patent case to a law clerk:

The efficacy of this process [i.e., appointing and meeting with a technical advisor] can hardly be overstated. I learned more technical data in a 45-minute discussion with Professor Orr than I would have learned in two days of formal testimony. This is not to denigrate cross examination. There is no more fervent exponent of vigorous cross examination than I. But fair cross examination presumes an understanding of the data examined. In recondite fields of scientific endeavor, however, my understanding is deficient and I need help--much like the help one gets from a law clerk in a recondite field of law. I cannot recommend

this procedure too strongly. As noted in the text, however, I have throughout drawn my own independent conclusions.⁷⁵

Speaking as a law clerk, I cannot help but smile at the gold standard Judge Young used to assay the value of his confab with Professor Orr.⁷⁶

***490** 3. Up and Down the Halls of Government

Even beyond the bounds of the legal system, the institution of clerkship has proven its mettle as a strong and shiny metaphor for describing assistance rendered in a variety of governmental settings.

Many government agencies include an adjudicative function, and in those contexts, analogies to law clerks are hardly unexpected. For example, in an opinion and order denying a discovery request filed by a claimant appealing a social security disability determination, and who sought documents created by the Appeals Counsel and its staff,⁷⁷ Judge Terrence Kemp explained:

I am convinced that production of these documents would be injurious to the consultative process. Staff members' recommendations, like those of law clerks in the judicial setting, are not always accepted. They are not always correct. [Author's note: Say what?] Sometimes they may not reflect an accurate understanding of the proceedings below or may reflect an incorrect view of the law. In other cases, they may be accurate but may contain recommendations or conclusions which, for a variety of reasons, are not accepted by the Appeals Council. Nevertheless, it is valuable for the Appeals Council to have considered those recommendations, and valuable for the persons making the recommendations to be free to express a viewpoint without fear of public disclosure or fear that, in the hands of the claimant, the viewpoint will be used as a club against the final agency decision in later proceedings. That threat would be enough to temper the content of staff analyses and recommendations, and cut against the policy underlying the deliberative process privilege. Consequently, it is my conclusion the documents are not subject to discovery in this case.⁷⁸

Judge Malcolm Wilkey wrote to similar effect in *Montrose Chemical Corp. v. Train*,⁷⁹ an appeal from a district-court decision granting a request under the Freedom of Information Act for summaries of evidence developed at a hearing conducted by the Environmental Protection Agency on the pesticide DDT.⁸⁰ In an opinion reversing the district court, Judge Wilkey explained:

Ruckelshaus' use of his assistants to winnow down the evidence was similar in many ways to a judge's use of his law clerk to sift through the report of a special master or other lengthy materials in the record. In both situations, when faced with a voluminous record, the decision-maker may wisely utilize his assistants to help him determine what materials will be significant in reaching a proper decision.

***491** To probe the summaries of record evidence would be the same as probing the decision-making process itself.⁸¹ While Judge's Wilkey's law-clerk reference in *Montrose Chemical* was at least his third use of the metaphor, it appears to be the first chance he got to use it in a majority opinion.⁸²

In *Halle v. United States*,⁸³ the appellant was a former member of the United States Army who had "sued the . . . Army Board for Correction of Military Records (Board) in federal district court, seeking injunctive and declaratory relief requiring the Board

to correct his military records.”⁸⁴ On appeal, Halle argued that the Board violated his rights by improperly relying on the advice of a “case examiner” when deliberating on his application.⁸⁵ Judge Stephen Anderson, writing for a unanimous panel, disagreed: “[A] case examiner is a staff member of the Board who assists the Board in its adjudicative functions, much like a law clerk or staff attorney assists a judge. Such staff examiners clearly are permitted to assist the Board in its consideration of the application.”⁸⁶ In a court challenge to a decision of the New York Public Employment Relations Board, where the plaintiffs had sought the disqualification of the hearing officer because he had previously practiced law with some of the attorneys who prosecuted the case against them before the PLRB, Judge Neal McCurn observed: “[A] judge's law clerk is ‘obviously privy to his judge's thoughts in a way the parties cannot be.’ The same may well be said about an administrative adjudicator's legal advisor.”⁸⁷ Finally, in *Bettencourt v. Board of *492 Registration in Medicine*,⁸⁸ the First Circuit held that staff members working for the Massachusetts Board of Registration in Medicine enjoyed absolute liability from liability for damages.⁸⁹ As Judge Levin Campbell wrote: “just as a law clerk is entitled to absolute immunity from damages actions based on his participation in the decision of a particular case . . . defendant Hyams should receive absolute immunity for his actions as legal adviser in plaintiff's case before the Board.”⁹⁰

Even when describing governmental settings that are not so adjudicative, judges have found the law-clerk analogy to be useful. For example, in an opinion remanding to the district court a case in which citizens had sued the director of the federal Office of Science and Technology to obtain a document under the Freedom of Information Act,⁹¹ the D.C. Circuit provided the following guidance to the district court, in the event it encountered a question of constitutional privilege:

No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility.⁹²

In *Nixon v. Sirica*, the D.C. Circuit's per curiam opinion points out that presidential privilege, which is “intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to that *493 contained in the fifth exemption to the Freedom of Information Act.”⁹³ In a different context, in support of the proposition that “the high reputability and effective functioning of the SEC . . . would be significantly compromised by arrangements whereby an individual could obtain information about its impending action from one of its employees and profit from having such knowledge before this became available to the public generally,”⁹⁴ Judge Henry Friendly explained:

In thus noting the peculiar irony of the use of inside information of impending SEC action, we do not mean at all to limit our holding to that agency. Similar considerations would apply in many other instances that readily come to mind. Arrangements to obtain advance information with respect to rate decisions of the ICC, FPC, FCC, and CAB, of merger decisions of the ICC, of the issuance of television licenses by the FCC or airline certificates by the CAB, or of the approval or disapproval of foods or drugs by the FDA, are only a few examples. An arrangement with the secretary or law clerk of a federal judge to secure advance information with respect to a decision having implications for the stock market would be another.⁹⁵

In a case in which the Washington Legal Foundation sued unsuccessfully to gain access to the “internal documents and memoranda”⁹⁶ developed by the Advisory Working Group on Environmental Sanctions, established by the federal Sentencing Commission, the district court, which was affirmed by the court of appeals, explained that “if these type [sic] of deliberative

memorials were subject to the common law right [of access], then arguably jury deliberations, private conferences of judges, law clerk notes, and rough drafts of opinions would likewise be subject to the rule.”⁹⁷

In *Prewett v. Alabama Department of Veterans Affairs*,⁹⁸ Judge David Proctor launched into a rather extended discussion of the roles and statuses of his law clerks in his order on a claim brought under the Equal Pay Act in which female County Veterans' Affairs Assistants (CVAAs) asserted that they were entitled to the same pay as male Veteran Service Officers *494 (VSOs).⁹⁹

In his discussion of the “equal skill” prong “of the tripartite test of skill, effort, and responsibility,”¹⁰⁰ Judge Proctor wrote: The court has struggled in vain for months to find the perfect analogy that can be likened to the facts of this case. Perhaps the unique nature of a comparator position created by state statute in the public sector--which is like forcing a square peg into the round hole of a federal statute originally drafted to remedy pay differentials in private industry--is to blame for the lack of kindred fact patterns. In any event, the court finds that the characteristics of the CVAA and VSO positions are not unlike the circumstances of the two law clerks who were appointed to work for the undersigned. Both law clerks are paid by the Administrative Office of the United States Courts. Both expend substantially similar effort in attending to their day-to-day job duties because each is responsible for managing approximately half of the undersigned's civil cases. Like the veteran cases handled by CVAAs and VSOs in the county offices, cases are not routed to one law clerk or the other based upon experience or education or any other qualification--they are merely assigned randomly based upon whether the terminal digit of the civil action number is even or odd. To any outsider looking in, the job content of the law clerks' primary duties would appear virtually identical.

Nonetheless, despite the appearance of similarity, each law clerk has a different appointment in the federal system based upon the job requirements for those positions. One of the law clerks is a male who recently graduated from law school with no prior work experience. Because he lacks post-graduate experience, no matter what other credentials or skills he brings to the table, he is only eligible for the “JSP-11” level appointment--which then corresponds with a certain salary range. See <https://lawclerks.jdc.ao.dcn/employinfo.htm>. On the other hand, the second law clerk is a female who has two years of post-graduate work experience which qualifies her for a “JSP-13” level governmental appointment and entitles her to a much higher pay scale. The reasoning behind the higher appointment level available to her is obvious--although she may not use the experience gleaned from her post-graduate work experience in daily practice, it is available for her (and the undersigned) to draw upon when a matter requires it.

