The Sweet Reasonableness of Federal Judges

HON. RICHARD D. CUDAHY*

It is time to celebrate the rites of spring. No, not birds or buds or even baseball. For federal judges, no spring rite is more precious than the annual draft of law clerks, those precocious luminaries whose most certain virtue is inexperience and who help judges do their thing.

Some would say more than help—that the law clerks are the ghostwriters of the Federal Reports. That is a cruel saying, even if occasionally true. Whatever the function of these tyros, nothing could be as splendid as the annual quadrille from which they emerge.

For, despite some carping by disgruntled clerk candidates, it is clear that hiring law clerks is one of the things federal judges do best. The annual hiring rite is a model of cooperation and teamwork—qualities for which the federal bench is rightfully celebrated. In fact, the history of law clerk hiring bespeaks an impressive capacity to prefer the common good over petty selfish interest. In these bleak times, the selfless judiciary stands one for all and all for one.

Federal judges hire their clerks midway through their second law school year. The rules this year, as they have for several years past, called on judges to conduct no interviews and to make no offers before the first of March. All were held at the starting gate until released on that fateful day with the scent of law clerks in the air. Time and again the federal judges were sorely tempted to break early from the gate; time and again they clung steadfast to their sacred pledge.

This year, March 1 fell on a Saturday. Those somnolent judges who tarried until Monday, March 3, to conduct their first interviews were greeted instead with the carnage of a Saturday Night Massacre. For these feckless jurists the shelf of applicants was bare. All these laggards checked their voice mail on Monday morning only to be told by their prospective interviewees that they had taken jobs with other, more alert, judges.

In spite of the Massacre, it is simply unthinkable that any judge would fail to honor at least the letter of the March 1 deadline. Presumably, the law students had been interviewed between 12:30 and 1:00 a.m. on Saturday and had accepted offers at approximately 1:03 a.m. on the same day. In fact, it appears that some judges conducted their interviews in Bermuda, thereby placing themselves one hour ahead of Eastern Standard Time and enabling them to move that much faster. Some other judges apparently believe that the Bermuda ploy—even if legal—disregarded the spirit of the rules. Next year these embittered judges plan to interview in Paris, or possibly Moscow, in

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* Judge, United States Court of Appeals for the Seventh Circuit.

order to get the better of those still operating out of Bermuda and other less Easterly points.

Whatever the case, we can rest assured that compliance this season with the March 1 benchmark was universal. Even if the interview was conducted in Alma Ata, it was still March 1 (Gregorian calendar). Rumors that certain judges interviewed as early as Christmas Eve have been hotly denied. One judge huffed that he always welcomes law students (in the top 1% of their class) to visit his chambers to enjoy a friendly cup of coffee. If the name of such a congenial student subsequently pops into the judge's mind as a choice for law clerk, this is purely a coincidence and certainly did not involve an interview before the date to which he was sacredly pledged.

I. OF THE TIME OF TROUBLES AND BEYOND

The history of law clerk hiring is a tale of close cooperation in the service of the loftiest judicial aspirations. Before 1984, second-year law students aspiring to be clerks were interviewed and hired beginning about April 15. That just happened to be the date when the Harvard Law Review elected a new Editor in Chief. On the evening of that person's ascension, he or she received a telephone call from Judge Skelly Wright of the D.C. Circuit and was hired on the spot. That traditional, almost mythic, call was universally accepted as the kick-off of the hiring season.

In 1983, the deans of the leading law schools persuaded Chief Justice Warren Burger that, if a later date for hiring could be observed, all the second-year grades would be available for inspection by the judges. The process would be fairer (and perhaps the Harvard Editor in Chief would have proved a flash in the pan). So, at the behest of the Judicial Conference of the United States (but, of course, without consulting the judges who did the hiring), the hiring date was moved from April to the following September 15.

