

Scholars have long recognized the importance of the European Court of Justice (ECJ) as an active court and an engine of European integration. Few, however, have peered inside the black box of the institution to look at the individuals who do the work or to analyze the ECJ as an organization. Law clerks at the ECJ, called *référéndaires*, are drawn from the ranks of lawyers, legal academics, legal administrators, and judges. They provide valuable legal and linguistic expertise, ease the workload of their members, participate in oral and written interactions between *cabinets*, and provide continuity as members rapidly change. Although they have more power than their counterparts in the United States Supreme Court, they are not the puppeteers of the members, but their agents. Focusing on the purported unchecked power of clerks distracts us from examining the important institutional consequences of changes in workload or an expansion of members.

BEYOND PRINCIPALS AND AGENTS Seeing Courts as Organizations by Comparing *Référéndaires* at the European Court of Justice and Law Clerks at the U.S. Supreme Court

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The first scholars who studied the European Court of Justice (ECJ) drew parallels between it and the Marshall Court in American constitutional history (Lenaerts, 1990; Stein, 1981) and documented the importance

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of the institution as an engine of European legal and political integration (Stone, 1995; Sandholtz & Sweet, 1998). Legal scholars debated the appropriateness of the ECJ's so-called activism (Cappelletti, 1987; Krislov, Ehlermann, & Weiler, 1986; Rasmussen, 1986, 1988; Shapiro, 1987; Stein, 1981), its status as a constitutional court (Mancini, 1989), and the merits of the legal rules generated by particular cases. With a few notable exceptions, political scientists ignored the ECJ, consistent with the practice of those in the subfield of public law who devoted nearly all of their attention to the U.S. Supreme Court and of those in comparative politics who ignored law and courts altogether (Shapiro & Stone, 1994, p. 397; Stone, 1992, p. 5; Tate, 1987).¹ International relations scholars took up the important question of why courts in member states acquiesce rather than ignore the edicts of this transnational body, and why member states comply with the ECJ's rulings (Alter, 1998; Burley & Mattli, 1993; Garrett, 1995; Kilroy, 1995; Sweet & Brunell, 1998).

Although important, I do not believe the question of why national courts comply is the only question worth engaging about this important political and legal institution. Because I reject legal formalism, I am interested in more than the products of legal institutions; I am interested in the process by which the products, the legal rulings, are produced. Just as those who study the presidency, Congress, or the bureaucracy pay attention to the characteristics of the individuals who occupy powerful positions within institutions and how they go about their work, I would argue that the people and structures of the ECJ also merit investigation. My earlier work tries to disaggregate the ECJ, to see it as a set of individuals and structures rather than a monolith, and to see it as a political institution rather than a judgment-producing machine. I began to examine who the judges are, how they came to be selected, and how long they served (Kenney, 1998b; 1999). This article continues that empirical project of describing and understanding the ECJ as a political institution and as an organization.

1. Feld (1963) examined the membership of the European Court of Justice (ECJ). For a more recent examination of judicial selection, see Kennedy (1996). Scheingold (1965) looked at the workings of the Coal and Steel Court. Volcansek (1986) was the first to examine the relationship between the ECJ and national courts (see also Volcansek, 1992). In addition to Krislov and Shapiro, others examined the ECJ's role in policy making (see University of Chicago Legal Forum, 1992; *Comparative Political Studies*, 1994), policing the boundaries of federalism (Bzdera, 1992; Lenaerts, 1990), and public opinion and the ECJ (Caldeira & Gibson, 1995; Gibson & Caldeira, 1995, 1996).

Although legal scholars in the United States have long recognized the importance of law clerks to the functioning of the U.S. Supreme Court as an institution, law clerks have not been compared to legislative or bureaucratic staff by scholars of organizations and institutions. The counterparts of U.S. Supreme Court law clerks at the ECJ are called *référéndaires*. Drawn from the ranks of lawyers, legal academics, legal administrators, and even judges, *référéndaires* serve many functions. They provide valuable legal and linguistic expertise, ease the workload of their members, participate in oral and written interactions between *cabinets* that result in a single collegiate judgment, and provide continuity as members of the ECJ change.²⁻³ Their work takes place behind the scenes and like the internal workings of the Court as a whole, has received little scholarly or even journalistic attention. By understanding who *référéndaires* are and how they contribute to the ECJ's work, we learn much about the institution as a whole.

Why is disaggregating the ECJ and understanding the work of its components important? First, I would argue that the ECJ as an institution is intrinsically interesting and because of its importance, worth knowing more about for its own sake. Second, through describing the role and work of *référéndaires*, one learns much about how the ECJ itself operates. This empirical work, in turn, lends credence to or rules out of order larger claims about judicial decision making (Baum, 1993). Third, I would argue that understanding courts as institutions is best achieved by drawing on organizational theory applied most often to bureaucracies and highlighted in importance by the new institutionalism (Armstrong, 1998; see also Burgess, 1993; March & Olsen, 1984; R. Smith, 1988; Stone, 1992). The question of how institutions (including courts) should organize themselves so as to govern (issue legal rulings) effectively is one that should concern all political scientists, if not all citizens. Are there any generalizations we can make that hold cross-nationally and cross-institutionally about organizations? Toward that end, this article provides important information about some of the trade-offs inherent in expanding staff to enhance individual efficiency (whether it is adding a law clerk, an office of legal counsel in the EEOC, a Congressional budget office, or a National Security Council) that may diminish the deliberative capacity of the government (ECJ) as a whole to reach a compromise (i.e.,

2. Members include both judges and advocates general.

3. The *cabinet* is the suite of rooms where each judge or advocate general has his private office surrounded by the offices of his *référéndaires* and clerical staff, comparable to chambers at the U.S. Supreme Court.

govern). In an era of increasing globalization, when we are witnessing the rise of transnational organizations, organizational theorists and scholars of bureaucracy are going to have to expand their theories to understand how international organizations work. This study of the ECJ begins to describe how one important institution seeks to reach consensus among members drawn from more than 15 disparate legal systems.

Last, even if the question of why national courts and member states obey is not—in my view—the only important question with regard to the ECJ, I would argue that understanding the role of *référéndaires* contributes, albeit indirectly, to that debate. One does not have to be a legal formalist to see the value of consistency in the law. Governments, national courts, companies, and private citizens must know what European Community (EC) law requires of them, and those rulings must be relatively clear and consistent, if law is going to create a uniform system of rules and practices in 15 countries. If the ECJ wants to ensure compliance with the law, it should only deviate from precedent for good legal and policy reasons, rather than because the current crop of judges failed to understand it. *Référéndaires*, more so than U.S. Supreme Court law clerks, contribute to legal consistency because of differences between the backgrounds of judges on the two courts. Furthermore, the task of achieving a single consensus judgment is more difficult for the ECJ than the U.S. Supreme Court because the ECJ must reach agreement across differences that include language, legal system, and legal culture, in addition to the intractable differences that the U.S. Supreme Court faces: legal philosophy, political ideology, and personality differences. I will argue that *référéndaires* at the ECJ contribute to smooth functioning of the institution, promoting consistency, efficiency, and consensus in ways that are not true of their counterparts on the U.S. Supreme Court, because of differences in how the ECJ is structured. And, in turn, *référéndaires*' contributions help produce decisions that are most likely to secure acceptance by national courts and legal communities because they are persuasive to member state judges.

To support these arguments, I must first briefly describe the ECJ and explain how it differs from the U.S. Supreme Court. Next, I will briefly summarize the literature on U.S. Supreme Court law clerks. I will then present the data I have gathered on *référéndaires*. To begin my organizational analysis, I will take up the comparative question of whether clerks (agents) are controlled by or unduly influence their judges (principals). This analysis will lead me to a broader comparison of the two institutions. I will then make some concluding observations about what this evidence contributes to our understanding of organizations.

