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How Should a Judge Be: In Defense of the Judge as CEO

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RESPONSE

How Should a Judge Be: In Defense of the Judge as CEO

*David Lat**

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INTRODUCTION

How should a judge be?¹ How should a judge organize her chambers? How should a judge utilize her law clerks? Should a judge write her own opinions, or should she let law clerks prepare draft opinions that she then edits?

Federal judges enjoy broad discretion in terms of how they go about their work on a day-to-day basis, including how they use their clerks.² In their very interesting essay, *The Management of Staff By*

* Founder and managing editor, *Above the Law*, <http://abovethelaw.com>, and author, *Supreme Ambitions* (2014).

1. The title of this article is inspired by SHEILA HETI, *HOW SHOULD A PERSON BE?* (2012).

2. See Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 132 (2014) (“While decisions are subject to appeal, judges enjoy largely unfettered autonomy in how they go about their jobs on a daily basis, including the process by which they write opinions.”); *id.* at 144 (“The Constitution does not mandate how judges perform their role (or even the existence of clerks).”).

Federal Court of Appeals Judges,³ Professor Mitu Gulati and Judge Richard A. Posner outline three models of judges when it comes to managing their staffs (for federal appellate judges, generally a judicial assistant or secretary and four law clerks).

Which of the three models is optimal? The authors explicitly state that they “do not intend to offer [their] personal opinions, or indeed any other opinions, on which management style or system is best.”⁴ I would like to pick up where they have left off and offer a few brief, informal thoughts on how federal appellate judges should organize their chambers and use their law clerks.

Like Gulati and Posner, I limit my discussion to federal court of appeals judges, as opposed to trial judges, state-court judges, or U.S. Supreme Court justices. As a former law clerk to a judge on the U.S. Court of Appeals for the Ninth Circuit and as the author of a book set in the Ninth Circuit, I know much more about the federal appellate bench than I do about other sectors of the judiciary. I also agree with Gulati and Posner that this topic would benefit greatly from rigorous empirical examination, which lies beyond the scope of this Essay.

I. THE THREE MODELS

Based on interviews with seventy-five federal appellate judges, Gulati and Posner identify three models of judicial management: the editing judge, the authoring judge, and the delegating judge.⁵

The editing judge, which the authors describe as the “standard” model, involves a judge who edits draft opinions prepared by her law clerks. The law clerk drafts the opinion based on guidance from the judge, including direction as to the ultimate outcome of a case, and the judge then edits this draft.⁶

The authoring judge, in contrast, writes her own opinions: “Unlike the standard mode, in which the clerks are the primary authors and the judges are editors, the judge is the primary author and the clerks focus on research and editing.”⁷ In this model, “[t]he judge will draft the opinion and give it to a law clerk to review, make editorial suggestions, and think about issues that may need further

3. Mitu Gulati & Richard A. Posner, *The Management of Staff by Federal Court of Appeals Judges*, 69 VAND. L. REV. 479 (2016).

4. *Id.* at 497.

5. *Id.* at 481.

6. *Id.* at 483–84.

7. *Id.* at 486.

exploration. On the basis of the law clerk's work, the judge is likely to revise his draft and may ask the law clerk to do yet more research."⁸

Finally, the delegating judge, also referred to as the "hierarchical model," has "a junior manager to whom a portion of the management tasks are delegated." This manager is often a more long-term or "career clerk," as opposed to the one-year clerks typically hired by editing judges. The delegating judge is similar to the editing judge in that both types of judges edit drafts produced by law clerks, instead of writing their own opinions.⁹

These three models could actually be distilled down to two: "writer judges" versus "editor judges," or judges who write their own draft opinions versus judges who edit drafts generated by their law clerks. One could also think of the two models as "writer judges" versus "manager judges," or judges who devote most of their time and energy to the writing process versus judges who spend more time supervising their clerks and editing draft opinions produced by the clerks.¹⁰