Apparently, the judges could not tolerate this additional five months of suspense in finding out who their law clerk was going to be. This would explain why the only applicants still available on September 15 did not include any law review editors in chief—or even circulation managers. The September date was quickly abandoned. The next choice fell on July 15. This date proved just as unworkable because law students were nowhere to be found in July. They were either buried in the tax reporters of some law firm library or biking through Uzbekistan.

There followed an eight-year interregnum or "Time of Troubles." Various judges, individually and collectively, made proposals of varying complexity to harness the untapped spirit of sweet reasonableness that imbues the federal judiciary. Judge Patricia Wald of the D.C. Circuit advocated a computerized

matching system like the one used to match prospective interns with hospitals.[1] Judicial sentiment around the country seemed to be, "That's O.K. for the docs, but what we're doing here is really important." In 1990, four judges proposed a plan that featured delaying offers (to be made simultaneously to the chosen applicants) until May 1 at 12:00 noon, Eastern Daylight Time. Apparently, no one thought of the problems of the University of Hawaii, where the appointed hour came before dawn. When the simultaneous offer scheme was put to the test, there was a totally unforeseen split between the judges whose offers were accepted and those whose offers were spurned. To everyone's complete surprise, the first group thought the system was brilliant, while the latter could not be quoted. Since the second group of judges were a lot madder than the first group were glad, the elaborate plan was scrapped.

The demise of the simultaneous offer arrangement brought on a period of frantic bottom-fishing. The "bottom" in this case referred to the latest date on which a judge could schedule interviews without being wiped out by the competition. The "bottom" moved rather quickly from March back toward Valentine's Day, toward Christmas and then on to Thanksgiving and Halloween. There seemed to be no hard "bottom" short of the Fourth of July. Soon law clerks would be hired before they decided to go to law school. There was a sense that evil spirits had entered into the affairs of the judges, bringing conflict and despair in their wake.

II. A NEW HOPE?

But there was hope. Certain wise and compassionate judges were watching as the hiring procedure teetered on the brink of the abyss, waiting for some sign that an intervention would be welcomed and a new system adhered to. One of the watchers was Judge Stephen Breyer, then of the First Circuit. Judge Breyer had been proposing solutions to the clerk-hiring puzzle almost, it seemed, since time immemorial. His solicitude for the plight of his brethren was touching. He had an abiding, perhaps naive, faith in the essential goodness of the judiciary. If only one could tap into that great well-spring of goodwill, recommendation letters could once again flow untroubled into waste baskets throughout the land. Law clerks could at last be hired in peace. This was the vision of empyrean bliss that entranced Judge Breyer as he prepared to ascend heavenward in the general direction of the Supreme Court. He would leave behind as his memorial a huge empty canvas bearing the title, "The Unknown Applicant"—a rendering of a creature who left no corporeal trace beyond the beep on an answering machine.

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[1] *See* Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 160 (1990).

Joining Judge Breyer in his death watch at the bedside of the ailing judiciary were two other leaders—Judge Ed Becker of the Third Circuit and Judge-in-waiting Guido Calabresi (a wannabe of the Second). This troika, which had been relying heavily on tea leaves and the entrails of domestic pets to give them a sense of the direction of judicial thinking, now turned to scientific polling and even to focus groups.

The results were dramatic. The evil spirits fled. The judges were restored to their earlier and true sweet reasonableness. Polling data shot off the chart in favor of a benchmark hiring date. At a national workshop for federal appellate judges in Washington, those in attendance shouted themselves hoarse in favor of a new system of law clerk hiring. The judges voted all power to Maximum Leaders Becker, Breyer, and Calabresi. After at least five earlier failed efforts at reform, these judges held the last hopes of the federal judiciary, if not for salvation, at least for sanity. The three judges then moved with dispatch to establish the March 1 date. The Judicial Conference endorsed this last-ditch effort, endowing it not with the force of law but at least with the menace of a voodoo curse.