THE ECJ AND THE SUPREME COURT COMPARED

Fifteen judges sit on the ECJ, one from each member state in the European Union.⁴ The Council of Ministers appoints members for renewable 6-year terms. The judges elect one of their members to be the President who assigns cases, is in charge of the administration of the Court, and leads the ECJ in its internal deliberations. Also sitting with the Court are nine advocates general, one assigned to each case. The advocate general reads the briefs, attends oral arguments, and writes an opinion setting out the facts, summarizing the legal arguments, and recommending how the Court should rule. Despite the many similarities between the ECJ and the U.S. Supreme Court, and although I would argue that the ECJ is best regarded as a constitutional rather than an international court, readers whose frame of reference is the U.S. Supreme Court need to recognize important differences between the Court of Justice and the Supreme Court.⁵

Treaties that create the Coal and Steel Community and the European Economic Community and not a constitution provide the legal basis of the Court of Justice (Mancini, 1989). The EC is “a distinct legal order of a novel kind, neither international nor national but more akin to an embryonic federation” (L. N. Brown, 1989, p. 39). The ECJ has used its judicial power to promote greater European integration (Mancini & Keeling, 1994, p. 186). With the craftiness of the Federalist former Chief Justice John Marshall, it has turned the treaties into a constitution (Stein, 1981). Through its doctrine of direct effect (holding that the Treaty is not merely binding on the governments of member states but legally enforceable by individuals in national courts) and by holding EC law to be supreme, the ECJ has expanded its own power and transferred power to national courts at the expense of member states (Shapiro, 1987, pp. 1008-1009; see also Weiler, 1986, pp. 1103-1142). The ECJ has resolved important policy questions when other Community institutions reached an impasse (L. N. Brown, 1989, pp. 4, 7; Hartley, 1988, p. 227). The “activist” nature of the court and the “juridical” nature of politics in the EC have generated much commentary (Bzdera, 1992; Cappelletti, 1987; Koopmans, 1986; Rasmussen, 1988; G. Smith, 1990; Weiler, 1986; Volcansek, 1992, p. 109). Because the Court was created to hear cases about the Coal and Steel Community and later to hear cases about the common mar-

4. Although the Treaty calls for the appointment of judges through the common accord or Council, in practice, there is one judge from each member state. (For a contemporary discussion, see Kenney, 1999; for a more lengthy overview of the ECJ, see Kenney, 1998a.)

5. In the interest of brevity, I have assumed readers to be familiar with the U.S. Supreme Court. For those who are not, an excellent basic text is O'Brien's (1993) *Storm Center: The Supreme Court in American Politics*.

ket, it has little of the human rights cases that provide the mainstay of controversy and publicity about constitutional courts in the United States or Germany. The vehicle for its landmark decisions are cases on customs classifications, equal pay for men and women, and the importation of foreign liquors or ladies' pajamas.

Perhaps most characteristic of its status as a hybrid international, constitutional, or federal court is its procedure for deciding preliminary rulings. An individual may bring a case in a domestic court and ask for that court to apply EC law to the case. When a national court or tribunal concludes that the case before it raises a matter covered by EC law, Article 177 permits it to submit questions and request that the Court of Justice give a preliminary ruling interpreting the Treaty. The ECJ answers the questions and sends the answers to the national court to apply to the facts of the case. Unlike the federal system of the United States, the European Union does not have independent trial courts. The Court of Justice must rely on national courts to submit cases to it and to carry out its rulings.

Although its landmark cases may arise from disputes over obscure products, the ECJ also is asked to rule on matters that have little legal significance or are simply routine. Unlike the U.S. Supreme Court, the ECJ has no mechanism for setting its own agenda or controlling its workload through granting or denying certiorari (Kennedy, 1993). Like many European courts but unlike the modern U.S. Supreme Court, the ECJ issues only one judgment; there are no dissenting or concurring opinions. Speaking with one voice strengthens the authority of the ECJ's judgments. It also conceals disagreement. Muddled or vague judgments may result from the need to compromise. The president assigns one judge to be *juge-rapporteur* of each case. The *juge-rapporteur* takes instructions from the conference (*délibéré*) and writes the judgment. The judgment, then, reflects the views of the formation as a whole, or the majority, rather than the *juge-rapporteur*'s personal views. The judgments themselves differ remarkably from the U.S. Supreme Court's opinions. Often, it is the advocate general's opinion rather than the Court's judgment that more fully explicates the legal, public policy, and political choices presented by the case. The ECJ's judgments, on the other hand, are terse and declarative in the tradition of civil law opinions, rather than exercises in legal reasoning and persuasion (Rudden, 1987, pp. 3-4), depriving legal scholars and future judges the complexity and diversity that may have characterized the judicial debates (Bzdera, 1992, pp. 131-132). One *référéndaire* commented that whatever cannot be agreed to is simply excised from the judgment.

Judges defend the need for secrecy and unanimity because their appointments are only for six-year renewable terms, not life. If they signed separate opinions, member states could check whether their judges were voting for or

against the national interest and refuse to reappoint judges who did not vote appropriately, thereby compromising their independence. The turnover of membership of the ECJ is higher and the length of service lower than at the Supreme Court: 9 years on average versus 15 (Kenney, 1999, p. 154).

The working language of the ECJ is French. All written documents are available to members and *référéndaires* in the language of the case and are also translated into French. The advocate general's opinion is drafted in his or her native language and then translated into French. Although all members need French to function at the Court, clearly the proficiency of the members varies from native speaker to those who are truly bilingual to fluency to merely adequate. It makes sense that those judges who are most skilled in French, as well as those who speak fluently several Community languages (perhaps now most important, German), will find it easier to interact with their colleagues on a professional as well as a social basis. Members and *référéndaires* who are multilingual will also be able to work directly from the pleadings in the language of the case without waiting for translations as well as listen to oral proceedings without relying on interpreters. The linguistic skills of the members and their staffs is an important consideration that is not relevant at the U.S. Supreme Court.

Although many Supreme Court justices are drawn from the federal bench, there is no equivalent Community bench from which to draw members of the ECJ (with the possible exception of the Court of First Instance). Members are drawn from the judiciaries of member states, private practice, political office, and the professorate. Members vary, then, in their depth of knowledge of EC law. Members from countries who have only recently joined the European Union may have few judges or legal academics trained in EC law. Thus, both language and knowledge of EC law become important considerations in appointing members to the Court of Justice in a way that has no parallel in the United States.

Members of the ECJ not only do not share a common native language but they do not share a common legal tradition. A French judge and a German judge may have very different ideas about how to draft a judgment, just as common law and civil law judges will have very different notions about how to proceed, or about the value of oral argument. Similar to this, the different member states have very different practices about employing legal staff.⁶

6. Judges in the United Kingdom do not employ law clerks. German judges employ experienced lawyers as their law clerks. French judges on the *Conseil d'État* do not have law clerks, but the court itself is a large body made up of judges who vary in age and experience and thus have junior apprentice-like judges. A greater understanding of national differences in the member states in the use of legal staff may help to explain differences in the use of *référéndaires* at the Court of Justice.

The inner workings of the Court of Justice have received little scholarly attention relative to the U.S. Supreme Court, which reflects its relative newness, scholarly focus on doctrine, and structural barriers to gathering information. No European equivalent of *The Brethren* (Woodward & Armstrong, 1981) (or *Closed Chambers*, Lazarus, 1998) exists, and the members and staff were both familiar with the former text and determined that such an account never be written. No journalists comprise a Court of Justice press corps who go beyond reporting the outcome of the cases to analyzing how the Court is operating (Helm, 1996, p. 14). Like the founding fathers of the American Constitution, the drafters of the Treaty did not make the record of their deliberations available.⁷ Unlike their American counterparts, no James Madison came forward to offer individual documentation of the decision making. Similarly, no written materials about the internal workings of the Court are available, either draft judgments, memoranda, or even the pleadings presented by member states or the Commission who have the right to intervene in cases they regard as of national importance.