The prevalence of the models has shifted over time. The writer judge is in some ways the "traditional" model, or the model of how laypersons imagine judges. As Gulati and Posner explain, "Most judges have a sense of how judicial icons such as Learned Hand and Henry Friendly did things—they did all their own writing, much of their own research, and used their clerks largely as sounding boards, and to do ministerial tasks."¹¹ This model was more common a few decades ago; the authors note a 1976 study reporting that Ninth Circuit judges back then authored most of their own opinions.¹²

Today, however, the editor or manager judge is more common than the writing or authoring judge in the federal appellate courts. This is most likely due to the dramatic increase in caseloads over the years. According to Gulati and Posner, "most judges nowadays consider the Hand-Friendly model a relic of the past; that given the workload of most federal circuit judges it is an unrealistic model to follow."¹³

8. *Id.* at 487.

9. *Id.* at 489.

10. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 DUQ. L. REV. 3, 24 (2013) (noting "two models of the appellate judge," the "writer" model and the "manager" model).

11. Gulati & Posner, *supra* note 3, at 481.

12. *Id.* at 482.

13. *Id.* at 481–82.

II. THE ARGUMENT IN FAVOR OF THE AUTHORIZING JUDGE

Although Gulati and Posner do not endorse any particular model in *The Management of Staff By Federal Court of Appeals Judges*, Posner in other writings has expressed his support for the authoring judge—the model that he himself follows as a longtime judge on the U.S. Court of Appeals for the Seventh Circuit.¹⁴

According to Posner, editing—even heavy editing—“is no substitute for writing from scratch because he who writes the first draft controls the final product to a degree the editor will not realize.”¹⁵ This is because writing “is a process of discovery rather than just of rendition and therefore often gives rise to new ideas.”¹⁶ Allowing a clerk to draft an opinion gives the clerk great—in Posner’s view, excessive—responsibility, because “the first draft influences everything that follows. Even though judges work with drafts to make them their own, they often adopt the authorities, organization, and language from their clerks’ drafts.”¹⁷

Posner also argues that the editing-judge model could lead to incorrect outcomes in certain cases. He describes the following scenario: after a case has been argued and the judges have voted on how it should be resolved, the clerk discovers, in the course of drafting the opinion, a problem that neither he nor the judges had previously noticed.¹⁸ In this situation, “[t]he clerk may be tempted to paper over the problem rather than admit to his judge that he had failed to provide accurate advice before the argument and the vote” (e.g., in the clerk’s bench memo).¹⁹ Why? Because “the clerk is apt to think his job in writing an opinion draft is to write a brief in support of the outcome for which his judge has voted,” as opposed to the correct outcome.²⁰

14. Another judge who reportedly writes his own opinions is Judge Frank Easterbrook, Judge Posner’s colleague on the Seventh Circuit and, like Posner, a former law professor at the University of Chicago. See Yoon, *supra* note 2, at 143.

15. Posner, *supra* note 10, at 25; see also RICHARD A. POSNER, REFLECTIONS ON JUDGING 238–48 (2013) (arguing in favor of judges drafting their own opinions).

16. Posner, *supra* note 10, at 25.

17. *Id.* at 25–26 (internal quotation marks omitted).

18. *Id.* at 30.

19. *Id.*

20. *Id.*; see also Gulati & Posner, *supra* note 3, at 484 (“Few clerks are bold enough to come to the judge and tell him that the arguments in favor of that outcome are not good enough and therefore the judge should change his vote. The judge, by contrast, if he is writing himself, is more likely to come to that conclusion, as he is not a mere amanuensis doing what his boss wants.”); Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Own Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1090 n.37 (2005) (“Law clerks, who have been delegated the task of writing an opinion based on an argument that the judge has suggested, are perhaps less likely to second-guess the argument than the judge herself.”); DAVID LAT, SUPREME