Just like the Plaintiffs, who may perform the same day-to-day duties as a VSO but are not statutorily eligible to be paid as a VSO because they are not veterans, the law clerk who is a recent graduate lacks the post-graduate work experience that would qualify him for a different federal appointment and higher pay scale. In both my chambers and at the Alabama VA, the skill required for the higher paid position applies to all *495 persons who hold that job regardless of gender and thus is the very reason why the positions and pay of those two employees simply cannot be compared at all.¹⁰¹

In a related context, in a suit brought by veterans to recover benefits for exposure to radiation, Judge Gladys Kessler granted absolute immunity to various high-level officials in the United States Department of Veterans Affairs, noting that “the function of the VA Defendants is closely analogous to that of extremely high-level ‘law-clerks’ to the Under Secretary for Benefits.”¹⁰² Judge Kessler was not fully committed to the metaphor, however, as she equivocated a bit in the following footnote: “The Court means no disrespect by use of this term. The issue is ‘function,’ not level or quality of experience or expertise.”¹⁰³ As a law clerk myself, I take no offense at Judge Kessler's law-clerk reference, but I suspect that it's not my end of the analogy she was worried about.

4. Out in the Private Sector

The law-clerk analogy even has value, it seems, to judges attempting to describe how things work in the private sector. For example, when rejecting a claim that a prospective employee was harmed on the day a prospective employer decided not to hire him, rather than on the day his conditional offer of employment was withdrawn, Judge Allen Schwartz explained:

Holding that an employee may suffer an adverse action as a result of an internal decision by the employer is akin to finding that a party's summary judgment motion is denied before the Opinion is composed and issued, following discussions between the judge and his law clerk. The absurdity of such result is evident.¹⁰⁴

In *National Hockey League Players' Ass'n v. Bettman*,¹⁰⁵ Magistrate Judge Michael Dolinger turned to a law-clerk analogy to explain why NHL President Gary Bettman did not demonstrate partiality or engage in misconduct on the basis of a telephone call made by Edmonton Oilers general manager Glen Sather to NHL General Counsel Jeffrey Pash:

Sather initiated the call, Pash did not respond to his comments, and Sather was required to place his opinions in writing. This sequence of events is *496 familiar even to judicial officers, whose law clerks periodically receive phone calls of a similar nature from either pro se parties or counsel and simply tell their interlocutor to place his or her concerns in writing, with a copy to the adverse party. Such an event does not require recusal by the judge and plainly should not have such an effect on an arbitrator, who, as noted, acts under less stringent standards.¹⁰⁶

Judges have also used the law-clerk analogy to explain: the relationship between National Association of Securities Dealers staff members (law clerks) and NASD District Business Conduct Committees (judges),¹⁰⁷ the work of non-physicians who performed preliminary screening of cases presented to a hospital review board made up of physicians,¹⁰⁸ and the relationship between job duties and job titles.¹⁰⁹

B. Law Clerks # Those Folks

While judges have employed any number of law-clerk analogies, there are situation in which the analogy just does not apply. Recall those pesky little “but see” citations, hooked like cabooses to footnotes 31, 59, and 72. This section is devoted to opinions in which judges have determined, sometimes in response to litigant suggestions, that some person really is not like a law clerk at all.

In *United States v. Noriega*,¹¹⁰ a number of news organizations sought “immediate access to transcripts of the audiotapes of telephone conversations of Defendant Manuel Noriega made by the federal government and obtained by Cable News Network (‘CNN’).”¹¹¹ “The transcripts were made by the the court from audiotapes produced by CNN *497 in compliance with a court order.”¹¹² CNN objected to the release of the transcripts to other news organizations, but Judge William Hoeveler was not impressed with at least one part CNN's argument:

CNN's argument that the transcripts are “judicial work product” rather than court records is unpersuasive. In likening the transcripts to a law clerk's bench memo or a judge's notes, to which the press would have no right of access, CNN mistakenly characterizes the transcripts as somehow the product of judicial thought processes. To the contrary, the contents of the transcripts are wholly devoid of judicial thought or input. They are, unmistakably, exhibits. And, as such, they are no more a product of judicial thought than any other deposition, affidavit, or transcript received for purposes of fact-finding in a legal proceeding.¹¹³

Judge Allen Pepper was similarly unimpressed by a law-clerk analogy proffered in support of a motion filed under 28 U.S.C. § 2255, in which a criminal defendant challenged the legality of the seizure of evidence against him by his estranged wife:

Jimmy Doug Shelton argues that once Cheryl Shelton became an agent for the government, she could no longer do anything that a government agent could not do, and that the assumption of the risk argument therefore does not apply:

Under the holdings of *Jenkins* and *Shelton*, anyone who trusts a third party--be that third party an estranged spouse, an employee, a housekeeper, a nanny, or a law clerk, and allows that person access to one's house or office--"assumes the risk" that this person will be recruited by the Government and thereafter used as an agent to conduct warrantless searches and seizures of one's property.

Movant's Supplemental and Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence, p. 11.

First, other than "estranged spouse," the third parties used as examples in this parallel do not even approximate the level of intimacy of the marital and criminal relationship between Jimmy Doug Shelton and Cheryl Shelton. Employees, housekeepers, nannies, and law clerks (the strangest example) would not be closely bound to Jimmy Doug Shelton--or to his home. As such, the comparison between these peripherally related third parties and a husband and wife is not meaningful.¹¹⁴

*498 And, in *Mumford v. Zieba*,¹¹⁵ when reversing the trial court and holding that a domestic relations court judge who had been sued for his politically motivated decision not to reappoint the plaintiff as chief referee of the Domestic Relations Court was entitled to qualified immunity, the court of appeals reported the trial court's determination "that the position of referee did not enjoy the policymaking or confidential status of a judge's bailiff, law clerk or private secretary."¹¹⁶

In *Brewer v. Aiken*,¹¹⁷ a capital case in which the defendant was sentenced to death in accordance with the jury's recommendation, the district judge "entered an order granting [a] writ of habeas corpus unless the State of Indiana provided Brewer with a new sentencing hearing in 90 days."¹¹⁸ In its opinion affirming the district court, the court of appeals rejected the state's argument "that [trial] counsel's failure to present . . . psychological evidence to the jury was immaterial, because before imposing sentence the judge obtained the information that Brewer says his lawyer should have furnished."¹¹⁹ In the words of Judge Coffey: "The state would have a good argument, if the judge made an independent decision--if the recommendation of the jury were no different from the recommendation of the judge's law clerk. Indiana's brief depicts it so."¹²⁰ The respondent in *Brewer* is not the only entity to earn the enmity of a judge for treating a jury like a law clerk. In his concurrence in *Van Houdnos v. Evans*,¹²¹ a sex-discrimination case brought under 42 U.S.C. § 1983, Judge William Campbell lamented the district court's decision to grant the defendant's motion for judgment notwithstanding the verdict, observing "that juries in § 1983 cases are becoming like law clerks, handing their recommendations to the judge who then does as he sees fit."¹²²

*499 IV. Losing the Job

In Part II, I described opinions in which judges analogized to the law-clerk hiring process. In this Part, I move from the entrance ramp to the exit ramp and focus on opinions in which judges have analogized to the law-clerk firing process.¹²³

Several judges have used the nature of the judicial relationship with law clerks to explain the concept of at-will employment. Judge Franklin Van Antwerpen did exactly that in rejecting "the argument that a defendant cannot intentionally interfere with a plaintiff's at-will employment contract."¹²⁴ As the judge explained:

This court currently employs two at-will law clerks. For the sake of argument, let's call them Adam and Jason. Now, assume Jason hated Adam and wanted to get him fired. Assume that Jason maliciously tells me that Adam has done no work since he was hired--all of the memos supposedly authored by Adam were

really written by Jason. Now, of course all of Jason's statements about Adam are horrible lies. But, assume that I believe Jason and fire Adam on the spot. I can fire Adam for any reason, or no reason, whatsoever. Still, just because Adam is an at-will employee does not mean that Jason is privileged to interfere with Adam's employment.¹²⁵

In *Braswell v. Shoreline Fire Department*,¹²⁶ Judge Ricardo Martinez was confronted with the argument “that an individual, by virtue of being licensed, has a property interest in a specific employment position or with a specific entity.”¹²⁷ He rejected that argument in the following way:

No case so holds. In fact, if such a proposition were true, government agencies could not fire attorneys, hospitals or clinics could not terminate at-will doctors or nurses, and federal judges could not fire at-will law *500 clerks without due process so long as they are bar certified. This of course is not the law.¹²⁸

So, like any other at-will employee, we law clerks can be dismissed for any reason, so long as it is not a bad reason, or for no reason at all.

As I noted in a previous article, one reason for terminating the employment of a law clerk is the death of his or her judge,¹²⁹ which Judge Sarah Barker recognized in a case involving Deputy Constable Flowers, who had been paid out of the personal funds of Constable Seaths and then sued for back pay when he was terminated by Constable Seaths' elected successor, Constable Duncan:

Despite the dearth of case law on this specific question, we believe common sense compels a conclusion that a person who, despite his performance of the functions of a public employee, is paid from personal funds rather than through officially sanctioned channels, is a personal employee and not a “public employee” . Imagine, for instance, a situation in which a judge needs some extra help and asks her best friend or neighbor to act as an extra law clerk or secretary. This friend or neighbor performs the functions of the job, but is paid from the judge's personal bank account and not by the government. We cannot imagine that, if the judge were to leave the bench for some reason, her successor would inherit the outgoing judge's friend as a court employee. In other words, we consider [Deputy Constable] Flowers, like the hypothetical judge's friend, to be a personal employee of Constable Seaths, not a public employee of the Township.¹³⁰

While I don't imagine there are too many law clerks paid out of their judges' personal funds,¹³¹ Flowers is too fragrant a blossom to leave out of this pungent bouquet of law-clerk references.