Insight into the inner workings of the Court or the mind of the judge is available only in the writings of former members or *référéndaires*, many of whom are legal academics specializing in EC law.⁸ Judges, advocates general, *référéndaires*, and members on the Court of First Instance may simultaneously hold academic appointments. Judges and advocates general give speeches, write, and publish about the Court of Justice, drawing on their experience and inside information. These accounts provide a rich source of commentary, but they are incomplete.⁹

7. In fact, the signatories of the Treaty ensured that no one would be able to investigate their original intent by sealing the record of their deliberations (Sandalow & Stein, 1982, p. 17).

8. Many members of the court have published extensively (see especially Koopmans (1986); Mancini (1989); Jacobs; Pescatore), for articles in English.

9. Two less tangible factors, a combination of culture and structure, inhibit information gathering about the inner workings of the Court. First, Europeans, especially officials at European Community EC institutions, accept a higher degree of secrecy and consider it normal. Second, the line between law and politics is drawn in a different place. Drewry (1991) characterized the situation in Britain as "endemic academic apartheid between legal and political studies." There is tremendous resistance to classifying and studying the Court as a political institution. Members and staff at the ECJ, although friendly, accessible, and helpful, are understandably cautious about betraying the confidentiality of the Court's decisions or saying anything that might disrupt the collegiality of the Court. Although they go out of their way to help those studying the Court, it is clear that many, but not all, view studying the political or internal aspects of the Court as inappropriate.

LAW CLERKS AT THE SUPREME COURT

The literature on law clerks in the United States generally falls into one of the following four categories: (a) an historical description of the clerk process and what work they do (or how they are chosen), (b) ruminations by former clerks about their experiences, (c) journalistic exposés based on law clerk interviews, or (d) social scientific studies of the role of clerks in the legal process.¹⁰ To compare the ECJ to the Supreme Court, I shall only discuss so-called elbow clerks: personal staff serving only one justice. Oakley and Thompson (1980) describe law clerks (on all courts) as the “subordinate, anonymous, but often quite powerful lawyers who function as the noncommissioned officers in the army of the judiciary” (p. 2). Justice Gray hired the first law clerk in 1882 and Justice Oliver Wendell Holmes continued the practice (Newland, 1961; O’Connor & Hermann, 1993; Swann, 1992). The 1922 Appropriations Act allowed for each justice to have a paid clerk. Between 1946 and 1969, most associate justices employed two clerks; by 1970, most justices employed three; and by 1980, most justices had four (O’Connor & Hermann, 1993, p. 4).

Although some states and federal courts have experimented with a more permanent staff of law clerks (Oakley & Thompson, 1980; Stow & Spaeth, 1992), most appellate court law clerks serve only 1 or at most 2 years. In many cases (90%), clerks for the U.S. Supreme Court have clerked previously for a federal appellate court for 1 year (M. R. Brown, 1996, p. 378). Like their counterparts in the early days of the ECJ, a few clerks have clerked for many years. Some justices have at least one senior clerk, someone who is serving his or her second year of service for the justice (Brenner & Palmer, 1990, p. 70; Mahoney, 1988, p. 325; Swann, 1992, p. 160; Wasby, 1984, p. 55).

Supreme Court justices vary in how they select their law clerks, a process that is intensely competitive (Kozinski, 1991). Justices now receive from 250 to 300 applications, although many have preferred recommenders (O’Connor & Hermann, 1993, p. 5). The largest number of law clerks have come from Harvard; 90% have come from the top 16 law schools (M. R. Brown, 1996, p. 365). Justices may also select their clerks from those who have clerked in the lower federal courts, particularly the D.C. Circuit Court of Appeals (Brigham, 1987, p. 123; O’Brien, 1993, p. 168).

Now that they hire four clerks, some justices seek a balance of gender, race, law school, and background. Justice Douglas selected the first woman

10. For a longer discussion of the literature on clerks, see Kenney (2000). Excerpts of many articles are published in *The Long Term View* (Vol. 3, No. 1, Spring, 1995).

clerk in 1944, and Justice Frankfurter hired the first African American, William Coleman, in 1949 (O'Connor & Hermann, 1993, p. 6; O'Brien, 1993, p. 159).¹¹ Personal compatibility and, for some, ideological compatibility, have been important selection criteria (O'Connor & Hermann, 1993, p. 6). Justices choose the most promising students rather than seek to cover their weaknesses in areas of law or specialize in a particular area of law.

Serving as a law clerk is a mark of elite status (Rhinehart, 1994, p. 575). After leaving the Court, clerks may receive a \$35,000 bonus in addition to generous salaries that law firms offer to attract them in a frenzy of competition between firms that O'Connor and Hermann (1995) liken to the National Basketball Association (NBA) draft (p. 247). They also found former clerks twice as likely as their counterparts to argue cases before the Court or to participate as amicus. Not only are clerks already identified as the cream of the crop by being asked to clerk, but firms may think they have an important insight into the certiorari process, the minds of their individual justices, and how arguments are generally received by the Court as a whole. Perhaps this is why the solicitor general is so keen to hire so many former clerks.

Law clerks perform several functions. Some praise the use of recent law graduates as a way of bringing the latest legal thinking to sitting judges (Crump, 1986b; Oakley & Thompson, 1980, p. 138). Their recent exposure to elite law professors provides the judge with a continuing seminar (Douglas, 1980, p. 175). Law clerks may also be sounding boards for judges (Coffin, 1985, pp. 60-62). Court of Appeals Judge Wald referred to her clerks as "her wailing wall" (Wald, 1990, p. 153). Since a clerk is one of few people with whom the judge can openly discuss cases, and because clerks share in and mitigate the crushing workload, the relationship between judges and clerks can be intense (Perry, 1991, p. 73).

The most important function law clerks at the U.S. Supreme Court now serve is summarizing the petitions for certiorari, thereby assisting the justices in their decision as to which of the more than 6,000 petitions will become 1 of the 100 or so cases the Court hears each year (Baum, 1993; Brenner, 1992; Brenner & Palmer, 1990; Caldeira, 1992; Perry, 1991). Eight justices in the cert pool divide the work among their clerks, whereas Justice Stevens and his clerks operate on their own (Sturley, 1992, 133). "I do not even look at the papers in over 80 percent of the cases that are filed," Justice John Paul Stevens has said publicly (Crump, 1986a, p. 43). Perry's informants recalled with

11. Brown attributes Justice Douglas's wartime selection of Lucille Lomen to WWII's impact on the labor force. The second woman clerk was not appointed until Margaret J. Corcoran was hired by Justice Black in 1966 (M. R. Brown, 1996, pp. 362-363).

dread the arrival of the petitions “sit[ing] and listen[ing] woefully as [the cart carrying cert petitions] rumbles down the hall” (Perry, 1991, p. 41).

Chief Justice Rehnquist quotes Justice Brandeis as attributing the high prestige of the U.S. Supreme Court compared to the other branches of government to justices doing their own work (Rehnquist, 1987, p. 261). They do not merely rubber-stamp the work of aides or read speech writers’ words from a teleprompter. Yet, how justices use their clerks varies. Clerks may perform research functions, summarize the contents of briefs, make recommendations on cases, edit, cite check, or even draft preliminary opinions (Stern, Gressman, & Shapiro, 1986, pp. 257-258, 573). They may discuss cases with their justice, argue about them with other law clerks, attend conferences, run errands, file documents, or perform library maintenance (“The Law Clerk’s Duty,” 1981, p. 1234). Douglas reported that Frankfurter “used his law clerks as flying squadrons against the law clerks of other justices and even against the justices themselves. Frankfurter, a proselytizer, never missed a chance to line up a vote” (Douglas, 1980, pp. 171-173).