Posner additionally maintains that judges who write their own opinions do a better job of bringing their experience and their true selves to bear on their judging. As he puts it, a clerk-drafted opinion “lacks the authenticity of the judge-written opinion. You cannot express yourself through another’s words. The authentic opinion narrates the encounter of the judge and the case—discloses the judge in the act of judging.”²¹ He expands upon this argument in his book, *Reflections on Judging* (here discussing Supreme Court opinions, but the same analysis applies to lower-court opinions):

[A judicial opinion] is ideally a product not only of analysis but also of experience, which is why brilliant twenty-five-year-olds are not judges. The clerk-written judicial opinion lacks color, depth, and authenticity. The Justice who does not write his own opinions may not understand them very well, moreover, or may forget them quickly, and in either event have difficulty assessing their bearing on subsequent cases.²²

Finally, Posner argues that opinions initially drafted by law clerks tend to be overlong, excessively formalist, and laden with legal jargon—in other words, poorly written.²³ He contends that law clerks, when drafting opinions, spend too much time on style—formalist style, including compliance with elaborate conventions of legal citation dictated by *The Bluebook*—and not enough time on substance.²⁴

Posner’s case in favor of the writer judge relies primarily on practical considerations (which should not be surprising, coming from a leading scholar in law and economics and self-proclaimed pragmatist). One can also make an ethical argument in favor of the writer judge: a judge who goes too far in delegating decisional and drafting authority to clerks is guilty of “a scandalous abdication of judicial responsibility.”²⁵ Under this view, twentysomething law clerks, who are neither nominated by the president nor confirmed by the Senate, have no business exercising the judicial power of the United States.²⁶

AMBITIONS 92–93 (2014) (describing a fictional judge reacting poorly to a clerk’s suggestion that she change her vote in a case after oral argument).

21. Posner, *supra* note 10, at 30.

22. POSNER, *supra* note 15, at 46.

23. *Id.* at 248–55 (discussing and criticizing “the formalist opinion,” which tends to be drafted by law clerks, who learn formalism in law school).

24. *Id.* at 250–51 (“Where stylistic formalism reigns, there is a fussy preoccupation with trivial forms of ‘correctness,’ so law clerks spend a lot of time proofreading and bluebooking opinions drafts lest a typographical error or an error of citation form end up in a published opinion.”).

25. Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 ME. B.J. 112, 113 (2007) (citing David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May/June 2005, at 34).

26. In 1958 and again in 1973, members of Congress raised the possibility of subjecting Supreme Court law clerks to Senate confirmation hearings. See TODD C. PEPPERS, COURTIFIERS OF

Although “[i]t’s not quite plagiarism” (hardly a ringing endorsement), having clerks “ghostwrite” their judges’ legal opinions offends the principle of intellectual integrity, according to lawyer and author William Domnarski.²⁷ Put simply, Domnarski says: “[I]t cannot be accepted as legitimate that judges can put their names on opinions that they did not write.”²⁸ He quotes the late Judge Henry J. Friendly, the renowned Second Circuit jurist, who once quipped that he wrote his own opinions because “they pay me to do that.”²⁹ This argument does not turn on practical advantages to be gained from judges drafting their own opinions. Rather, it can be boiled down to something definitional: writing opinions is just what judges *do*.

III. IN DEFENSE OF THE JUDGE AS CEO

The model of the writer-judge possesses significant surface appeal. It is the model that most laypeople have in mind when they imagine judges (or, at least, it’s the model I had in mind before I went to law school and then served as a law clerk). There is something grand and romantic about imagining a great judicial writer from a past era, like Justice Oliver Wendell Holmes, Jr., perfecting the language in an opinion while standing—yes, standing—at his desk.³⁰

But there is a reason—actually, reasons, plural—that the model of editor-judge or manager-judge is dominant today. In my novel *Supreme Ambitions*, set in the U.S. Court of Appeals for the Ninth Circuit, one character—Judge Christina Wong Stinson, a judge who falls into the editor-judge camp—makes the case for drafting by law clerks:

[E]ven the justices don’t write their own opinions! Judges today aren’t writers, but managers. I am the CEO of this chambers: I use my expert judgment and accumulated wisdom to make the big, important decisions. As the president who appointed me famously said, ‘I am the decider.’ The president, as commander in chief of the armed forces, decides whom we fight and when, but we don’t expect him to drive a tank. Similarly, I decide how a case should come out . . . and my team executes. The president

THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 5–6 & nn.11–12 (2006).