*501 Turning to what counts as a good reason for dismissing a law clerk for cause, Judge Joseph Goodwin, dissenting in part in *Dixon v. Coburg Dairy, Inc.*,¹³² used a law-clerk analogy to point out the limitations on First Amendment free-speech rights: The majority claims that if Dixon were to display the Confederate flag during a pro-flag rally on the grounds of the state capitol, that action would clearly constitute an exercise of his First Amendment rights. I disagree--flag-waving at a pro-flag rally on state capitol grounds does not always constitute an exercise of First Amendment rights. . . . In some circumstances, the government could even fire an employee for participating in an otherwise constitutionally-protected pro-flag rally on the capitol grounds. Imagine that a pro-flag citizen group had brought a lawsuit challenging the process by which the South Carolina legislature decided to remove the Confederate flag from atop the statehouse, and planned a rally to publicize the case and their cause. A law clerk to the judge assigned the case wishes to attend the pro-flag rally, as he strongly supports flying the flag atop the capitol. Surely the judge could, consistent with the First Amendment, prohibit the clerk from attending the pro-flag rally in order to prevent any appearance of judicial bias or impropriety, and in fact could fire the clerk if he disobeyed and attended the

rally anyway. See Judicial Conference of the United States, Code of Conduct for Judicial Employees, Canon 2 (1995) available at <<http://www.uscourts.gov/guide/vol2/ch2a.html>> (“A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office.”); *id.* Canon 5.B (“[A] judicial employee[] may engage in nonpartisan political activity only if such activity does not tend to reflect adversely on the dignity or impartiality of the court or office and does not interfere with the proper performance of official duties.”). A complaint from the clerk that his discharge violated the First Amendment, because he was exercising his First Amendment rights, would almost assuredly fall on deaf ears.¹³³

Judge David Warriner made a similar point in an opinion in which he ruled that the superiors of a jail guard did not violate the guard’s constitutional *502 rights when they terminated him after he swore out a warrant against an inmate who allegedly assaulted him:

My law clerk, I suppose, has a right to go down to some political rally and make a speech for his favorite candidate for office; but I suppose that if he did it, he would be fired. It is clear that the First Amendment entitles one to engage in political debate but he would be fired just the same. He would be fired because his speechmaking would be detrimental to my decisionmaking. Similarly, Mr. Funn has a right to swear out a warrant and appear as a witness on behalf of the Commonwealth in a criminal action against Mr. Giles. He has that right and he exercised the right. But this was detrimental to the interests of his employer. He was told by his superior not to do it; that if he did he would be fired. And he was.

I don’t see any constitutional issue in this case.¹³⁴

In all the hypothetical invocations of law clerks I uncovered, the only two that substantively mention law-clerk termination for cause raised the specter of termination for law-clerk political activity; I found no reference to any other possible good cause for firing a law clerk, and Judge Warren Urbom expressly “express[ed] no opinion as to the proper disposition of a dismissal of a law clerk”¹³⁵ in an opinion in a case in which “the defendants in their oral argument and brief asked hypothetically what would happen if a judge’s law clerk said that he regarded the judge as unqualified. . . .”¹³⁶

V. The Tool Closest at Hand

I do not mean to suggest that law clerks are tools, but it would be hard to argue that someone occupying the position of “elbow law clerk”¹³⁷ is not close at hand. That proximity, I suspect, explains the law-clerk references collected in Part V. In the three previous Parts, I discussed analogies to law-clerk hiring, law-clerk duties, and law-clerk firing. In an ideal world, or least a more symmetrical one, I would now be presenting my epic conclusion, but that will just have to wait. While uncovering the opinions *503 discussed in Parts II-VI, I also found a few others that do not fit so neatly into my grand scheme, but reflect grandly on the wordsmithing of the judges (or law clerks . . .) who drafted them. In those opinions, the law-clerk references would have worked just as effectively if they had been references to butchers, bakers, or candlestick makers, but rather than trundling down to the butcher shop, the bakery, or Candlestix-R-Us, the judges who wrote the opinions highlighted in this Part simply let their fingers do the walking right up to their elbows to find the explanatory device they needed to make the point that needed making.

Several judges have endeavored to explain concepts of “possession” and “constructive possession” by using examples involving law clerks. For example, in *United States v. Martinez*,¹³⁸ the court of appeals reported:

The district court properly instructed the jury as follows: Now, the law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. I’ve got a pencil here. I’m in actual possession of this pencil. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person or

persons is then in constructive possession of it. I have pencils on my desk in my chambers. My law clerk will go get them for me if I want them. And that's possession, also. That's constructive possession.¹³⁹

Other aspects of life in chambers have also inspired judges to use their law clerks as tools for driving home a point. To explain her determination, in a case brought under the Fair and Accurate Credit Transactions Act, that “the term ‘print’ does not encompass electronic on-screen receipts,”¹⁴⁰ Judge Cecilia Altonaga explained:

The plain meaning of “print” does not coincide with “display on a computer screen,” as Plaintiff suggests. In order for the receipt to be printed, it must be reduced to a tangible form, and notably, in the case of an electronic receipt, the consumer controls whether or not the receipt is in fact “printed.” Judge Torres described the distinction appropriately when *504 he wrote, “‘print’ does not encompass on-screen computer displays because ‘print’ only refers to a tangible, paper receipt. That is why [the plaintiff] had to print a copy of his receipt to get it off of his computer; it is why the machine used to transfer text from a computer to paper is called a printer; and it is why a judge who asks a law clerk to print a case does not intend for the clerk to merely display the case on his computer screen.”¹⁴¹

Turning from the law clerk's computer screen to another piece of office equipment, the chambers fax machine, Judge Paul Friedman used his law clerk, among others, to explain the nuances of standing under the Telephone Consumer Protection Act:

The faxes at issue in this case were sent to Gary Kopff, by name, and not a single fax was sent to Judy Kopff. While Judy Kopff worked as her husband's assistant, the faxes were addressed to him. The Court concludes that, as a result, Judy Kopff lacks standing to pursue the claims in this case. For example, if the undersigned were to be sent unsolicited facsimiles, in violation of the TCPA, at the fax machine in chambers addressed specifically to “the Honorable Paul L. Friedman,” it cannot be that the Court's judicial assistant, law clerks and interns would each have a cause of action by virtue of walking by the machine and picking up the facsimile. . . . While the Court might think otherwise were the faxes addressed generically--e.g. to “Employee of Heritage Management”--or were they not addressed at all, in a case like this one where there is a specific, existing addressee such as Gary Kopff, the Court is persuaded that the TCPA cause of action is his, and not his staff's, regardless of the fact that the “staff” in this case is his wife. Accordingly, the Court will grant summary judgment for the defendants as to plaintiff Judy Kopff's claims.¹⁴²

*505 And from the fax machine, it is but a hop, skip, and a jump to the coffee machine in the break room. In *Desrochers v. City of San Bernadino*,¹⁴³ the Ninth Circuit was called upon to determine whether several “police officers' complaints about their supervisors' conduct may give rise to a constitutional violation.”¹⁴⁴ Writing for the majority, which ruled against the officers, Judge Diarmuid O'Scannlain explained:

We have never held that a simple reference to government functioning automatically qualifies as speech on a matter of public concern. To the contrary, as we have recently indicated, the fact that speech contains “passing references to public safety[,] incidental to the message conveyed” weighs against a finding of public concern. *Robinson v. York*, 566 F.3d 817, 823 (9th Cir. 2009) (internal quotation marks and citation omitted).

To be sure . . . at times we have employed broad language. But those sweeping pronouncements cannot be read to encompass the content of the speech before us. See, e.g., *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405 (9th Cir. 1988) (“We do not necessarily suggest that all speech concerning . . . government inefficiency automatically deserves protection.”). For example, what if we judges prohibited our law clerks from taking coffee breaks? Suppose they responded with a memorandum complaining about the action. While they might assert--perhaps fairly--that caffeine deprivation would adversely affect their performance, morale, efficiency, and thus, their competency, no one would seriously contend that such speech addressed a matter of public concern. See *Havekost [v. U.S. Dep't of Navy]*, 925 F.2d [316,] 319 [(9th Cir. 1991)] (stating that the speech regarding the “length

and distribution of coffee breaks” does not address a matter of public concern). Similarly, the reality that poor interpersonal relationships amongst coworkers might hamper the work of a government office does not automatically transform speech on such issues into speech on a matter of public concern.¹⁴⁵

In a rather caffeinated dissent, Judge Kim Wardlaw offered a robust and full-bodied objection to “[t]he majority’s disparaging comparison of the sergeants’ speech to complaints regarding law clerk coffee breaks.”¹⁴⁶

References to law clerks have also proven useful in judicial explanations in criminal cases. In *United States v. Crow*,¹⁴⁷ the Ninth Circuit affirmed the conviction of Ralph Crow for engaging in “conduct . . . which impeded[d] or disrupt[ed] the performance of official duties by *506 Government employees.”¹⁴⁸ In dissent, Judge John Noonan pointed out that to be enforceable, the Government Services Administration (“GSA”) regulation under which Crow was convicted needed to have been—but was not—conspicuously posted.¹⁴⁹ He continued:

The district court did offer a hypothetical that illuminates the extent of the problem here. Suppose, the district court said, that a government employee is vacuuming a rug in a court house and a passerby deliberately stood in his way. Would the passerby be guilty of the crime with which Crow is charged? Yes, the district court concluded. By the same token, a law clerk intent on his or her research who did not move when requested to do so by a GSA employee cleaning the room would be guilty of violating the law. The opinion of this court apparently accepts the criminality of such conduct even though the passerby or law clerk was not shown to have had any notice that a federal regulation empowered the carper-sweeper with authority to make his requests peremptory and disobedience to them subject to penal sanction.

