



JUSTICES & THEIR LAW CLERKS

A BIBLIOGRAPHICAL EXPERIMENT

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LITERATURE ABOUT THE SUPREME COURT and its Justices has been on an epochal explosion beginning in the latter half of the twentieth century and especially during the past few decades. Much of this has come from outside scholars or publicists who are, plus those who claim to be, earnest students of the Court as an institution or of the particular Justices they are writing about.

But before these outpourings reach tsunami proportions, there may be some lasting virtue in taking a special look at what has been written by law clerks who worked for the Court's Justices. These are all individuals who have put in one or more years of service at the Court. Hence they each had some direct experience, toward the beginning of their law careers, to observe how the Court and their Justice were functioning.

A few of the writings about a modern Justice, as seen by one of his law clerks, are ambitious volumes that qualify essentially as full-scale biography. Here I have in mind John P. Frank's early *Mr. Jus-*

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tice Black: The Man and His Opinions (Alfred A. Knopf 1949); John D. Fassett's *New Deal Justice: The Life of Stanley Reed of Kentucky* (Vantage Press 1994); G. Edward White's *Earl Warren: A Public Life* (Oxford University Press 1982); John C. Jeffries, Jr.'s *Justice Lewis F. Powell, Jr.* (Charles Scribner's Sons 1994); Francis A. Allen's (with his son Neil Walsh Allen) *A Sketch of Chief Justice Fred M. Vinson* (Green Bag Press 2005); and Dennis J. Hutchinson's *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (Glencoe, The Free Press 1998). Biography of any real worth usually involves an author's commitment to an arduous and long-term labor, combined with perceptive skills that enrich the ultimate product. It is impressive that each of these full-scale biographies of six modern Justices has been produced by an individual who was not a professional biographer or a professional historian but rather one of that Justice's former law clerks.

Yet for the most part the law clerks' views about their Justices are to be found in articles in law reviews or in more popular media, or in chapters of a book edited by others, or in speeches that have had the wit to be recorded and preserved. And there is indeed much of all this.

It will of course be recognized that a former law clerk who writes about his or her Justice may well have a slightly rosier view of the Justice than historical accuracy can fully sustain. Considerations of loyalty and of privacy may in some instances intrude. Again, law clerk bias or superimposed ideology is not entirely unknown. Or the law clerk may well be lacking the full inside facts of an event – especially an important event – that occupied the Court's attention.

Nevertheless, it should not be difficult for even a somewhat unsophisticated reader to make suitable discounts for such factors. What ought to remain, at least in most situations, is a remarkably solid impression as to both substance and procedure and a candid portrayal of personalities.

But where to look to gather such information emanating from law clerks? Apart from in memoriam observations, assume the search will usually occur sufficiently long after a law clerk's service

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so that confidentiality restrictions are not seriously dented. “History has its claims,” as Herbert Wechsler once remarked. In exploring the possibilities, I have tried to assemble a bibliographic tour relating to Harlan F. Stone and his law clerks. It is in the nature of an experimental journey. I am sure that comparables could be devised for any other modern Justice who is the object of substantial interest or persistent curiosity.

Set forth below is a list of all the writings I have been able to find by Stone law clerks about their Justice. Some deal solely or mostly with Stone substantive opinions over the entire course of Stone’s judicial career. Others (including a number of pieces by me) speak wholly or in considerable part about the law clerk’s relationship to the Justice during the period of his clerkship. In his twenty-one years on the Court, first as an Associate Justice and then as the Chief, Stone had twenty-two law clerks, all but two of whom were at the time of their service recent graduates of Columbia Law School.

Much can also be learned about Stone’s various law clerks’ interactions with the Justice on Court matters by examining the massive official biography produced by Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (The Viking Press 1956) if you have the patience to plough through the helpful Index and the Bibliographic Notes.

In a different setting, illumination from many of the Stone law clerks can be found in an unpublished book-length master’s thesis by Elliott A. Brown, entitled *Harlan Fiske Stone and His Law Clerks* (1965) – copies are in the libraries of Columbia University and of the Columbia Law School. This thesis contains much in the way of interviews with the law clerks as well as lengthy excerpts from their memoranda and letters, including those specially written to Brown concerning their time with Stone.

Additionally, interviews with some of the Stone law clerks yield certain insights about their work for Stone that are reflected in Todd C. Peppers, *Courtiers of the Marble Palace*, pp. 88-93 (Stanford University Press 2006). And a little of the same can be found in Artemus Ward and David L. Weiden, *Sorcerers’ Apprentices* (New

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York University Press 2006), which is a competing book on the history and role of Supreme Court law clerks. Possibly more helpful for this purpose will be my *The Family of Stone Law Clerks*, a chapter in a forthcoming book *Behind the Bench: Portraits of United States Supreme Court Law Clerks and Their Justices*, edited by Messrs. Peppers and Ward and scheduled for 2011 publication by the University of Virginia Press.