27. William Domnarski, *Judges Should Write Their Own Opinions*, N.Y. TIMES (May 31, 2012), <http://www.nytimes.com/2012/06/01/opinion/judges-should-write-their-own-opinions.html> [<https://perma.cc/GL8L-RR29>].

28. *Id.*

29. *Id.*

30. As Holmes famously quipped regarding his use of a standing or upright desk, “There is nothing so conducive to brevity as a caving in at the knees.” CLARE CUSHMAN, COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY 212 (2011).

didn't appoint me to this job so that I could dither over whether to cite this case or that one for the summary judgment standard.³¹

Borrowing from these comments by Judge Stinson, I refer to the editor- or manager-judge as the “judge as CEO” model. While a judicial chambers is much smaller than a typical corporation, the analogy made by Judge Stinson generally holds: the editor judge makes the top-level decision, like a CEO, and her clerks then implement that decision, like company employees.³²

Here are three arguments in favor of the “judge as CEO” model. I call them the “three Es”: efficiency, experience, and editing.

A. *Efficiency*

By allowing the judge to effectively “leverage” herself—including her insight, her wisdom, and her professional experience—over a higher number and wider range of cases, the practice of using law clerks to draft opinions promotes judicial efficiency.

As a leading scholar of law and economics before he joined the bench, Posner famously argued for the efficiency of the common law: as a system of judge-made rules, the common law is efficient because judges recognize efficiency as a value.³³ I agree and argue that this same respect for efficiency explains why the vast majority of federal appellate judges fall into the manager mold.

In light of the important and noble role the federal judiciary has played in our nation's history, it might seem strange to some to view it through an economic lens. But it most certainly can be cast in economic terms (and if doing so allows for production of more justice at lower cost, this surely isn't a bad thing). We can view the federal judiciary as a “production function,” with judges as the main input and their judicial decisions as the output.³⁴

Law clerks, of course, are an important input as well, and they play a major role in helping judges maintain their high productivity

31. LAT, *supra* note 20, at 139.

32. For an example more familiar to members of the legal profession, one can think of a judicial chambers as a small law firm, with the judge as the senior or managing partner and the law clerks as the associates. See DENNIS J. HUTCHINSON & DAVID J. GARROW, *THE FORGOTTEN MEMOIR OF JOHN KNOX* (2002), at xii (citing Justice Lewis F. Powell, Jr., comparing his chambers and those of his fellow justices to “nine little law firms”); Yoon, *supra* note 2, at 136 (“The judge is also the proverbial name partner, and all work product (i.e., orders, opinions) that comes from the chambers bears only the judge's name.”).

33. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 98 (1st ed. 1972) (“Our survey of the major common law fields suggests that the common law exhibits a deep unity that is economic in character.”).

34. Yoon, *supra* note 2, at 133.

levels in the face of rising caseloads. And rise those caseloads have. According to one estimate, a federal court of appeals judge today carries a caseload that is 600 percent larger than that of her predecessors in 1960.³⁵ Indeed, caseloads have been growing at a faster rate than both federal appellate judgeships and overall U.S. population since at least the turn of the twentieth century.³⁶

It should come as no surprise that during the past four decades or so, judges went from writing their own opinions to relying upon law clerks for drafting. A study conducted in 1976 found that judges on the Ninth Circuit wrote most of their own opinions.³⁷ A study conducted in 2013, in contrast, found that 95 percent of all surveyed federal judges assign the drafting of opinions to law clerks.³⁸