This case is small by virtue of the offense charged and the punishment threatened. The case is large in its implications. A federal bureaucracy is given power to create crimes. No notice need be given of the bureaucracy’s criminalizing regulation. A person is guilty if intentionally he performs the act forbidden by the secret regulation.

. . . There was no evidence whatsoever at the trial that the regulation applied to Crow was posted. An essential element of the crime was not proved. His conviction was contrary to law.¹⁵⁰

In a civil context, Judge Richard Posner once used his law clerks to point out the pitfalls of using market prices to establish the value of assets:

Free-marketers may . . . argu[e] that the market price, and not some real estate appraiser’s appraisal (even if fully current), is the best, perhaps the only, measure of value. That is indeed a powerful argument with respect to a liquid market, such as the market in stocks traded on major stock exchanges—a market in which there are plenty of willing buyers and sellers, so that it is always possible to make a transaction that will reflect the value estimations of a number of market participants. There are some illiquid markets, though, *Central National Bank v. U.S. Dept. of Treasury*, 912 F.2d [897,] 902 [(7th Cir. 1990)], and in them transaction prices will not always reflect market values, at least if “market” is defined to require some minimum number of potential transactors. If the author of this *507 opinion decided to value his watch by soliciting bids from his two law clerks, he might get a less reliable valuation than from an appraiser.¹⁵¹

We law clerks even have value, it turns out, for judges seeking to explain the Rules of Evidence. As Judge Ira DeMent once noted: “One cannot avoid the hearsay rule by tacking a question mark at the end of an essentially factual statement. My law clerk said that would be the end of the hearsay rule?”¹⁵² Well played, Judge DeMent, well played.

The traditional status of a clerkship as a gateway position in a legal career makes many of us useful tools for telling time. In *Ricci v. Okin*,¹⁵³ Judge Joseph Tauro began his opinion by noting: Twenty-one years ago, I made my first trip to Belchertown, to see for myself the conditions alleged in a class action filed on behalf of the residents there.

To put that time frame in some perspective, I point out that the law clerk who accompanied me that day, Mark Brodin, is now a tenured professor at the Boston College Law School--a rookie Boston lawyer named Bill Weld had passed the bar less than two years earlier--and Kris Brown, the law clerk now working on these cases, was four years old.¹⁵⁴

The law-clerk yardstick Judge Robert Jones used in his conclusion in *United States v. Suntip Co.*,¹⁵⁵ a 1993 opinion, was not a former law clerk, but a current one:

The law clerk assisting me on this case was in the eighth grade when the Lake timber contract was awarded to Suntip. Former President Jimmy Carter was in office and the Bee Gees still commanded radio airplay. I make these observations in note of the fact that the first contract that is among the subjects of this dispute was entered into 14 years ago and to emphasize that the government does not have an indefinite amount of time to attempt to collect damages from a defaulting contractor. Because the government's claims for damages were compulsory counterclaims in Suntip's district court action, it was required to file counterclaims four years ago or earlier.¹⁵⁶

***508** Not only was the law clerk in *Suntip* young enough to serve colorfully as a chronometer, his or her youth also seems to have inspired Judge Jones to take the controls of the Wayback Machine.¹⁵⁷

Judge Jones's reference to the Bee Gees in *Suntip* is the perfect overture for Judge Harrison Winter's 1972 opinion in a case in which the Fourth Circuit effectively struck down a high school's ban on boys wearing hair below their collars and sideburns below their ear lobes:

Whether the right of a male to wear long hair and to have long or fulsome side burns is a constitutionally protected right is a question which has given birth to a rash of recent litigation resulting in conflicting adjudications. And if the right is recognized as a constitutionally protected one, there is a similar lack of agreement as to its precise nature, that is, the chapter and verse of the Constitution which protects it. Unquestionably, the issue is current because there is abroad a trend for the male to dress himself more extravagantly both in the nature, cut and color of his clothing and the quantity and mode of his facial and tonsorial adornment. The shift in fashion has been more warmly embraced by the young, but even some of the members of this court, our male law clerks and counsel who appear before us have not been impervious to it. With respect to hair, this is no more than a harkening back to the fashion of earlier years. For example, many of the founding fathers, as well as General Grant and General Lee, wore their hair (either real or false) in a style comparable to that adopted by plaintiffs. Although there exists no depiction of Jesus Christ, either reputedly or historically accurate, He has always been shown with hair at least the length of that of plaintiffs. If the validity and enforcement of the regulation in issue is sustained, it follows that none of these persons would have been permitted to attend Tuscola Senior High School.¹⁵⁸

Finally, just as the Bee Gees led to Tuscola Senior High, Tuscola Senior High leads to the South Carolina Senate, where, in 1970, law student Victoria Lamonte Eslinger was denied temporary employment as a Senate ***509** page because she was a woman.¹⁵⁹ The Fourth Circuit held that the ban on female pages violated the Equal Protection Clause, and in so doing, referred to its own law clerks:

When we apply the test of *Reed v. Reed*, 404 U.S. 71 (1971)], we are compelled to conclude that S.525 [which barred women from serving as Senate pages] denies equal protection. The “public image” of the South Carolina Senate and of its members is obviously a proper subject of state concern. Apparently, the South Carolina Senate felt that certain functions performed by pages on behalf of senators, e.g. running personal errands, driving senators about in their autos, packing their bags in hotel rooms, cashing personal checks for senators, etc., were “not suitable under existing circumstances for young ladies and may give rise to the appearance of impropriety.” Resolution S.525, n. 2, *supra*. In their brief, defendants argue that “[i]n placing this restriction upon female pages, the Senate is merely attempting to avoid placing one of its employees in a conceivably damaging position, protecting itself from appearing to the public that an innocent relationship is not so innocent, and maintaining as much public confidence while conducting the business of the people of South Carolina as possible.”

We find this rationale unconvincing. It rests upon the implied premise, which we think false, that “[o]n the one hand, the female is viewed as a pure, delicate and vulnerable creature who must be protected from exposure to criminal influences; and on the other, as a brazen temptress, from whose seductive blandishments the innocent male must be protected. Every woman is either Eve or Little Eva--and either way, she loses.” Johnson and Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675, 704-5 (1971). We have only to look at our own female secretaries and female law clerks to conclude that an intimate business relationship, including traveling on circuit, between persons of different sex presents no “appearance of impropriety” in the current age, graduated as we are from Victorian attitudes. We note also that South Carolina has had female senators. While the record does not reflect their ages, the association of female senator with male page has not given rise to a sufficient “appearance of impropriety” to require legislative regulation which is the reverse of S.525. In short, present societal attitudes reject the notion that, in most forms of business endeavor, free association between the sexes is to be limited, regulated and restricted because of a difference in sex.¹⁶⁰

***510** So, while the Fourth Circuit may have a reputation for conservatism, its law clerks in the early 1970s were at the forefront of men's hairstyles and women's rights.

Finally, I conclude with a caution. In an article devoted to rhetoric and metaphor, it is important to point out that the same symbol can signify different things in different contexts. In *United States v. Bervaldi*,¹⁶¹ in which the court had to determine the reasonableness of a police officer's determination that Bennett Deridder's residence was some place other than the address listed on his driver's license, Judge Lanier Anderson saw law clerks as representing a degree of residential transience:

In addition, both officers unequivocally testified that when they interviewed Deridder on that day he indicated that he resided at 129th Avenue but that the address on his license, 132nd Place, was his parents' address. It is not unusual for persons of Deridder's age--the Autotrac report and driver's license records indicate he was twenty-seven at the time of the entry--to use their parents' address for records, such as driver's licenses, official mailing address, et cetera, because in a sense it may be a more permanent or fixed address than the address of their own residence. For example, oftentimes university students or law clerks in their twenties use their parents' address while studying or clerking.¹⁶²

In *Auerbach v. Kinley*,¹⁶³ however, Judge Neal McCurn used law clerks to make the opposite point. In that case, college students who met the durational requirement for county residency were nonetheless asked to fill out special questionnaires and were then barred from registering to vote on grounds that their status as students prevented them from qualifying as residents.¹⁶⁴ In holding that the students' constitutional rights had been violated, Judge McCurn pointed out that

[a]lthough the defendants assert that students as a group are more transient than the rest of the electorate and therefore additional scrutiny of students is justified, they have not presented any evidence that students as a group are more transient than other groups (e.g., construction workers, individuals on temporary job assignments, and law clerks) who are routinely allowed to register and vote without additional questioning.¹⁶⁵

***511** In one context (or in one judge's eyes), law clerks represent transience, while in another opinion, we represent something less than transience. You say tomato, I say tomato.¹⁶⁶

VI. (My Epic) Conclusion

Truth to tell, my conclusion may be something less than epic, but what the heck, if you have read this far, you have obviously forgiven me for swerving you once before, so I am betting that you will forgive me again. And, in fact, there's at least a little bit of a here here.