The rallying of the judges around the March 1 date has been touching. Compliance has brought tears to the eyes of even the most hardened judge-basher. Paranoia has been totally absent. Judges are almost pathetic in their eagerness to believe only the best about their brothers and sisters. When applicants with their own agenda carry tales of other judges interviewing before the sacred date, the judge to whom the tale is told angrily rejects it as a contemptible fabrication. And the universal impulse to help the institution of the courts even at one's own expense is inspiring. Often judges observe that certain brilliant candidates are over-qualified and send them packing down the corridor to a judge who they are quick to concede is a touch brighter than they are and can better engage a near genius at close quarters. All told, if there is any doubt that judges are team players, one ought to be impressed by their selfless commitment to the March 1 benchmark.

III. A GOLDEN AGE?

However, one must also concede that the March 1 benchmark is a bit rudimentary, maybe even for such simple folk as judges. Judges deserve a more sophisticated approach—like, for example, the medical match system. Now that they have the March 1 benchmark under their belts and fully digested, it may be time for a scheme that is a mite more challenging. One proposal by the dean of an obscure law school that operates on cruise ships is to institute something akin to the National Football League draft. Judges could be ranked in the order of brilliance of their opinions. The judge producing the least

brilliant, or most inept, opinions (in the view of the lawyers who had to read them) would have the first pick of a law clerk. All the other judges (in reverse order of ineptitude) would then make their selections. The most able judge would get the last pick—possibly a graduate of the S.S. Princess Law School. This method might tend to equalize the quality of the product emanating from the federal courts and would certainly do a lot for mediocre graduates of mediocre law schools. All that is required is for some group of brilliant judges, like Judge Becker, Justice Breyer, and Judge Calabresi, to volunteer happily to take the last picks in the draft.

Another challenging proposal—characterized as "populist"—has been made by a militia group composed exclusively of disaffected law students. This "Sons of Liberty" group, which publishes the Second Amendment Law Review, believes that, instead of the students traveling to be interviewed by judges, the judges should travel to be interviewed by students. Their declared mission is to expose liberal activist judges, who might have in mind drawing unsuspecting law clerk aspirants into a conspiratorial web. If the judges had to do the traveling, the liberal activists—notorious elitists—would certainly insist on first class travel and thus show their true colors. These hateful activists would no doubt promote some new, big-ticket federal program to pay their air fares. It certainly is true that unmasking unreliable elements in the judiciary is a high priority. The militiamen (*not* gender neutral) deserve to be heard.

One last clever overture for hiring clerks has been made this season by fifteen influential law school deans, who have (wisely) requested anonymity.[2] These deans have suggested that clerkship applicants be given twenty-four hours to mull over a judge's offer of employment before being required to accept or reject. This makes perfect sense. It gives the applicant (assumed to be female for purposes of this example) time to phone all the judges she has interviewed with and who told her to call if she got an offer from another judge. These earlier judges are thus put on the spot either to make an offer or to fold ignominiously with stammered apologies. Assuming that most are ashamed to fold, the applicant can assemble quite a portfolio of offers from judges who may or may not really want her as their law clerk. The applicant can then continue the bidding by asking each of the numerous offering judges whether that judge will also hire her boyfriend as a law clerk. The bargaining need not stop here. For the law student may ask each potential employer whether the judge in question will hire her former boyfriend as a third clerk. The bargaining may go on: there are still places to be found for the student's additional boyfriends as the judge's press flack, speech writer, secretary, and so on. Thus,

[2] *See* Letter from Fifteen Unnamed Deans to All Federal Court Judges (Sept. 17, 1996) (on file with author).

if the proposal of the Fifteen Unnamed Deans is taken to heart, the winning jurists will acquire staffs not only of the customary brilliance but also infused by an extraordinary—perhaps explosive—chemistry.

But for now, and with due respect to these more complex and demanding proposals, we must reconcile ourselves to the fact that judges are a simple lot on the whole. They are to be commended for their unflinching commitment to the modest strictures of the March 1 benchmark. This system is even simpler than the simplest jurist or dean or potential law clerk could hope for. Whether Saturday or Monday, whatever time of day or night, a solitary date, March 1, is all that counts. Even a judge without a law clerk can fathom that.