It's hard to see how a typical judge today could stay on top of her caseload while drafting her own opinions. Disagreeing with Judge Posner's call for judges to do more of their own opinion writing, Judge Beverly B. Martin of the Eleventh Circuit notes that in a recent year, each active member of her court participated in an average of 723 merits determinations.³⁹ This means that even assuming a judge works seven days a week and 365 days a year, she is responsible for writing or reviewing about two orders or opinions deciding a case on the merits each day.⁴⁰ And this number does not include rulings on applications for certificates of appealability, petitions for rehearing, and other miscellaneous motions related to pending cases. Summing up, Judge Martin writes that "these numbers describing our work load make it plain why some judges do not write all the rulings that are issued under their names."⁴¹

How does the drafting of opinions by law clerks solve the problem of case volume? Editing draft opinions prepared by law clerks is much less time-consuming than writing the opinions oneself.⁴² This

35. Todd C. Peppers et al., *Surgeons or Scribes: The Role of United States Court of Appeals Law Clerks in "Appellate Triage"*, 98 MARQ. L. REV. 313, 315 (2014).

36. See Yoon, *supra* note 2, at 133–34 (looking at the period from 1900 through 2013 and concluding that "[f]or the courts of appeals, which focus on writing opinions, the growth in caseload far outpaced the increase in authorized judgeships").

37. JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 90–91 (1980) (cited in Gulati & Posner, *supra* note 3, at 483 nn. 5–9).

38. *Id.* at 326.

39. See Beverly B. Martin, *Another Judge's Views On Writing Judicial Opinions*, 51 DUQ. L. REV. 41, 44–45 (2013).

40. *See id.*

41. *Id.*

42. See Matthew Parham, *Should Judges Write Their Own Opinions?*, LAW PRACTICE (June 5, 2012), <http://lawpraxis.blogspot.com/2012/06/should-judges-write-their-own-opinions.html> [<https://perma.cc/B3LK-993J>] ("There is a reason that law firms across the country have adopted

is especially true when the opinions need to reference voluminous factual material and extensive legal research in order to explain to the litigants how their case was resolved. So Judge Martin, for example, generally relies upon her law clerks to take the first pass through the record on appeal, to conduct the initial legal research, and to prepare a first draft for her review.⁴³

Judge Diane Sykes of the Seventh Circuit, who also typically has her clerks draft opinions (which she then edits heavily), agrees that opinion drafting by clerks is necessary for most judges. As she states, “The caseload is too large and our decisions have to be explained in writing, and no single judge can do it all himself or herself, unless you are in the league of Judge Posner and Judge Easterbrook. The rest of us are mere mortals”⁴⁴

Could judges keep up with their caseloads if they did not rely upon clerks for the drafting of decisions? Quite possibly, although the decisions—the “outputs,” if you will—would probably look quite different. As Judge Kermit Lipez of the First Circuit explains:

Could I do my opinions without law clerks? Sure. But the opinions would be much shorter, more conclusory, and less grounded in the law and the details of the record. Some of you might well say that shorter would be better. I understand that sentiment. I have no doubt that some of our opinions are excessively long. On balance, however, I think we enhance our accountability, and the predictability of the law, if we explain ourselves more fully in our decisions. By enhancing our ability to explore the relevant law and the record, law clerks enhance the candor and intellectual rectitude of our decisions.⁴⁵

Judge Lipez concludes, “We could do our jobs without law clerks, but we could not do them as well.”⁴⁶

B. Experience

Having the judge play the role of editor or manager fits best with most judges’ pre-judicial work experience. Federal appellate judges typically come from other judicial positions or successful careers in practice, and these backgrounds prioritize and develop managing and editing abilities more than writing skill.

It is surely no coincidence that the two judges most known for doing all or almost all of their own opinion writing—Judge Richard

a division of labor in which substantive pleadings are drafted in the first instance by a junior attorney. This division of labor is efficient”).

43. Martin, *supra* note 40, at 46–47.

44. *Judges’ Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 453 (2014).

45. Lipez, *supra* note 25, at 115–16 (footnotes omitted).

46. *Id.* at 116.