To begin, notwithstanding the frequency with which federal judges are confronted with issues of employment law, they turn to law clerks relatively infrequently to explain the nuances of hiring (Part II) or firing (Part IV). That suggests two things. On the front end, it would seem that even though most federal judges hire one or two law clerks every year, the ready availability of qualified candidates is such that law-clerk hiring is not close enough to the surface of judicial consciousness to make it into many opinions. On the back end--and this is even better news--it would seem that on the whole, law-clerk performance is satisfactory enough that law-clerk firing is submerged deeply enough in the minds of most judges to keep them from referring to it rhetorically in cases involving an employee's termination.¹⁶⁷

So, if judges aren't thinking all that much about hiring or firing us, then what aspects of their relationships with law clerks are on their minds? The answer, of course, comes from Part III, which is devoted to opinions in which judges refer to the work that law clerks do. Taken together, those opinions paint a picture of a relationship that shares certain characteristics with--dare I say it?--the Holy Trinity.¹⁶⁸ On the one hand, many uses of the law-clerk analogy stress the importance of the law clerk as another set of hands, to help with the legal research and writing that is essential to ***512** judging. Law clerks also provide another set of eyes, and are thus available to look over the same things their judges review, and then offer advice and recommendations which may either support or conflict with the judge's view of the case. In those ways, the law clerk's usefulness depends upon his or her being a distinct individual standing with, but separate from his or her judge. But that separation goes only so far; while law clerks are separate from their judges in some ways, they are not so separate in other very important ways. Law clerks are barred from doing things their judges cannot do, such as having ex parte communication with or advocating for parties. Law clerks are protected by judicial immunity, and their work--both oral and written--is protected by judicial privilege. In other words, law clerks are, and are recognized as, extensions of their judges.

My basic conclusion, that judicial analogies to law clerks demonstrate that judges view law clerks as being simultaneously separate from and connected to their judges, is not, perhaps, a ginormous pot of gold. I don't suspect that I've uncovered anything that couldn't be discerned from authorities such as the Law Clerk Handbook published by the Federal Judicial Center. But, if my pot of gold is a little bit wee, I hope that the rainbow of judicial opinions we've slid down to get here is entertaining enough to elicit a Whee!

Footnotes

^{a1} The Author is an Adjunct Professor at the University of New Hampshire School of Law, in Concord, New Hampshire, where he has taught a course in judicial opinion drafting. By day, he is a law clerk toiling in the chambers of a United States Magistrate Judge.

¹ *United States v. Pulvano*, 629 F.2d 1151, 1157 n.8 (5th Cir. 1980). Indeed, “[a]ll of the world's great religions teach in one form or another that confession is good for the soul and that by making confession one may be absolved, in part at least.” *United States ex rel. Williams v. Fay*, 323 F.2d 65, 72 (2d Cir. 1963) (citing William Shakespeare, *Romeo and Juliet* act 2, sc. 3, l. 56; Psalms 32:5; James 5:16; John 1:8).

- 2 And, if Parker B. Potter, Sr., is one of my readers, so much the better, even though my father is not a Father.
- 3 For those readers unfamiliar with professional wrestling--only a handful or two, I am sure--a "swerve" occurs when the plot line takes an unexpected turn, typically when a good guy (also known as a "babyface") or a bad guy (also known as a "heel") suddenly changes his or her colors, abandoning comrades on one side of the line between good and evil, and joining up with former foes on the other side. Wrestling Dictionary, Online World of Wrestling, available at <http://www.onlineworldofwrestling.com/information/dictionary/> (defining "babyface", "heel", and "swerve"). As it turns out, I am a serial swerver. See Parker B. Potter, Jr., [Law Clerks Gone Wild](#), 34 *Seattle U. L. Rev.* 173, 173 (2010) ("The title of this Article promises too much"). Hi-diddle-dee-dee, it's bait-and-switch for me.
- 4 But, really, how could we ever know very much about that, given the law clerk's duty of confidentiality?
- 5 I presume that all the examples I discuss in this article were actually drafted by the judges who signed the opinions in which they appeared. Law clerks writing about themselves over the signatures of their judges is just a bit too creepy for me, and so I am going on the assumption that every word I quote in this article was actually written by a judge. The beauty part is that if I am wrong, I'm pretty sure nobody is going to call me on it.
- 6 See, e.g., Eileen Kavanagh, [Robert Traver as Justice Voelker--The Novelist as Judge](#), 10 *Scribes J. Legal Writing* 91, 99 (2006) ("Of course the downside of all this caution is that the resulting judicial writing is deadly dull. Too many opinions are now written in the homogenized style of the recently graduated law-review-trained law clerk.").
- 7 See, e.g., Gerald Levovits, Alifya V. Curtin & Lisa Solomon, [Ethical Judicial Opinion Writing](#), 21 *Geo. J. Legal Ethics* 237, 271-75 (2008) (decrying the use of humor in judicial opinions).
- 8 See Daniel M. Katz & Derek K. Stafford, [Hustle and Flow: A Social Network Analysis of the American Federal Judiciary](#), 71 *Ohio St. L.J.* 457, 476 (2010) ("Federal judicial clerkships are desirable employment opportunities to which many individuals aspire."); Roger J. Miner, [A Significant Symposium](#), 54 *N.Y.L. Sch. L. Rev.* 15, 23 (2010) ("This year, I received hundreds of applications from law students throughout the nation.").
- 9 See Dakota S. Rudesill, Comment, [Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress](#), 87 *Wash. U. L. Rev.* 699, 711 n.43 (2010) ("Judges receive hundreds more applications from qualified young lawyers than they have clerkships to offer.").
- 10 *Faro v. N.Y. Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974).
- 11 *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 182 n.27 (D. Conn. 2005) (citation to the record omitted), rev'd, *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007).
- 12 *Kevin v. Thompson*, 235 F.3d 1026, 1027 (7th Cir. 2000). Judge Easterbrook elaborated: "Like all other units of government, courts must refrain from discriminating on improper grounds, such as race or speech. Beyond that, however, government bodies are free to participate in markets just as other buyers do, which includes the right to pick and choose among would-be sellers." *Id.* at 1027. In Judge Easterbrook's view, "[t]he equal-protection clause should not be confused with a civil-service system, nor the federal judiciary with the Merit Systems Protection Board." *Id.* at 1028.
- 13 *Id.*
- 14 *Adams v. Gaudet*, 515 F. Supp. 1086, 1106-07 (W.D. La. 1981) (citation omitted).
- 15 *Salton v. W. Elec. Co.*, No. C-3738, 1972 WL 293, at *4 (D. Colo. Dec. 14, 1972).
- 16 *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 181 (D.C. Cir. 1960).
- 17 *Id.* at 181 n.28.
- 18 *Nelson v. Nat'l Aero. & Space Admin.*, 568 F.3d 1028, 1051-52 (9th Cir. 2009) (Kleinfeld, J., dissenting).
- 19 A couple of pages ago, I smartened readers up to babyfaces, heels, and swerves, so now I feel compelled to unmask another piece of grappling jargon that is doing double duty as the heading of this Part. Among professional wrestlers, losing a match is called "doing the job," while winning a match is called "going over." Wrestling Terms List, Wrestling Information Archive,

<http://www.100megsfree4.com/wiawrestling/pages/other/terms.htm> (defining “going over” and “job”). Given that the squared circle has spawned some litigation. See, e.g., *Bollea v. World Championship Wrestling, Inc.*, 610 S.E.2d 92 (Ga. Ct. App. 2005) (Hulk Hogan's alter ego Terry Bollea sued wrestling promotion for breach of contract, defamation, and false-light invasion of privacy when promotion had Jeff Jarrett do the job for Hogan, but had Jarrett do the same job for Booker T., who was then awarded the WCW Championship belt, which Bollea thought rightfully belonged to Hogan). Thus, my little lexicon of lucha-lingo could have some legal utility. Or not.

20 Sounds kind of like the life cycle of a law clerk, doesn't it?

21 [93 F.R.D. 455 \(N.D. Tex. 1982\)](#).

22 *Id.* at 455.

23 [845 F.2d 624 \(6th Cir. 1988\)](#).

24 *Id.* at 638.

25 Today's “toner-stained wretch” is, of course, a direct descendant of yesteryear's “ink-stained wretch” who has gone the way of the dodo. (Once upon a time, boys and girls, people used to write with things called “pens” filled with stuff called “ink.” Who knew this article came with an embedded history lesson?).

