

FEEDING THE RIGHT STUFF

WOULD YOU CLERK FOR LEARNED HAND?

Ross E. Davies[†]

Being a feeder judge (that is, a judge whose clerks routinely go on to clerk for a Justice of the U.S. Supreme Court) must be difficult. Hard at the start of the process and, alas, sometimes even harder at the end. While a number of forthright scholars and judges have described the challenges at the start, information about difficult endings is in shorter supply. But not nonexistent.

At the start of the process, there is the matter of picking clerks who are not merely excellent law students, but also likely to be marketable to the Justices:

“There are some judges who like to position themselves as feeders to the Supreme Court, since that’s one way that a judge can make a reputation for him or herself,” said Joan Larsen, a faculty clerkship adviser at the University of Michigan Law School. “I have had a feeder judge say to me, ‘Yes, Joan, I’m sure he would be a great clerk, but I can’t send him upstairs.’”¹

For some feeder judges, there may be an even earlier start, namely, the picking of feeder professors, as Judge Alex Kozinski suggests:

Just as the clerkship process is filled with lore about feeder judges, so every name-brand law school has its resident professor or professors who fancy themselves as feeders to prestigious court of appeals judges and even Supreme Court Justices. . . . [T]he repu-

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

¹ Catherine Rampell, *Judges Compete for Law Clerks on a Lawless Terrain*, N.Y. TIMES, Sept. 23, 2011.

tation of being a feeder is somewhat self-sustaining; a feeder professor will attract the most accomplished and aggressive research assistants who are the kind of people that judges and Justices look for anyway. The aura of being a feeder therefore is a real benefit, and professors who have it work very hard to maintain it.²

And then there is the fact that the feeder judge is competing with his or her peers for those superstudents, as Judge Patricia Wald explains:

And, candidly, there is another factor in the calculus of many appellate judges who lead the annual chase. A judge's reputation among his own colleagues may in part reflect his ability to garner the most highly-credentialed clerks under his banner so that he can maintain a reputation as a "feeder" of clerks to the Supreme Court. Correlatively, the stronger an appellate (or a district) judge's reputation for channeling clerks to the high court, the more attractive he will be to many understandably ambitious, qualified clerk applicants. Some judges have long friendships with justices so that their clerks have an edge simply by virtue of that relationship. Others become feeders because they consistently are able to recruit the law review editors and top students from prestigious schools; not surprisingly, they want to keep it that way. . . . Early identification of these "precious few" is sought and received from old-time friends in the law schools — usually before the interview season even begins.³

A "chase" it is, as numerous commentators have observed.

The pursuit wraps up quickly enough. A few promising students are set to clerk for feeder judges, the not-so-promising to clerk for non-feeder judges, and, eventually, all of them to serve their judges (and thus the public) in the adjudication of cases.

Immediately and simultaneously, the endgame begins. Feeder judges work to feed their clerks to Justices. Clerks interview with as many Justices as possible. But even those few promising clerks are more than enough to fill the available Supreme Court slots. Those who do not end up at the high court are doubly disappointing, having failed both themselves and their unsuccessful feeder judges.

² Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1729 (1991).

³ Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 154-55 (1990).

Which brings us to the mysteries of the unhappy endings. The numbers make sense in a general musical chairs kind of way – too many accomplished and attractive backsides for too few desirable seats. But they make no sense on an individual basis. Every single fodder-clerk is a star. None would be working for a feeder judge were he or she not only a brilliant lawyer-to-be, but also suitable to be sent upstairs. And no one involved is happy about the bad results. Even the most forthright of feeder judges have little to say about their failures, and their disappointed clerks are similarly discreet.

It may well be, though, that all is well. Maybe these difficult endings are simply a result of judicial integrity. After all, discovering truth and dispensing justice are the main missions of judges, even feeder judges. Think about it: In the frantic annual chase for the “precious few,” a judge simply cannot develop a deep understanding of a person he or she is hiring as a clerk.⁴ Judge-clerk professional relations are, however, famously – even familialy – close.⁵ Maybe, sometimes, upon really getting to know a clerk, a judge concludes that the clerk does not have the right stuff, and the judge communicates that sad truth (as opposed to something else) to the Justices.

One episode involving Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit might shed some light. Widely regarded as the greatest U.S. judge who never served on the Supreme Court,⁶ he is less widely known as the original leading feeder judge. But that he was. Over a period of 20 years he fed 10 of his clerks to members of the Supreme Court. A .500 batting average⁷ is not top-notch by modern standards,⁸ but for Hand’s day it was great.⁹

⁴ See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING 33-34 (2013).

⁵ See, e.g., Deanell Reece Tacha, *No Law Student Left Behind*, 24 STAN. L. & POL’Y REV. 353, 368 (2013); Douglas W. Swalina, *Hon. Maurice M. Paul*, FEDERAL LAWYER, July 1999, at 16.