Posner and Judge Frank Easterbrook of the Seventh Circuit—came to the bench from legal academia.⁴⁷ As former full-time law professors at the University of Chicago Law School, they were used to writing quickly, voluminously, and well.⁴⁸

But legal academia is an atypical background for federal appellate judges. According to a May 2014 report, only 6.7 percent of active U.S. circuit court judges were working as law professors immediately prior to appointment.⁴⁹ Far more common backgrounds were other federal judicial service (31.9 percent), private practice (25.8 percent), state judicial service (18.4 percent), and service in the U.S. Department of Justice (7.4 percent).⁵⁰

These backgrounds all generally involve more management and less writing than work as a law professor. Lower-court judges edit orders and opinions drafted by their law clerks and manage their chambers and courtroom staff. Law firm partners edit briefs and other work product prepared by associates and manage those associates and other staffers, such as paralegals or secretaries.⁵¹ Justice Department lawyers might be somewhat more hands-on, but if they are coming to the bench from supervisory positions in a U.S. Attorney's Office or Main Justice, which is typical, they too will have more immediate experience as editors and managers than as writers.

Given these “inputs” into the judicial system—i.e., judges coming largely from other judicial roles or the practice of law, rather than academia—it makes the most sense to shape the production of “outputs” in a way that best takes advantage of their skills. And that counsels in favor of having judges serve as editors and managers, not writers. As Posner acknowledges, “[J]udges whose work habits have been shaped by a [managerial] culture in a law firm or government legal agency find the managerial approach to judging congenial.”⁵²

47. See Choi & Gulati, *supra* note 20, at 1080 & n.6; Yoon, *supra* note 2, at 143.

48. As Posner notes, academia “is the main example” of “a branch of the legal profession of which writing was a central component.” POSNER, *supra* note 15, at 243.

49. BARRY J. McMILLION, CONG. RESEARCH SERV., R43538, U.S. CIRCUIT COURT JUDGES: PROFILE OF PROFESSIONAL EXPERIENCE PRIOR TO APPOINTMENT (2014), <https://www.fas.org/sgp/crs/misc/R43538.pdf> [<https://perma.cc/E6C7-WCVK>].

50. *Id.*

51. See Parham, *supra* note 43 (noting that “judges who rely on clerks to prepare first drafts are only doing what attorneys at any large, private law firm do, and so what they themselves have likely done during the entire career that resulted in their promotion to the federal bench”).

52. POSNER, *supra* note 15, at 245–46; see also *id.* at 240 (acknowledging that rejecting the manager model in favor of the writer model “is difficult for the judicial appointee who has spent many years in a managerial role in a law firm or government legal service; as a writer of first drafts, he is rusty”).

Could judges coming out of professional backgrounds other than academia be transformed, through a combination of formal training and experience over time, into better writers? Certainly—and this is essentially Posner’s response to this point, arguing that “practice makes perfect.”⁵³ But it seems inefficient, to put it mildly, to select judges based largely on their success as managers and editors and then require them to become writers in their new judicial roles.

If we decided we wanted a system in which judges draft their own opinions, then we should overhaul our entire system of judicial selection to place greater weight on a nominee’s ability to write prolifically and well. This type of reform would favor law professors, as well as perhaps practicing lawyers who have demonstrated their ability to write through publishing law review articles or even books. But such a reform seems especially unlikely in today’s politically charged environment for judicial nominations, where a long “paper trail” is a liability rather than an asset for a judicial nominee.⁵⁴ And it might also have the deleterious effect of reducing the diversity of professional backgrounds on the federal bench, increasing the representation of legal academics at the expense of lawyers with greater practical experience.⁵⁵

C. Editing

To the extent that there are problems with a system in which law clerks draft opinions for their judges, all or most of these problems can be addressed with more and better editing by the judges. Indeed, a system in which clerks draft opinions and judges edit them appropriately may achieve the best of both worlds, combining the efficiency of the editing judge with the insight of the authoring judge.