Finally, there is the always-available resort to the Columbia Oral History Project (the webpage on how to use the oral history collection is www.columbia.edu/cu/lweb/indiv/oral/howtouse.html). This includes interviews with Milton Handler, Walter Gellhorn and Herbert Wechsler, three of the Stone law clerks who had each become, among other things, a giant on the Columbia Law School faculty.

In any event, here is the list.

Alfred McCormack (1925 Term)

1. *A Law Clerk's Recollections*, 46 Columbia L. Rev. 710 (1946).

Milton Handler (1926 Term)

1. *The 1926 Term: My Clerkship With Mr. Justice Stone*, Supreme Court Historical Society Yearbook 1985, p. 1.
2. *Clerking for Justice Harlan Fiske Stone*, 1995 Journal of Supreme Court History, p. 113.

Walter Gellhorn (1931 Term)

1. *Stone on Administrative Law*, 46 Columbia L. Rev. 734 (1946).

Herbert Wechsler (1932 Term)

1. *Stone and the Constitution*, 46 Columbia L. Rev. 764 (1946).
2. *Mr. Chief Justice Stone*, Address at Supreme Court Bar In Memoriam Proceedings, p. 43 (November 12, 1947).
3. *Harlan Fiske Stone*, in *Columbians as Chief Justices*, Supreme Court Historical Society Yearbook 1988, p. 74.

Warner W. Gardner (1934 Term)

1. *Mr. Chief Justice Stone*, 59 Harvard L. Rev. 1203 (1946).
2. Chapter V in Warner W. Gardner, *Pebbles From the Paths Behind: A Sort of Memoir: The Public Path 1909-1947* (1989); Chapter V, which

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is entitled “The Supreme Court” and deals with Warner’s law clerkship, was reproduced in 8 Green Bag 2d 188 (2005).

3. *Harlan Fiske Stone: The View from Below*, Supreme Court Historical Society Quarterly, Vol. 22, No. 2, p. 1 (2001).

Harold Leventhal (1936 Term)

1. *Harlan Fiske Stone*: Remarks at Harlan Fiske Stone Fellowship, Columbia Law School, October 28, 1975, 49 New York State Bar Journal 24 (1977).

Louis Lusky (1937 Term)

1. *Footnotes Redux: A Carolene Products Reminiscence*, 82 Columbia L. Rev. 1093 (1982).
2. *Clerking for Harlan Fiske Stone*, 13 Supreme Court Historical Society Quarterly, Vol. 13, No. 1, p. 13 (1992).
3. *Harlan Fiske Stone, 1925-1941, 1941-1946*, in Clare Cushman (ed.), *The Supreme Court Justices, Illustrated Biographies, 1789-1993*, pp. 361-365 (Congressional Quarterly 1993).

Allison Dunham (1939 and 1940 Terms)

1. *Mr. Chief Justice Stone*, in Allison Dunham and Philip B. Kurland (eds.), *Mr. Justice*, pp. 47-67 (University of Chicago Press 1956).

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1. *Mr. Chief Justice Stone*, 59 Harvard L. Rev. 1200 (1946).
2. Letter to Alpheus T. Mason, December 18, 1953, re Stone’s views on outside activities of federal judges, in *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges*, pp. 224-226, Hearings before Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate, 61st Cong., 1st Sess., September 30, 1969.
3. *A Justice’s Papers: Chief Justice Stone’s Biographer and The Saboteurs’ Case*, Supreme Court Historical Society Quarterly, Vol. 14, No. 3, p. 10 (1993).
4. *Dissenting Opinions—An Addendum to Justice Scalia’s Observations*, Supreme Court Historical Society Quarterly, Vol. 16, No. 2, p. 4 (1995).
5. *Opinion-Assigning by Chief Justices*, Supreme Court Historical Society Quarterly, Vol. 25, No. 1, p. 14 (2004). [Items 1, 3, 4 and 5 are reproduced, along with some miscellaneous Stone matters, in my *Some Joys of Lawyering*, pp. 29-68 (Green Bag Press 2007).]

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6. *Recollections of West Virginia State Board of Education v. Barnette*, 81 St. John's L. Rev. 755 (2007), being participation at the Robert H. Jackson Center, Jamestown, N.Y., April 28, 2006.
7. *A Note on the Saboteurs' Case and the Commander in Chief*, 11 Green Bag 2d 423 (2008).
8. *The Family of Stone Law Clerks*, a chapter in a forthcoming book, as stated above.