26 But, at least one judge has described, in published opinions, his practice of adopting law-clerk drafts virtually without revision. See, e.g., *Hodgson v. Mauldin*, 344 F. Supp. 302, 314 n.32 (N.D. Ala. 1972) (“The foregoing opinion was originally prepared as a memorandum for the Court by Kirby Sevier, Law Clerk, who was present at the evidentiary hearing. Since its excellence in form and content could not be improved upon, it has been reproduced in its entirety as the considered opinion of the Court.”); see also Parker B. Potter, Jr., *Judges Gone Wild*, 37 Ohio N.U. L. Rev. (forthcoming 2011) (describing law-clerk acknowledgments penned by Judge Seybourn Lynne of the Northern District of Alabama).

27 [509 F.2d 238 \(9th Cir. 1975\)](#).

28 *Id.* at 242.

29 *Id.*

30 *Id.*

31 *Id.*; but see *McCarthy v. Manson*, 554 F. Supp. 1275 (D. Conn. 1982). In *McCarthy*, another habeas case, Judge José Cabranes soundly rejected the idea that magistrate judges are basically law clerks in robes:

In support of its argument that the failure to object to a magistrate's recommended decision is of minor importance, respondent claims that “the magistrate's role in habeas matters is akin to that of a judge's law clerk.” Respondent is wrong, as the legislation on the magistrate's system, and its actual operations, amply confirm. Respondent relies in part on *Wingo v. Wedding*, 418 U.S. 461, 473 n.18 (1974) (quoting S.Rep. No. 371, 90th Cong., 1st Sess. 26 [1967]). Even assuming that *Wedding* were still good law, as to which there is considerable doubt, see, e.g., *Orand v. United States*, 602 F.2d 207 (9th Cir. 1979), the passage in *Wedding* relied upon by respondent does not support respondent's argument. The Senate Report quoted by the Court noted that before 1967 the examination of post-conviction review applications had been entrusted by many judges to their law clerks; that “judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications”; and that the adoption of the Federal Magistrate's Act would facilitate the judges' decisions in habeas corpus cases by placing these matters in the hands of a “qualified, experienced magistrate [who] will, it is hoped, acquire an expertise in examining these [post-conviction review] applications and summarizing their important contents for the district judge [.]” Magistrates are subordinate judicial officers and their functions in matters relating to applications for the writ of habeas corpus and other matters is not “akin to that of a judge's law clerk”; a law clerk is not a judicial officer and is not himself empowered to perform any of the duties entrusted by law to a magistrate. *Id.* at 1286 n.10 (parallel citations and citations to the record omitted); see also *Kliban v. United States*, 65 F.R.D. 6, 8 (D. Conn. 1974) (“It is certainly unreasonable to assume that in civil proceedings this permanent Court officer [i.e., the magistrate judge] is to take merely the informal and limited part of an additional law clerk ...”).

32 [522 F.2d 209 \(4th Cir. 1975\)](#).

- 33 [Id.](#) at 210.
- 34 [Id.](#) I can't imagine that any American judge believed that yesterday, either.
- 35 [Geras v. Lafayette Display Fixtures, Inc.](#), 742 F.2d 1037, 1047 (7th Cir. 1984) (Posner, J., dissenting). While the principal point of Judge Posner's dissent was that magistrate judges are not the constitutional equivalent of Article III judges, a part of his argument can be expressed as a classical syllogism:
Magistrate Judge = Law Clerk
Law Clerk # Judge,
Magistrate Judge # Judge
See [id.](#) at 1046 ("A district judge cannot tell his law clerk 'You try this case--I am busy with other matters--and render judgment, and the losing party can if he wants appeal to the court of appeals.' "). As Judge Posner further observed, "[n]o American judge today believes that a law clerk becomes a judge by preparing an opinion draft." [Id.](#) at 1047.
- 36 [United States v. Thomas](#), 788 F.2d 1250, 1257 (7th Cir. 1986).
- 37 [Id.](#) at 1258.
- 38 383 F.3d 1036 (D.C. Cir. 2004).
- 39 [Id.](#) at 1044.
- 40 [Id.](#) at 1046.
- 41 [Id.](#) While it is safe to assume that Law Clerk PI would be unwelcome in a criminal proceeding, we know to a certainty investigations undertaken by law clerks are verboten in civil cases. See Potter, [supra](#) note 3, at 185-88 (discussing [Kennedy v. Great Atlantic & Pacific Tea Co.](#), 551 F.2d 593, 599 (5th Cir. 1977)).
- 42 70 F.3d 483 (7th Cir. 1995).
- 43 [Id.](#) at 485.
- 44 [Id.](#) And, because the Executive Committee exercised judicial power, the court of appeals had jurisdiction to entertain an appeal from its decision. [Id.](#)
- 45 793 F.2d 149 (7th Cir. 1986).
- 46 [Id.](#) at 154.
- 47 [Id.](#) at 155.
- 48 [Id.](#); see also [Guercio v. Brody](#), 814 F.2d 1115, 1115-17 (6th Cir. 1987) (applying the reasoning of [McMillan](#) to a dispute over the termination of a bankruptcy judge's personal secretary).
- 49 [Marafino v. St. Louis Cty. Cir. Ct.](#), 537 F. Supp. 206, 211 (E.D. Mo. 1982) (quoting [Gearhart v. Oregon](#), 410 F. Supp. 597, 600-01 (D. Or. 1976)).
- 50 See [id.](#)
- 51 No. 06 Civ. 3533(HB), 2007 WL 211083 (S.D.N.Y. Jan. 29, 2007).
- 52 [Id.](#) at *5.
- 53 [Id.](#) (citation omitted).
- 54 [United Food & Commercial Workers Int'l Union, AFL-CIO v. SIPCO, Inc.](#), Civ. No. 90-250-B, 1990 WL 364772, at *3 (S.D. Iowa Oct. 16, 1990).
- 55 [Wilson v. Dep't of Health & Human Servs.](#), 834 F.2d 1011, 1013 (Fed. Cir. 1987).

- 56 [United States v. Cianci](#), No. CR. 00-083-T, 2002 WL 32157201, at *1 (D.R.I. Mar. 18, 2002).
- 57 [447 F.2d 1178](#) (D.C. Cir. 1971).
- 58 [Id.](#) at 1179.
- 59 [Id.](#) at 1185; but see [United States v. Anderson](#), 85 F. Supp. 2d 1047 (D. Kan. 1999). In *Anderson*, Judge John Lungstrum rejected a criminal defendant's argument "that because the United States Probation Office ('USPO') is treated as an arm of the court, any communications by the government made to an officer of the USPO in connection with the preparation of a presentence investigative report ... should be treated like communications to the court itself." [Id.](#) at 1082. As the judge explained:
[T]he court is not persuaded that a blanket prohibition against ex parte contact with officers of the USPO is required by law. The role of the USPO is different from, say, that of the judge's law clerk to whom it would be improper to make an ex parte communication. The USPO receives narratives, suggestions, and even argument from both sides to assist it in preparation of the PSIR. Unlike a law clerk, whose advice to the judge is strictly confidential, however, the USPO officers assemble information and promulgate the PSIR for both informal and formal comment by both sides.
[Id.](#) at 1083.
- 60 [Dockery](#), 447 F.2d at 1185.
- 61 [United States v. Wilson](#), 973 F. Supp. 1031, 1032 (W.D. Okla. 1997).
- 62 [Id.](#)
- 63 [United States v. Langston](#), No. 1:08-cr-00003-MPM-JAD, 2008 WL 5156625, at *1 (N.D. Miss. Dec. 8, 2008).
- 64 [Id.](#)
- 65 [952 F.2d 965](#) (7th Cir. 1992).
- 66 [Id.](#) at 966.
- 67 [Id.](#)
- 68 [Id.](#) (citing [Mitchell v. McBryde](#), 944 F.2d 229 (5th Cir. 1991); [Oliva v. Heller](#), 839 F.2d 37 (2d Cir. 1988)). The Supreme Court was not persuaded, and, on appeal, stepped down from absolute immunity to qualified immunity. See [Buckley v. Fitzsimmons](#), 509 U.S. 259, 275-76 (1993).
- 69 [United States v. Boshell](#), 728 F. Supp. 632, 637 (E.D. Wash. 1991) (citing [United States v. Roberts](#), 726 F. Supp. 1359 (D.D.C. 1989)).
- 70 [Id.](#) at 637-38.
- 71 [Id.](#) at 637 n.5.
- 72 [Drexel Burnham Lambert Grp., Inc. v. Galadari](#), 127 B.R. 87, 105 (S.D.N.Y. 1991); but see [United States v. Continental Airlines, Inc.](#) (In re *Continental Airlines*), 150 B.R. 334, 342 (D. Del. 1993) (rejecting argument that "[t]he fee Examiner's reports to the Bankruptcy Court are substantially no different than ... a confidential bench memorandum" drafted by a judicial law clerk). In an opinion in a case brought by an equity receiver, Judge Richard Posner mused about "a judge-made rule of long standing that, with immaterial exceptions, an equity receiver must get the permission of the court that appointed him to appeal." [Troelstrup v. Index Futures Grp., Inc.](#), 130 F.3d 1274, 1276 (7th Cir. 1997) (citations omitted). In rejecting "[t]he reason the cases give for this rule--that the receiver is an officer of the court," [id.](#) (citation omitted), Judge Posner noted that "a trustee in bankruptcy bears the same relation to the bankruptcy court as an equity receiver does to the equity court yet no one supposes that the trustee requires the bankruptcy court's permission to appeal," [id.](#) (citation omitted). He then continued:
Yet one might have thought that it would follow from the rule and its "officer of the court" rationale that the receiver couldn't appeal at all, with or without the court's permission, any more than a law clerk, master, or other judicial adjunct can appeal the orders of the court that employs him.
[Id.](#)