Several controversies have swirled around Supreme Court clerks.¹² Critics have asserted that clerks, rather than justices, have written the Court’s opinions. In 1957, *U.S. News & World Report* referred to clerks as “ghost-writers” of opinions, the “second justices” on the Court, “not subject to the usual security or loyalty checks,” and asserted that they exercised an influence on the opinions of the justices (Newland, 1961, p. 311). Chief Justice Rehnquist responded by describing his experience as a clerk for Justice Jackson, concluding, “The specter of the law clerk as a legal Rasputin, exerting an important influence on the cases actually decided by the Court, may be discarded at once” (Rehnquist, 1957, pp. 74-75; see also Bickel, 1958; Rogers, 1958).

Newland (1961) surveys other memoirs of clerks who describe the tasks the justices they worked for asked them to perform. Although he mentions the rumors circulating that Chief Justice Vinson, and Justices Murphy, Burton, Black, and Clark relied too much on their clerks for opinion writing, he argues that the written evidence for such assertions is weak. Clerks have first-hand knowledge only of what occurs in their own justice’s chambers. Clerks may also overstate the importance of their own contributions. Perhaps most important, no matter who writes the first draft or the footnote, the justices and the Court as a whole are ultimately responsible for published opinions and must defend their decisions against criticism inside and outside of the Court.

12. The first scandal involved one of Justice McKenna’s clerks, who was indicted for leaking information with regard to an unannounced decision of the Court (Newland, 1961, p. 310).

Scholars have examined whether law clerks attempted to sway justices or mirror the justice's mind (Brenner, 1992) and analyzed the effect of law clerks' recommendations to justices on granting certiorari (Brenner & Palmer, 1990) or in bench memos (Brenner, 1992). Brenner and Palmer (1990) and Brenner (1992) find support for the claim that law clerks attempt to "mirror the mind of the Justice" in writing recommendations for cert in both the Vinson and Jackson papers. In reflecting on his own clerk experience for Justice Jackson, Rehnquist (1957) agreed, although he admitted the possibility of unconscious bias (p. 75).

The second body of criticism surrounding law clerks stems not so much from the claim that law clerks write opinions or unduly sway their bosses, but from what law clerks report (gossip, conjecture) about the justices themselves, their practices and interactions, and how the Court decides cases. Perhaps the most notorious is *The Brethren* (Woodward & Armstrong, 1981), but more recent incarnations exist (Lazarus, 1998). Depictions of justices watching porno movies in the Court basement (for obscenity cases), switching votes after conference to stay in the majority, horse-trading between cases or on drafts, or staying on the bench long after they were well enough to perform their duties are unseemly, and courts have rarely been subject to this sort of scrutiny (although the presidency has long been plagued by sensational kiss-and-tell books by former staffers). Many scholars have criticized the veracity and strength of the evidence of such insider knowledge of conversations between justices.¹³ Because I see little evidence of clerks wielding untoward power, in my view, the criticism in these exposés is damaging to the Court, not because the justices are the puppets of the clerks but because the justices themselves are revealed as human, with human shortcomings, and as people who are motivated in their decision making by considerations other than legal principle. Before I go on to explore the issue of whether clerks wield inappropriate power, I must first describe the law clerks, or référendaires, of the ECJ.

DATA COLLECTION AND METHOD

I visited the ECJ, attended oral proceedings, and conducted interviews in 1989 and 1990. I interviewed 7 current or former référendaires, 2 staff members of the ECJ, and several lawyers involved in litigation for the European

13. For a discussion of the accuracy of *The Brethren's* (Woodward & Armstrong, 1981) findings, as well as a discussion of the appropriateness of clerks talking to journalists, see Abramson (1980), Adler (1979), and Ashman (1980).

Commission in Brussels. I also interviewed the former Dutch judge, Judge Koopmans. In 1994, I spent a month in Luxembourg conducting interviews, working in the Court's archives, library, and computerized database, and attending oral proceedings. I interviewed 19 référendaires and 4 former référendaires. I interviewed at least 1 person from 11 of the 13 cabinets of the judges and 4 out of 6 of the advocates general. Although it was not my objective, I spoke with three judges and one advocate general (who himself was a former référendaire).

RÉFÉRENDAIRES AT THE COURT OF JUSTICE

Each member (judge or advocate general) hires three référendaires to help with the work, setting the criteria for selection and determining the length of service. During the first two decades, each member had one référendaire who was a permanent employee. Each new member would thus inherit his or her successor's référendaire. The 2 longest-serving référendaires served 34 years each. The legendary Karl Wolf served 33 years, retiring in 1991. Two other so-called permanent référendaires served 25 years and 23 years, respectively.¹⁴

Between 1970 and 1972, members freed themselves from, as one member put it, "the burden of inheriting their predecessor's référendaire." Référendaires are now temporary posts and are Category A employees in Grades 3 through 5. Grade, and steps within the grade, are determined by the age of the référendaire. They serve at the pleasure of the member. In 1979, the budget allocated a second référendaire to members.¹⁵ After a particularly tough judicial year in 1985, members were allowed to take on a third référendaire on a temporary basis. By 1990, the budget allowed for each member to employ three.¹⁶ (In May of 1994, members of the Court of First Instance were allowed to hire a second référendaire.)

The longest serving of the 56 référendaires working on June 20, 1994 had worked as a référendaire for 13 years.¹⁷ Two référendaires had worked for 12

14. The practice of a permanent référendaire is less strange to American audiences if you compare it to the earlier days of the Supreme Court. Charles Evan Hughes, for example, retained Taft's law clerk. Justice Owen J. Roberts kept one clerk for 15 years, and Justice Butler employed one clerk for 16 years (Swann, 1992, p. 160).

15. Official Journal, L-23, vol. 22, 1979, p. 54.

16. Official Journal, L-24, vol. 33, January 29, 1990.

17. The average age figure is based on service at the ECJ, not necessarily to the same member. Of the 120 who had completed their service to the ECJ as of 1994, the average was 3.73 years of service.

years, and one had worked for 11 years. The average number of years of service was 5.¹⁸ The years of service varied by *cabinet*. Two *cabinets* had an average length of service of 8.3 years. Two had an average length of service of 1.7 years.¹⁹ One must remember that the length of service depends in large part on the number of years the member has been serving. A member whose mandate has expired, and who has not been reappointed, may have a preference for longer-serving référendaires but not be able to keep them in service because his or her term is up. Furthermore, new members are likely to bring at least some of their staff with them, thereby lowering the average length of service.

Similar to law clerks on the U.S. Supreme Court, most of the référendaires I interviewed saw their tenure at the European Court as a springboard to another job rather than a career. Those who were on leave from another job envisaged returning to it, whether it was the European Commission's legal service (which only permits 2-year leaves), a division within the ECJ (lawyer-linguist, research and documentation service, or information service), or a judgeship in a member state. Some planned to return to or take up academic positions with their knowledge of EC law considerably enhanced by inside information gleaned from access to the pleadings of member states and from being a part of a small community in close proximity to a member. Another group intended to return to private practice. Although they may now be more skilled advocates before the ECJ, as their law-clerk counterparts will be better advocates before the Supreme Court (O'Connor & Hermann, 1993), those Brussels law firms specializing in EC law are probably more interested in those with experience working for the commission's legal division in competition law, according to one référendaire.