⁶ See, e.g., Richard Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 511, 534-35, 540 (1994).

⁷ Circuit judges in Hand’s day were allowed one law clerk. See J. Daniel Mahoney, *Law Clerks: For Better or for Worse?*, 54 BROOK. L. REV. 321, 325-26 (1988).

⁸ See, e.g., ARTMEUS WARD & DAVID L. WEIDEN, SORCERERS’ APPRENTICES 82 (2006); David Lat, *Supreme Court Clerk Hiring Watch: Color Commentary on the October Term 2012 Class*, ABOVE THE LAW, June 15, 2012, abovethelaw.com.

⁹ See, e.g., TODD C. PEPPERS: COURTIERIERS OF THE MARBLE PALACE 31-34 (2006), *but see id.* at 131 (suggesting even more Hand clerks at the Supreme Court).

On June 20, 1945, Hand wrote two reference letters to Supreme Court Justice Wiley Rutledge. The first was on behalf of Hand's own clerk at that time, Robert H. Goldman. The second was for Richard F. Wolfson, who was clerking for Hand's Second Circuit colleague, Judge Thomas Swan. On June 26, Rutledge wrote back to Hand. Before you read Rutledge's letter, which is transcribed below, read the two Hand reference letters on pages 191 and 192. Make your own choice about which candidate to hire. Then come back here and read Rutledge's decision and opinion.

And now Rutledge's letter:

Dear Judge Hand:

I very much appreciate your taking the time and pains to write me concerning Mr. Richard [sic] Goldman and Mr. Richard Wolfson. I have seen both of these young men and have decided to tender the place to Mr. Wolfson.

I like Mr. Goldman, agree with your judgment that he is intelligent and I have no doubt also well-trained and industrious. Nevertheless, the balance seemed to fall in Wolfson's direction, perhaps slightly on all scores but more especially on the basis of general physical stamina. The grind here is so continuous that I cannot take any more chances than I have to on having a clerk who might be out occasionally for physical reasons.

I trust that you are winding up the work of the term with leeway for a real period of rest and relaxation during the summer.¹⁰

The Hand-Rutledge correspondence invites at least four questions: (1) do modern feeder judges ever, in fact, hire clerks who should not be fed to the Justices; (2) if so, what do they do about it; (3) will we ever know; and (4) if you were one of today's "precious few" would you accept a clerkship with a feeder judge whose reference letters are not always perfectly glowing, and who might endorse a colleague's clerk over one of his or her own? In other words, would you clerk for Learned Hand?

¹⁰ Wiley Rutledge Papers, box 120, Library of Congress, Manuscript Division; see also WARD & WEIDEN at 76-77. Do not worry about Goldman. He did just fine. He practiced in New York City for several years before settling in his home town of Lowell, Massachusetts, where he enjoyed a long and successful career in the law. See *Robert H. Goldman, 72: Lawyer, specialist in libel cases*, BOSTON GLOBE, Jan. 17, 1991.

JUDGE LEARNED HAND'S CHAMBERS

*U.S. Court House
N.Y.C.*

June 20, 1945

My dear Mr. Justice:

Robert H. Goldman has asked me to write you on the chance that you might like him for a law clerk during the next term. As you may know, he served as my law clerk from October, 1943 to August, 1944; and I found him intelligent, industrious, well-trained and cooperative. His work on long records was dependable and thorough. He is particularly scrupulous in his citations and references.

I also think that you will find him in entire accord with your own approach and outlook.

Last year he was forced to be away for considerable periods because of trouble with his digestion; but he tells me this has now disappeared. If this turns out to be the case, I should anticipate no trouble.

With best wishes for the summer, after your long and trying session, believe me, as ever,

Very respectfully yours,

Learned Hand

JUDGE LEARNED HANDS' CHAMBERS

June 20, 1945

Dear Mr. Justice:

Since writing you today about Robert H. Goldman, Mr. Richard F. Wolfson, Judge Swan's law clerk, has also asked me to tell you what I know about him. It so chances that I had the opportunity of working with him for some weeks this winter upon an exceptionally heavy appeal, in which we had to substitute - most inadequately - for the Supreme Court: the case against the Aluminum Company. The law clerks of the three judges divided the

extremely long record between them, and, as I had to write the opinion, I dealt with Wolfson for a substantial period. I can recommend him without reserve: he is accurate, exhaustive in his researches, fertile in suggestion, and reliable in his results. In particular, you will find him a most agreeable assistant, willing, anxious to help, not opinionated and not disposed to thrust his views upon you, though he has much independence of spirit. You will also find him thoroughly sympathetic with your own general background of feeling and belief.

Very respectfully yours,

Ross E. Davies