- 73 [Guentchev v. INS](#), 77 F.3d 1036, 1038 (7th Cir. 1996).
- 74 [Id.](#) at 1038 (citing [Urukov v. INS](#), 55 F.3d 222, 227-28 (7th Cir. 1995); [Cuevas v. INS](#), 43 F.3d 1167, 1170 (7th Cir. 1995); [Castaneda-Suarez v. INS](#), 993 F.2d 142, 146 (7th Cir. 1993)).
- 75 [MediaCom Corp. v. Rates Tech., Inc.](#), 34 F. Supp. 2d 76, 78 n.1 (D. Mass. 1998).
- 76 But, alas, I could not help but scratch my head, and head for the dictionary, to make heads or tails of the recondite term “recondite.” See Webster’s Third New International Dictionary 1897 (1993) (defining “recondite” to mean, inter alia, “very difficult to understand and beyond the reach of ordinary comprehension and knowledge”).
- 77 [Dawson v. Sullivan](#), 136 F.R.D. 621, 623 (S.D. Ohio 1991).
- 78 [Id.](#) at 626.
- 79 491 F.2d 63 (D.C. Cir. 1974).
- 80 See [id.](#) at 64-65. FOIA to EPA on DDT. Alphabet soup, anyone?
- 81 [Id.](#) at 68.
- 82 See [Soucie v. David](#), 448 F.2d 1067, 1070, 1081 (D.C. Cir. 1971) (Wilkey, J., concurring); [Nixon v. Sirica](#), 487 F.2d 700, 764 (D.C. Cir. 1973) (Wilkey, J., dissenting).
- 83 124 F.3d 216 (unpublished table decision), 1997 WL 545584 (10th Cir. Sept. 4, 1997).
- 84 [Id.](#) at *1.
- 85 [Id.](#) at *3.
- 86 [Id.](#) (citing [Koster v. United States](#), 685 F.2d 407, 414 (Ct. Cl. 1982)). In a partial concurrence in [Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority](#), Judge Spottswood Robinson disagreed with the majority’s determination that it was not improper for FLRA General Counsel Stephen Gordon, FLRA Member Leon Applewhaite, and an attorney from the agency’s solicitor’s office to meet together shortly before Applewhaite was to serve in an adjudicatory capacity in a hearing at which Gordon was to serve as a prosecutor. 685 F.2d 547, 592 (D.C. Cir. 1982) (Robinson, J., concurring in part and concurring in the judgment). As Judge Robinson explained, once “the roles of Gordon as prosecutor and Applewhaite as adjudicator were firmly solidified ... Gordon’s continued presence at and participation in Stern’s briefing of Applewhaite was hardly less serious or more defensible than would have been the presence and participation of FLRA’s counsel-on-appeal in a conference between a judge on this panel and his law clerk.” [Id.](#) at 595 n.24.
- 87 [N.Y. State Inspection, Sec. & Law Enforcement Emps., Dist. Council 82 v. N.Y. State Pub. Emp’t Relations Bd.](#), 629 F. Supp. 33, 49 (N.D.N.Y. 1984) (quoting [Fredonia Broad. Co. v. RCA Corp.](#), 549 F.2d 251, 256 (5th Cir. 1978)).
- 88 904 F.2d 772 (1st Cir. 1990).
- 89 [Id.](#) at 785.
- 90 [Id.](#) (citing [Slotnick v. Staviskey](#), 560 F.2d 31, 32 (1st Cir. 1977); [Oliva v. Heller](#), 839 F.2d 37, 40 (2d Cir. 1988)).
- 91 [Soucie v. David](#), 448 F.2d 1067, 1070 (D.C. Cir. 1971) (Wilkey, J., concurring).
- 92 [Id.](#) at 1081 (Wilkey, J., concurring) (citing [Rogers, The Right to Know Government Business From the Viewpoint of the Government Official](#), 40 Marq. L. Rev. 83, 89 (1956); [Kramer & Marcuse, Executive Privilege--A Study of the Period 1953-1960](#), 29 Geo. Wash. L. Rev. 623 (1961)). The paragraph to which this footnote is appended lived to fight another day, in Judge Wilkey’s dissenting opinion in [Nixon v. Sirica](#), 487 F.2d 700, 764 (D.C. Cir. 1973).
- 93 [Nixon](#), 487 F.2d at 717.
- 94 [United States v. Peltz](#), 433 F.2d 48, 52 (2d Cir. 1970).

- 95 [Id. at 52 n.4](#); but see [United States v. Jeter](#), 775 F.2d 670, 685 (6th Cir. 1985) (Merritt, J., dissenting) (disagreeing with majority's affirmance of convictions for illicitly obtaining and distributing carbon paper used in the typing of secret grand jury documents, and observing: "[U]nder the Court's view, the improper release of all confidential judicial information-- including judicial opinions, votes and panel assignments--would constitute theft of government property and an obstruction of justice.... The law clerks and secretaries of judges would be subject to criminal prosecution for telling tales out of school.").
- 96 [Wash. Legal Found. v. U.S. Sentencing Comm'n](#), 89 F.3d 897, 899 (D.C. Cir. 1996).
- 97 [Id. at 900](#).
- 98 [533 F. Supp. 2d 1160](#) (M.D. Ala. 2007).
- 99 [See id. at 1168](#).
- 100 [Id. at 1167](#).
- 101 [Id. at 1174-75](#).
- 102 [Broudy v. Mather](#), 366 F. Supp. 2d 3, 10 (D.D.C. 2005).
- 103 [Id. at 10 n.10](#).
- 104 [Obabueki v. Int'l Bus. Machs. Corp.](#), 145 F. Supp. 2d 371, 392 (S.D.N.Y. 2001).
- 105 [No. 93 Civ. 5769 \(KMW\)](#), 1994 WL 738835 (S.D.N.Y. Nov. 9, 1994).
- 106 [Id. at *26](#).
- 107 [See Zandford v. Nat'l Ass'n of Secs. Dealers, Inc.](#), 30 F. Supp. 2d 1, 13 (D.D.C. 1998) ("The functional equivalent of this action by NASD staff would be that of a judge's law clerk drafting an opinion pursuant to the judge's findings. Law clerks are entitled to absolute immunity for such actions, as is the NASD staff because the judge and the DBCC have absolute immunity for their adjudicatory roles.") (citations omitted) (emphasis in original).
- 108 [See Everett v. Franciscan Sisters Healthcare, Inc.](#), 882 F.2d 1383, 1387 (8th Cir. 1989) ("Appellant criticizes the use of non-physician reviewers, but this practice appears no less defensible than the customary use of law clerks and paralegals by judges to sift or screen voluminous documents to locate pertinent material for consideration by the court. The final ratings in every instance listed in the report were made by physicians.") (citation to the record omitted).
- 109 [See Nike, Inc. v. McCarthy](#), 285 F. Supp. 2d 1242, 1246 (D. Or. 2003) ("[T]he fact that, for example, I ask my law clerk to file a document does not change her job title from that of a law clerk to a docket clerk.").
- 110 [752 F. Supp. 1037](#) (S.D. Fla. 1990).
- 111 [Id. at 1038](#).
- 112 [Id.](#)
- 113 [Id. at 1042](#).
- 114 [Shelton v. United States](#), No. 1:00CR127-P-D, 2007 WL 4097302, at *9 (N.D. Miss. 2007).
- 115 [4 F.3d 429](#) (6th Cir. 1993).
- 116 [Id. at 431](#).
- 117 [935 F.2d 850](#) (7th Cir. 1991).
- 118 [Id. at 851](#).
- 119 [Id. at 861](#).