Although I do not have the precise figures on ages of Supreme Court clerks, if they are recent law school graduates, most référendaires are older when they begin their service at the ECJ.²⁰ The youngest starting age of current référendaires was 24 years; the oldest was 47. The oldest référendaire as of June 20, 1994, was 50 years; the youngest was 27. The *cabinets* ranged in starting-age averages from 28 to 39 years. The oldest *cabinet* had an average age of 43½ years; the youngest had an average of 31 years. The average start-

18. The average of 5 years of service is based on only 43 référendaires. The best assumption is that the remaining 13 référendaires joined the ECJ in the last 2 years. If one assigns a length of service of 1 year to each of them, the average years of service drops to 4.

19. This, again, is the lower figure, based on assigning a length of service of 1 year to the 13 new référendaires.

20. Rhinehart's (1994) survey of law school students seeking clerkships found that 93% were less than 30 years of age and 55% were less than 25 (p. 579).

ing age of the total that I could identify ($n = 161$) was 34 years. The youngest started at age 23, the oldest at age 52.

Of the the 56 serving référendaires, 10 were women, nearly 18% of the total.²¹ If one includes the 7 out of 24 women référendaires (29%) at the Court of First Instance, the combined total calculates to 21%. President Pilotte appears to have hired the first 2 women référendaires in 1953. Several people I interviewed stated that about one third of référendaires were women, doubling their actual numbers.

Of the 56 current référendaires, 6 were previously lawyer linguists, or *juriste linguiste*, working in the translation division of the ECJ. Four were on leave from the ECJ's research and documentation service and 1 was on leave from the information office. Thus, 11 référendaires came from within the ECJ and had the right to return to their divisions; 6 référendaires were on leave from the European Commission.

Each member has his or her own criteria for selecting référendaires and his or her own view about what constitutes a good mix. The specific legal expertise of référendaires is a much more important consideration than for Supreme Court justices choosing their law clerks. Many of the référendaires have published articles and books on EC law; others had written master's or doctoral theses on the subject. Many of the référendaires I interviewed were specialists in competition law.

The second criterion that virtually all members and référendaires mentioned in addition to a knowledge of EC law was a working knowledge of French. One of the most common paths to serving as a référendaire is first working at the ECJ as a lawyer linguist. Many members hire at least one Francophone, whether French or Belgian, to facilitate drafting. (A Francophone may be less important for advocates general who draft their opinions in their own languages, or, obviously, for Francophone members.) A number of référendaires had received advanced degrees from French (or French-speaking Belgian or Swiss) universities. The référendaires I interviewed had a working knowledge of three or four (or more) EC languages, as did the members who employed them.

Beyond knowledge of EC law and proficiency in French, the criteria members use to choose their référendaires vary. A member such as former Judge Koopmans, who is an expert in constitutional law, reported trying to select someone experienced in civil law. A law professor may want to make sure

21. For the ECJ as a whole up until 1994 for the référendaires I could identify, 14.6% were women ($n = 198$).

that he has someone who has been in practice.²² The former Danish judge, President Ole Due, whose background was in judicial administration as a former official in the Danish equivalent of the Justice Department, recruited more mature référendaires who themselves had had experience on the bench. Judge Grévisse, the former French judge, selected all three référendaires from among the judges then serving on the Conseil d'État. Several members who were professors, such as the U.K. judge, David Edward, brought with them their most accomplished students. Some members try to balance an ECJ insider (i.e., one who has served as a référendaire for another justice, worked as a lawyer linguist, or worked in one of the other divisions of the court) alongside newer référendaires. One judge reported seeking a mix of knowledge of different legal traditions.

The référendaires also facilitate critical linkages between member states and the ECJ. Because the ECJ entertains many visitors (i.e., law students, law societies from the member states, members of the national judiciaries, and other dignitaries) as part of its educational mission, much of the responsibility for entertaining visitors falls on référendaires. For this reason, at least one member of the *cabinet* is certain to be from the same member state as the member, although the *cabinets* varied whether they divided the entertaining duties among the référendaires or left it to one. Similarly, some members may place a higher priority on in-depth knowledge of national law than on knowledge of EC law and French. It is no accident, given the conflicted reception of EC law by national courts, that both the French and German *cabinets* drew their members from French and German nationals, respectively. Obviously, the French do not need to look elsewhere for a Francophone, but they could choose référendaires from specialists in EC law rather than from members of the Conseil d'État. Furthermore, the Germans mentioned that given the developments at the German Constitutional Court, they needed to give particular attention to whether the ECJ's judgments would be sufficiently protective of human rights to avert further confrontations. The Germans had law degrees from French-speaking (Swiss) universities and were also well versed in the EC law, so it was not a question of choosing attentiveness to German law at the expense of knowledge of French and EC law. The German *cabinet* was in the enviable position of having both. Although the evidence is slim, the interviews do hint that référendaires of at least some *cabinets* see themselves as assisting their member in paying very close attention to how the ECJ's judgments will be received by their member state's national courts.

22. France appointed a woman advocate general, Simone Rozès, in 1981. Ireland appointed the first woman judge, Fidelma O'Kelly, in 1999.

To understand how members use their référendaires and to understand the differences between *cabinets*, one must first understand the ECJ's internal procedures. For most cases, the first stage in the process is for the President to assign a juge rapporteur, the reporting judge. Référendaires have the following three categories of duties: (a) work on cases in which their judge is the reporting judge,²³ (b) work on cases in which their judge is the sitting but not reporting judge, and (c) administrative duties.

Most cabinets divided up the work between the référendaires, although a number reported that they worked collectively on a few important cases. In some *cabinets*, the member assigned cases to the référendaires; in others, a head référendaire made the assignment. In still other cases, the référendaires determined which cases they would get themselves. Some *cabinets* assigned cases according to the substantive expertise of the référendaires (e.g., tax law, social law, competition law, milk cases), but most distributed cases solely on the basis of workload. Any specialization for most was ad hoc, for example, customs classification cases going to the person who had handled them before. Most référendaires stressed that they had to be generalists, knowledgeable about all areas of EC law.

In the cases in which their judge was not the reporting judge, *cabinets* had three different ways for dividing cases. Some divided the cases according to expertise, whereas another group divided them according to the reporting judge and each référendaire would cover four judges. A third group divided them on an ad hoc basis according to workload.

After the President assigns a reporting judge, most *cabinets* wait for the translation of the written proceedings. The first step for the référendaire assigned to the case is to prepare the report for the hearing (*rapport d'audience*).²⁴ This document is available to the public at the oral proceedings and is a fairly straightforward statement of the facts of the case, the relevant law, and the arguments of all of the participants (based on their written submissions). Because it is shared with the parties (who may object), as well as scrutinized by his or her boss, the référendaire's capacity to frame the argument or facts in a particular way is virtually nonexistent.

The référendaire working on the case for the juge rapporteur also drafts the preliminary report (*rapport préalable*). Like the report for the hearing, the preliminary report will summarize the facts, law, and relevant arguments. The preliminary report, however, is an internal document. At the end of the

23. This does not apply to référendaires for the advocates general or for the President, who is never the *juge rapporteur* (reporting judge).

24. One *cabinet* reported drafting all the reports: the report for the hearing, the preliminary report, and the draft judgment once the case was assigned to their judge.

preliminary report, there is a section called observations of the reporting judge. In this section, the judge may inform the other members of the formation what he is thinking about the case. The members of the Court must then determine whether the case will be heard by the full Court or by chambers. All members of the ECJ meet Monday afternoons in what is called the administrative meeting of the Court. The business may vary from whether to allow an American scholar to distribute a questionnaire to determining the formation for a given case.²⁵

If a référendaire was assigned a case and his or her judge was the reporting judge (or the member was the advocate general assigned to the case), he or she would always attend the oral proceedings. Most référendaires reported that they would not attend other oral proceedings (even if their judge was sitting) unless it was a particularly interesting or important case or they happened to know someone who was arguing the case. Référendaires attending the oral proceedings sit at a special table (although they may sit in the audience) and occasionally pass notes to their members. They reported discussing the cases with their members before the proceedings and considering whether there were particular questions that needed to be asked. Most, but not all, found the oral proceedings of use only if the members asked questions.