- 120 Id.
- 121 807 F.2d 648 (7th Cir. 1986).
- 122 Id. at 657 (Campbell, J., concurring). Judge Campbell's law-clerk analogy was only the warm-up act. He continued: As a district judge since 1940, I have great confidence in the jury system. I am alarmed by what I sense to be an increased prevalence of directed verdicts against prevailing plaintiffs in § 1983 actions. In my opinion, this case represents a less-known but equally dangerous brand of "judicial activism," and our reversal here should serve as a warning or lesson concerning the precariousness of such activism. Id.
- 123 Just typing the words "law-clerk firing process" is enough to give me an advanced case of the heebie jeebies.
- 124 *Buckwalter v. ICI Explosives USA, Inc.*, No. 96-CV-4795, 1998 WL 54355, at *19 (E.D. Pa. Jan. 19, 1998).
- 125 Id. In the midst of his example, Judge Van Antwerpen notified readers, via footnote, that "[i]n actuality, Adam and Jason get along rather well." Id. at *19 n.7. Phew.
- 126 No. C08-0924 RSM, 2009 WL 3427350 (W.D. Wash. Oct. 20, 2009).
- 127 Id. at *3; see also *Ill. State Emps. Union v. Lewis*, 473 F.2d 561, 573 (7th Cir. 1972) ("We cannot properly differentiate between teachers and highway maintenance workers, pilots, law clerks, driver's license examiners or janitors on the basis of mere judicial assumptions about the circumstances attending their respective employment."); *Shirck v. Thomas*, 447 F.2d 1025, 1028 (7th Cir. 1971) (Stevens, J., dissenting) ("In the absence of contract or special legislation, I do not believe a schoolteacher has any greater constitutional right to public employment than a law clerk, a highway maintenance worker, a pilot, an election judge, or any other public servant.").
- 128 *Braswell*, 2009 WL 3427350, at *3 (citations omitted). In *Doe v. U.S. Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), Judge George MacKinnon dissented from a decision holding that a Justice Department lawyer who was stigmatized by being discharged for cause was due a post-termination "name-clearing" hearing: Of course, the effect of the majority's opinion will not be limited to the Executive Branch. When a Congressman wants to fire a staff aid and the reasons are such that they cannot be kept secret, a hearing must be held. If a judge wants to fire a law clerk, or the court wants to fire the clerk of the court, a hearing must be held if a reason is given for the firing. Id. at 1123 (MacKinnon, J., dissenting).
- 129 See Parker B. Potter, Jr., *Law Clerks Out of Context*, 9 U.N.H. L. Rev. 67, 122 (2010).
- 130 *Flowers v. Carson*, 917 F. Supp. 614, 620 (S.D. Ind. 1996).
- 131 That was, however, how the venerable institution got its start. See J. Daniel Mahoney, *Law Clerks: For Better or Worse*, 54 *Brook. L. Rev.* 321, 322-23 (1988) ("It is largely undisputed that the first jurist to utilize legal assistants was Horace Gray. ... Perhaps the most interesting aspect of Gray's use of these young clerks was the fact that he paid them from his own resources, a practice that has fallen into fortunate disuse."). I suspect that Mahoney found it fortunate that judges no longer personally pay their law clerks because at the time he wrote his article on law clerks, he had several of his own, given his position as a judge on the United States Court of Appeals for the Second Circuit. See *id.* at 321 n.a.
- 132 330 F.3d 250 (4th Cir. 2003).
- 133 Id. at 267 (Goodwin, J., dissenting) (internal citation omitted). And I don't see any reason not to use the first three sentences of my quotation from Funn to point out the power of the passive voice to obscure agency the next time I teach a course in legal writing. While Judge Warriner nowhere says so directly, I suppose that if Judge Warriner's law clerk were to be fired, Judge Warriner would be the one who pulled the trigger.
- 134 *Funn v. Winston*, 484 F. Supp. 923, 924 (E.D. Va. 1980).
- 135 *Neb. Dep't of Roads Emps. Ass'n v. Dep't of Roads*, 364 F. Supp. 251, 255 (D. Neb. 1973). Happily, after clerking for more than a decade, for six different judges, I've never even come within shouting distance of wanting to say such a thing.

- 136 *Id.*
- 137 See *Lincoln Nat'l Life Ins. Co. v. Silver (In re Silver)*, 367 B.R. 795, 799 n.1 (Bankr. D.N.M. 2007) (“The Court’s elbow law clerk, James E. Burke, did not participate in this adversary proceeding, including, as will probably be quite apparent to regular readers of this Court’s decisions, the preparation of this memorandum opinion.”). It is not quite clear whether Judge James Starzynski was suggesting that his opinion in *Silver* was going to be better or worse as a result the lack of law-clerk participation.
- 138 588 F.2d 495 (5th Cir. 1979).
- 139 *Id.* at 498 n.3; see also *United States v. Johnson*, 247 Fed. App’x 357, 360 (3d Cir. 2007) (reporting trial court’s jury instruction: “[I]f I take my magic marker and I give it to my law clerk, and now my law clerk has actual possession. But, under all the circumstances, could you find I still intend to exercise dominion and control over that, even though it’s in his possession? ... And it depends on what the circumstances were of my laying it there or giving it to him, and what surrounds that”); *United States v. Garner*, 46 Fed. App’x 278, 291 (6th Cir. 2002) (reporting trial court’s use of jury instruction similar to the one reported in *Martinez*).
- 140 *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281, 1286 (S.D. Fla. 2008).
- 141 *Id.* at 1287 (quoting *Grabein v. Jupiterimages Corp.*, No. 07-22288-CIV, 2008 WL 2704451, at *8 (S.D. Fla. July 7, 2008)). The hypothetical of a law clerk printing a case also adorns the pages of *Matthew Bender & Co. v. West Publishing Co.*, No. 94 Civ. 0589(JSM) & 95 Civ. 4496 (JSM), 1996 WL 774803 (S.D.N.Y. Nov. 27, 1996). In that copyright infringement case, during a hearing, Judge Daniel Martin asked counsel for West the following question:
Assume Justice O’Connor said to her law clerk: I’m giving a lecture over [at] Georgetown Law School tonight and I want the students to have a copy of my opinion in *Feist v. Telephone*. Go to the Supreme Court Reporter, just copy the caption and then that portion of the report that begins “O’Connor, J. delivered the opinion of the court.[“]
That is done.
Has Justice O’Connor violated your copyright?
Id. at *4. West’s counsel responded that there would be no copyright infringement under the standard of *de minimis* copying, and under the doctrine of fair use. *Id.*
- 142 *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 42 (D.D.C. 2008) (citations to the record and footnote omitted).
- 143 572 F.3d 703 (9th Cir. 2009).
- 144 *Id.* at 705.
- 145 *Id.* at 711 (footnote omitted).
- 146 *Id.* at 726 (Wardlaw, J., dissenting).
- 147 824 F.2d 761 (9th Cir. 1987).
- 148 *Id.* at 762.
- 149 *Id.* at 762-63 (Noonan, J., dissenting).
- 150 *Id.* at 763 (Noonan, J., dissenting).
- 151 *First Nat’l Bank of Chicago v. Comptroller of Currency*, 956 F.2d 1360, 1368 (7th Cir. 1992).
- 152 *KW Plastics v. U.S. Can Co.*, 130 F. Supp. 2d 1297, 1299 (M.D. Ala. 2001) (citing *Powell v. State*, 714 N.E.2d 624, 626-27 (Ind. 1999) (collecting cases); *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir. 1996)).
- 153 823 F. Supp. 984 (D. Mass. 1993).
- 154 *Id.* at 985.
- 155 No. CV 93-681-JO, 1993 WL 851950 (D. Or. Oct. 12, 1993).

- 156 Id. at *8.
- 157 And, of course, by including a reference to the Wayback Machine, I've identified myself as a law clerk who is a bit too long in the tooth (and too long on the job) to dramatically illustrate the passage of time. Oh well.
- 158 [Massie v. Henry](#), 455 F.2d 779, 780 (4th Cir. 1972). Judge Winter followed up with a suitably furry footnote: Substantially every president of the United States serving before the time of Woodrow Wilson would also have been in violation of this regulation. After Garfield, occupants of the White House had their hair cut somewhat shorter, but Arthur's mutton chop sideburns, Harrison's full beard and the mustaches of Cleveland, Roosevelt and Taft would have been in violation of the regulation. Before Wilson, only McKinley might have passed muster. Although presidents may have responded sooner to the trend to shorter hair, older men, within the memory of some of the judges of this court, were frequently seen with their hair long enough to have been in violation of this regulation.
Id. at 780 n.*.
- 159 See [Eslinger v. Thomas](#), 476 F.2d 225, 226 (4th Cir. 1973).
- 160 Id. at 231 (citation omitted).
- 161 226 F.3d 1256 (11th Cir. 2000).
- 162 Id. at 1263 (citation omitted).
- 163 594 F. Supp. 1503 (N.D.N.Y. 1984).
- 164 Id. at 1505.
- 165 Id. at 1511.
- 166 I just never get tired of using that one in print. See Parker B. Potter, Jr., [If Humpty Dumpty Had Sat on the Bench ...: An Eggheaded Approach to Legal Lexicography](#), 30 [Whittier L. Rev.](#) 367, 420 (2009).
- 167 There is, of course, another reason why judges may not think that much about law-clerk firing: many of us serve under term appointments of one or two years, making it easier for a judge to live with a hiring mistake, knowing that the finish line is in sight, rather than going through the trouble of an early termination and replacement of a sub-standard law clerk.
- 168 In making this analogy, I follow a set of footsteps made by some pretty big red slippers. See Sr. Prudence Allen, R.S.M., [Mulieris Dignitatem Twenty Years Later: An Overview of the Document and Challenges](#), 8 [Ave Maria L. Rev.](#) 13, 19 (2009) ("Pope John Paul II describes how interpersonal communion is analogous to the communion among the Divine Persons in the Holy Trinity.").