After the oral proceedings, the référendaire of the advocate general assists in preparing his or her opinion according to the working style of the individual member. Once the judges in the formation receive the opinion of the advocate general, the reporting judge circulates a memo indicating whether he intends to follow the advocate general's recommendations. If he does not intend to follow the recommendations, he explains why in the memo. After a few days have passed, if he has not heard objections from the other judges, the reporting judge drafts a judgment (*projet de motif*), which he circulates to the other judges in the formation. Once there is a draft judgment, the judges meet to discuss it, often line by line.

The scenario may differ in several ways. The other judges in the formation may disagree with the course of action proposed by the reporting judge. If so, they customarily inform him in writing. Another possibility is if one of the other judges agrees with the general course of action but not with the way the reporting judge is arriving at the outcome. In this case, the judge may write a *note en délibéré* spelling out his views. In a complex case, or a case in which the formation is very divided or where not sure which course of action to pursue, the reporting judge may suggest a "roundtable" discussion to see what the points of disagreement and agreement are prior to writing a draft judg-

25. The treaties require that some cases must be heard by the full Court.

ment. The reporting judge might only submit an outline to guide the roundtable discussion.

A former référendaire referred to the référendaires as “report-writing machines,” another called them “report-writing animals,” reminiscent of Perry’s informant on the U.S. Supreme Court who dreaded the rumbling cart bringing cert petitions. Subject to substantial differences in working style among members, référendaires assume much responsibility for sifting through the written submissions and drafting the report for the hearing. The judges and advocate general assigned to the case are also reading the documents, although the judges are most likely devoting the most attention to the cases in which they are the reporting judge, or which are of particular interest and concern to them. The référendaires of the advocate general assist with the drafting of the opinion; the référendaires of the reporting judge help draft the report for the hearing, the preliminary report, and the draft judgment. Référendaires of the other judges in the formation read the drafts and help prepare written responses. *Cabinets* vary as to how many *notes en délibéré* they write and circulate, in other words, how active they are in challenging or seeking to modify the reporting judge’s proposed course of action or legal reasoning. The two members most closely involved in the case will be the advocate general and the reporting judge, and his or her référendaires. They may confer about the details of the case before the advocate general issues his or her opinion, but never after.

The référendaires I interviewed worked in very close collaboration with their members. There was never any doubt about who was in charge, and I saw no evidence of members delegating excessive responsibility to their staffs. As one référendaire put it “four eyes see more than two.” The référendaires were there to assist the member, not to replace him or her. When one calculates the hours that members spend in oral proceedings, *délibérés*, entertaining visitors, and maintaining connections between the national judiciary and legal profession, it is hard to imagine how the reports would ever be written if the members did not have the assistance of their référendaires.

In addition to drafting reports and judgments, offering valued legal expertise, helping to perfect the French in draft judgments (in some cases), and serving as a sparring partner or discussant for the member, référendaires serve two other important functions: They provide communication between *cabinets* and provide continuity for new members. Judges use their référendaires differently and prepare differently for each stage of the proceedings. Some judges, such as former Judge Koopmans (reminiscent of Justice Frankfurter) often encouraged his référendaires to discuss the cases with staff in other *cabinets*. Other référendaires reported never discussing cases except with other référendaires within the *cabinet*. If there was a small error

or point of drafting, many référendaires reported that they would simply contact the other référendaire. If it was an important or substantive point, they would be more likely to write a note in consultation with their judge and circulate it to all members of the formation. Raising a matter référendaire to référendaire permits the judge to save face if one *cabinet* believes the other made an error.

A new member may keep on the previous judge's référendaires, or hire someone who has worked for the ECJ, to provide continuity. It was not uncommon for members to keep on some or all three of his or her predecessor's référendaires for at least 1 year. Whereas justices on the U.S. Supreme Court are all knowledgeable about U.S. law and have frequently served on the federal bench for many years, there is no requirement that judges on the ECJ have any background in EC law. Thus, they may, especially at the beginning of their tenure, appreciate advice from référendaires about the finer points of EC law. Other judges, however, are experts in EC law and select their référendaires on the basis of other considerations. Even those members who are experts in EC law may choose to hire someone who knows the institution well when they join the Court. Others bring three new référendaires with them.

PRINCIPALS AND AGENTS

Principal-agent theory originates in economics (Alchian & Demsetz, 1972; Fama, 1980; Moe, 1984; Pratt & Zeckhauser, 1985). "When employees do not exert themselves to achieve the goals of their organization they are shirking" (Wilson, 1989, p. 155). Often, employers (principals) cannot tell whether workers (agents) are lazy or pursuing different goals, because neither the outputs nor inputs of an organization can be easily monitored or measured. Wilson (1989) calls these kinds of governmental bureaucracies "coping organizations" (pp. 168-171). How can the employer guarantee that employees are carrying out its commands rather than pursuing his or her own interests, acting on different preferences, or maximizing different utilities? Much effort is expended devising schemes for aligning the interests of employer and employee, for example, by giving employees stock options in the company. But in trying to ensure that subcontractors or workers are not pursuing antithetical goals, companies and individual managers face severe information asymmetries. Like Dilbert's boss, many employers do not have the technical expertise to understand the intricacies of their employees' work. Even if it is possible, it is time consuming and therefore costly. Delegation and a division of labor are inevitable in complex organizations. So the ratio-

nal principal actor searches among feasible structures for monitoring, rewarding, and sanctioning the agent to efficaciously close the gap between desired and actual performance (Moe, 1984, p. 481).

Political scientists have taken up principal-agent theory most often to think about the bureaucracy and the U.S. federal system (Bendor, Taylor, & Van Gaalen, 1987; Cook, 1989; Moe, 1987; Wood, 1989), and, more recently, to understand the relationship between member states and the institutions of the European Union (Pollack, 1998, pp. 218-222; Sweet & Caporaso, 1998, pp. 93-94). The literature on the United States conceptualizes administrative agencies as agents and Congress, or occasionally, the president (Krasner, 1972), as the election-maximizing principals who control them through budgeting, the appointment process, oversight hearings, and legislation. This simplification has many problems, such as whether bureaucracies have one principal or many and whether the principal has one clear preference (Pollack 1998), which are most clearly set out by Moe (1987). Moe, whose criticisms I find persuasive, argues that what control means is not well defined in this body of work (p. 480), nor have its proponents paid enough attention to institutional differences to which scholars of bureaucracy would ask us to be attentive. Control, he argues, must be defined in the specific context of the particular relationship between principal and agent.²⁶ We must know the relevant details, “the information and beliefs of the two parties, their underlying goals and value structures, the nature and availability of rewards and sanctions, [and] the presence of institutional constraints” for the specific agency, in this case, the U.S. Supreme Court or the ECJ. Moe’s more nuanced account of principals and agents does have some utility for understanding the judge-clerk relationship, and I will seek to use that theory to explicate the structures and incentives operating.²⁷

We have witnessed three panics about the untoward power of U.S. Supreme Court clerks, occurring at approximately 20-year intervals: charges leveled by *U.S. News & World Report* in the 1950s (“The Bright Young Men,” 1957), Woodward and Armstrong’s (1981) *The Brethren*, and most recently, Lazarus’s (1998) *Closed Chambers*. I would be remiss as a reporter if I did not at least note the odd whisperings in the corridors of the ECJ of particular judges who delegated too much (or who lacked ability either in law, French, intellect, or motivation) or clerks who seized too much power. Nevertheless, I

26. Wilson (1989) would agree. What matters most is not that the organization is a bureaucracy, but that it is a *governmental* bureaucracy, making many of the possibilities for aligning incentives that private companies have to control their employees impossible. Furthermore, Wilson would argue that we need to know what kind of a government bureaucracy it is: production, craft, coping, or procedural.

27. I use the term *judge* to include justice and the term *clerk* to include référendaire.

will conclude that in both institutions, judges (principals) do control their clerks (agents). Clerks see themselves as delegates trying to carry out the preferences of their members and support staff who help the judges do their work, rather than puppeteers controlling a figurehead who, if he understood what was being done in his or her name, would object, or as operators overtly or covertly maximizing their own utilities or pursuing their own preferences. Judges face far fewer difficulties in controlling their clerks than Congress or the President face in controlling agencies or member states in controlling the European Union.

We must start with the assumption that clerks and the judges have different preferences.²⁸ If the problem was only that the clerks have more information and knowledge and, given sufficient time to appreciate the technical point, the judge would agree with the clerk, the danger of the clerk imposing preferences on a judge is more apparent than real. Even if the judge's opinion were different because of interactions with (or even research or drafting by) the clerk, his or her role as decision maker has not been supplanted in a dangerous way because he or she has engaged in a dialogue with a persuasive clerk. On the contrary, the judge may have been spared the error of a mistake (either a mistaken position in law or not pursuing his or her real preferences). These differences in preferences may stem from differences in an approach to the law and the role of the Court, in differences over public policy, or in major differences of ideology. For example, a *référéndaire* may have thought that EC law does not permit Ireland to ban student publication of abortion services in England, a law clerk may believe the death penalty to be cruel and unusual punishment, a *référéndaire* may believe that the Equal Pay Directive means that employers cannot pay part-time employees less than full-time employees, or a law clerk may believe that Title IX requires that schools be strictly liable for harm caused by teachers who sexually harass their students.

Before I examine the mechanisms that judges have for controlling their clerks and the factors that give judges power, let me describe the factors that give clerks greater power *vis-à-vis* judges and, in so doing, compare and contrast the two courts. Longevity gives *référéndaires* power, particularly when their knowledge of EC law and the institutional workings of the ECJ is paired with the lack of experience of a new judge. A new member may not only be new to the ECJ, but new to judging altogether (as a professor, for example), and unfamiliar with EC law. Although law clerks serve (as a general rule) on the Supreme Court for only 1 year, there is no fixed term for *référéndaires*, nor is there a convention that they serve for only 1 year. When this is coupled

28. See Posner (1995) for his conceptualization of judges as utility-maximizing beings.

with the short term that ECJ judges serve and the frequent turnover, you may have a situation with an experienced clerk and an inexperienced judge. The only parallel for this in the U.S. Supreme Court would be when a new justice joins the bench (perhaps even midyear), such as when Justice Kennedy joined the Court midterm and hired one of Scalia's former clerks (Lazarus, 1998, p. 266). Although U.S. Supreme Court clerks frequently have clerked for an appeals court judge, they rarely have clerked previously for another Supreme Court justice. Furthermore, most, but not all, Supreme Court justices have been federal judges before.

Second, law clerks have technical expertise in some areas that judges lack, expertise that could produce the information asymmetries to which principal-agent theory suggests we be attentive. At the Supreme Court, it is possible that a law clerk knows a great deal about telecommunications law, economic theory, education policy, and so on, compared to a justice who may face this issue for the first time. Given that most justices have been federal court judges, the number of circumstances may be few and they are less likely to be the high-profile landmark cases, however important they may be to the individuals affected by them. Asymmetries in technical legal expertise are more likely at the ECJ, where turnover is higher and where the judges may not be knowledgeable about EC law or may have specialized knowledge in only one area of that law (e.g., competition law) and know little about milk quotas, pensions, or other technical matters. Justices may not really care about the intricacies of the legal reasoning or even have particularly strong feelings about the outcome, in which case, a référendaire or clerk who felt passionately could arguably have a great deal of influence if he or she managed to persuade the boss.

Third, in the case of the ECJ only, the clerk may be much more linguistically versatile than the judge, comfortable not only with French but with other European languages as well. A judge who is not capable of functioning well in French would have real problems functioning at the ECJ. Although simultaneous translations exist for oral argument and papers can be translated, the judge is on his own in the *délibéré*. It may be difficult for a judge to supervise a clerk if the clerk is more fluent in French.

Fourth, because of the organization of work on both courts, judges rely on clerks to condense material and summarize points. Référendaires write the report for the hearing (among other reports); law clerks write the memoranda for or against certiorari. We have little evidence on what, if any, amicus briefs that justices read, but we know they do not read much of the original material for certiorari. My interviews suggested that judges occasionally refer to the pleadings for a particular point but often rely on the clerk's summary of them.

Clerks, whose way of seeing the case may differ from their judge's, may frame the case in a way that is more favorable to their position.²⁹

Regardless of the characteristics of the two parties (the judge and the clerk), there is no getting around the fact that clerks have more time with the case. If justices and judges divide the cases or motions between their clerks, they are dealing with three or four times as many cases as each clerk. Judges and justices travel and give speeches, manage their chambers and *cabinets*, attend all oral arguments, conferences, and *délibérés*, and meet with visitors. Clerks have more time with each case's briefs and pleadings.

What mechanisms, then, do judges have to ensure that clerks carry out their will? How much opportunity do clerks really have to further their individual goals at the expense of the judges'? And what differences are there between the power of the clerks on the two courts? By far, the most effective control is the clerk's own internalized sense of his or her role, some of which is specific to the member, but most of which is part of the culture of the institution.³⁰ Clerks think very highly of their own abilities; they see themselves as the chosen few, the up-and-coming elite.³¹ Yet, each interview confirmed that *référéndaires* understand they are there to do the member's bidding, not to pursue their own views. The sanctions, such as firing, that judges have are strengthened by the sense that a clerk who pursued his or her own agenda at the expense of his or her boss's would be violating institutional norms.³²

Unlike bureaucrats, clerks cannot play multiple principals off against one another, be they interested party members of Congress, other members of the Congressional oversight committee, or the President. Each law clerk serves one master and serves at his or her pleasure. Although neither Congress nor the President may easily fire civil servants, judges may fire law clerks who serve at their pleasure. Although firing is an extreme sanction, another powerful sanction/incentive is the judge's ability to assign work. Clerks who are suspected of less-than-faithful adherence to instructions may be given a shorter leash and assigned much fewer interesting cases. It stands to reason that any new clerk is tested and, over a period of time, earns trust (one reason

29. Chen (1994), a former Thomas clerk whose conclusions I do not share, places great weight on this point.

30. With respect to Supreme Court clerks and certiorari, Weiden (1998) recognizes this constraint but still argues that clerks have enormous power in summarizing petitions.

31. Any social scientist must give great weight to the views of the participants about how the organization works. Yet, the egos of some of the clerks makes it hard to evaluate whether their claims of influence and control are inflated and exaggerated.

32. In a similar way, heads of agencies may feel responsible for carrying out the President's program (Krasner, 1972), and bureaucrats, although not seeing themselves as always subject to congressional control, often view their mission as carrying out the law and the intent of a previous Congress (Wilson, 1989).

why many professors prefer to hire their students). Because most members of the legal community would perceive a law clerk's attempt to secure his policy preferences at the expense of the judge's a violation of institutional norms, firing for such a reason would be a major disgrace.³³

Even beyond wanting to keep their jobs, law clerks, like graduate students and others in feudal professions that rely heavily on word-of-mouth referrals and knowing the right people, seek to maintain the good will and high opinion of their boss. Such recommendations help to secure prestigious academic appointments, legal posts in the EC, positions in the Solicitor General's office, or jobs in high-paying law firms. Clerks could turn their backs on this relationship, but they would be squandering a key perquisite of the job that may have drawn them to it in the first place, apart from the learning experience: the personal relationship, good favor, and networking consequences of knowing the great man or woman.³⁴

Although firing and recommendations are strong mechanisms of control, perhaps the strongest is that law clerks do not accompany judges in the deliberations. Only the justices themselves participate in conference and only the judges themselves participate in the *délibéré*. If the judge disagreed with the position of the clerk, he would not argue for it in conference. If his weak or nonexistent preferences have been initially swayed by a clerk, his colleagues who disagree may try to persuade him during the conference or at other judge-to-judge meetings.

To return to the characteristics that give clerks power, an important one is knowledge of law and knowledge of the institution (for the ECJ). The kinds of information asymmetries that judges face relative to their clerks are far less than their analogues of legislative or bureaucratic staff, or employees in private industry. First, judges share the same profession and legal training, even if not the same legal specialization. Second, although a clerk may understand the intricacies of telecommunications law or milk quotas, judges are almost always older and more experienced professionals.³⁵ Information asymme-

33. It was very clear to me at the ECJ that those *référéndaires* who had been at there for a long period of time and who attempted to appropriate some of the power of the member in interpersonal interactions (i.e., throwing their weight around), were despised and seen as acting inappropriately. It is possible that feelings against those *référéndaires* ultimately rebounded against the member.

34. If the former Supreme Court law clerks I have met are representative, the currency of the post is flashed at every opportunity, the fact worked into all conversations, and the signed picture displayed prominently in the office.

35. One member of the ECJ commented that that was why members changed the post of *réfféréndaire* from permanent to temporary, so that members did not face *référéndaires* who were older than them.

tries are likely to be short-lived or in areas of the law where the judge does not have strong views. The positions of the clerks may be influential, then, in a small set of cases, assuming that the judge has no strong preferences and that he or she is unmoved by the preferences and arguments of other judges in conference. This is hardly a case of an agent subverting the will of the principal. Instead, clerks may persuade their bosses, just as participants in an oral argument, authors of amicus briefs, newspaper editorialists, luncheon companions, or colleagues from national courts on home visits may influence the way the judge thinks about broad areas of law and policy.

Language asymmetries may make clerks more versatile strategic players inside the ECJ, but the danger of subverting the interests of the judge are minimal. Not only must a judge function in conference and contribute to a single judgment, he can obtain translations if necessary. Language limitations may contribute to his being a less effective judge, and he may rely on his staff for drafting.

Last is the power the clerk has to frame the arguments and to summarize the evidence. To some extent, the opportunity for influence is minimized by the skill of thinking like a lawyer and having been drilled on the proper way to summarize facts and state legal issues. Lazarus (1998) places much weight on the possibility that clerks inserted their preferences and biases into the construction of the issues in their memos for certiorari. Chen (1994), too, sees this power of construction as nearly total. However, Lazarus (1998) goes on to say that because there was such bad feeling between the two factions of the Court, clerks leapt on every perceived biased presentation and cried foul, which suggests that effective checks and balances were operating (pp. 268-269). The *référéndaire* for the advocate general and the reporting judge do have tremendous responsibility. My interviews, however, suggested that at least some chambers were very attentive to how other *cabinets* did their work (writing many notes on *délibéré*). I think that clerks do possess some power in how they synthesize material for judges. Even if their role orientation is to be completely loyal and faithful to their boss's views, they may not know them perfectly on every conceivable legal matter (on some, the boss may not know his own). So one might speculate that they always try to lay out the evidence, choices, and alternatives, perhaps offering opinions, and seek guidance. The more they know the mind of their justice, the more quickly and accurately they can predict what that guidance is.

The real influence of clerks is in helping judges think through the cases, acting as their sounding boards and sparring partners. In the cases where

judges have strong, clear preferences, they can easily exert control. No clerk, for example, is going to persuade Justice Brennan (hypothetically speaking) that the death penalty is not cruel and unusual punishment, or convince Justice Blackmun that the Constitution permits states to criminalize abortion, or somehow sneak anything by either of these justices who take that position. In cases where they are somewhat undecided, the clerk may have some influence in how judges think about the legal and policy issues. However, this is a good thing and contributes to sound judging. Clerks are most likely to have influence, then, in cases that are genuinely new to the Court, and for which there may be generational differences in how to think about issues (such as pregnant women at work or gay rights) and in cases where clerks may frame new issues in ways that are persuasive to judges who hold positions on analogous issues (such as discrimination against racial minorities). This extension of concepts to new situations is what social movement scholars call *domain expansion*. I do not see this as substantially different from the efforts of the parties or amicus or other public commentators to persuade judges, the operative word being *persuade*. Judges are clearly the decision makers, even if they share the work of writing or delegate some tasks. As is the case in any organization, if the principal is incompetent, lazy, or incapacitated, staff (agents) may wield inappropriate power. What little evidence exists of this on courts also leads us to conclude that the power is checked by the other members of the deliberative body.

CONCLUSION

Although I conclude that clerks and référendaires are not dangerously displacing justices and judges, structural and institutional factors do affect how much power they have. For example, the dramatic rise in petitions for certiorari has made justices more dependent on their clerks' memos, although I am persuaded by the evidence that clerks diligently try to follow the dictates of their justices and look for the same cues of cert worthiness that their justices employ. Although référendaires at the ECJ write many reports, they do not have comparable screening power. They are not potential gatekeepers. Conversely, the length of time that référendaires serve, along with their often considerable age, experience, expertise, knowledge of the institution, and linguistic competency, when coupled with the shorter term of members of the ECJ and a potential lack of expertise in language, judging, or EC law, create

an opportunity to be much more powerful than law clerks at the U.S. Supreme Court. This power is mitigated, however, by the existence of the single collegiate judgment.

The danger which some critics have associated with American law clerks is that the clerk's draft of a judgment may be merely rubber-stamped by the judge. This situation could not arise at Luxembourg because (as we shall see) a single collegiate judgment has to emerge from the secret deliberations of the Court (from which *référéndaires* are excluded). (L. N. Brown, 1989, p. 18)

Once courts are conceptualized as organizations that are distinctive and yet hardly unique in problems of controlling staff and managing workload, the danger of focusing exclusively on the principal-agent problem of power-mongering clerks is not only that such a concern is misguided but that it distracts us from more important organizational problems. Stow and Spaeth's (1992) findings indicate that judges may become more dependent on staff and less able to supervise their work as the workload increases (p. 220; see also Kester, 1983; Mahoney, 1988; McCree, 1981). Justice Stewart worried that the U.S. Supreme Court was becoming more bureaucratized (Perry, 1991, p. 71) and O'Brien (1993) traces the effects of moving from discussing cases frequently and even boarding together to becoming "nine little law firms," (pp. 142-201). One of Lazarus's (1998) chief complaints is that the Supreme Court is not sufficiently deliberative. Crump (1986a, p. 47) and Posner (1985, p. 114) both raise concerns about the increasing number of separate opinions and the growing length of opinions. We may especially want to examine the role of *référéndaires* as the workload of the ECJ increases. The flow of paper, the crush of work, and the sizable staff may isolate members from one another and diminish the quality of deliberation. At the ECJ, the danger of bureaucratization, however, must be balanced by the contribution that *référéndaires* make in the functioning of an international (supranational or multinational) organization with high turnover. *Référéndaires* facilitate the socialization of new members and relationships between *cabinets*, in addition to their other important duties. Some evidence exists that they play a part in anticipating the likely reaction of national courts, thereby helping to reduce conflict between the ECJ and national courts and helping to ensure that national courts comply with EC law. In facing their organizational challenges, courts would do well to examine how courts in other jurisdictions have met similar problems. However, they would also be well served by considering how other organizations (legislatures, bureaucracies), particularly multinational organizations, have confronted similar dilemmas.

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