53. POSNER, *supra* note 15, at 243 (arguing that even if a new judge “would find it tough sledding to write a decent opinion [at first],” writing “would become easier as the years rolled by,” and “eventually the judge would develop a proficiency that no law clerk, working for only one year, could develop”).

54. See, e.g., Nina Totenberg, *Robert Bork’s Supreme Court Nomination ‘Changed Everything, Maybe Forever’*, NPR, <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [<https://perma.cc/9ZAK-WGL6>] (noting former law professor Robert Bork’s “long paper trail of controversial legal writings,” which eventually helped doom his Supreme Court nomination); David Weigel, *Goodwin Liu, Goodnight*, SLATE, http://www.slate.com/blogs/weigel/2011/05/20/goodwin_lieu_goodnight.html [<https://perma.cc/5HAM-9YKN>] (arguing that a lesson to be learned from the failed Ninth Circuit nomination of former law professor Goodwin Liu is to “leave no paper trail of note”).

55. Posner himself criticizes both the lack of professional diversity in the federal judiciary and the relevance of much legal scholarship produced by law professors in a new book. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* (2016).

Critics of clerks drafting opinions raise the specter of judges essentially rubber-stamping the work product of young and inexperienced law clerks, fresh out of law school, who lack the wisdom and judgment that their bosses acquired over decades in the legal profession.⁵⁶ But this rubber-stamp scenario is an extreme case—and, if judges are to be believed, not a typical case either.⁵⁷

Even Posner, an opponent of the editing judge model, concedes that some judges can, through proper editing, make a judicial opinion their own.⁵⁸ Examples abound. The late Justice Antonin Scalia, widely regarded as one of the finest writers on the federal judiciary,⁵⁹ did not draft most of his opinions in the first instance. But as he “mercilessly revised” his law clerks’ drafts, he turned them into writing that was unmistakably his own.⁶⁰

One could argue that justices of the Supreme Court, which decides roughly 80 cases a year, have a greater ability to transform law clerk drafts into polished judicial opinions. But even on the federal appellate courts, there exist manager- and editor-judges who possess strong and distinctive writing voices that remain consistent over time even though their clerks change from year to year.

Take Judge Alex Kozinski of the Ninth Circuit, who Posner (along with many others) regards as “an excellent writer.”⁶¹ Judge Kozinski generally does not write his own drafts, but the opinions that

56. See *supra* Part III (discussing allegations of “a scandalous abdication of judicial responsibility”); see also Choi & Gulati, *supra* note 20, at 1078 & n.3 (“Commentators have discussed the practice of delegating significant portions of the opinion-writing task to clerks, and more than a few have criticized it.”).

57. See, e.g., Choi & Gulati, *supra* note 20, at 1096 & n.52 (noting results from a survey of federal judges “suggest[ing] that most judges did not perceive an inappropriate level of delegation” of responsibility to clerks); Lipez, *supra* note 25, at 115 (opining that “it is a rare case where a judge, either through writing or conversation, does not participate actively with the law clerk in the preparation of an opinion”).

58. POSNER, *supra* note 15, at 46 (citing Justice Potter Stewart and Justice John Marshall Harlan II).

59. See, e.g., Howard J. Bashman, *Secrets of Great Appellate Writing*, APP. ISSUES (March 2016), http://www.americanbar.org/content/dam/aba/publications/appellate_issues/2016win_ai.authcheckdam.pdf#page=20 [<https://perma.cc/S9JV-TVCJ>] (including Justice Scalia on a list of 13 leading judicial writers); William Peacock, *Best and Worst SCOTUS Writers*, FINDLAW (Aug. 29, 2014), http://blogs.findlaw.com/supreme_court/2014/08/friday-double-poll-best-and-worst-scotus-writers.html [<https://perma.cc/9H6C-4UJX>].

60. William Jay, *Tribute: The Justice Who Said He Hated Writing*, SCOTUSBLOG (Mar. 4, 2016), <http://www.scotusblog.com/2016/03/tribute-the-justice-who-said-he-hated-writing/> [<https://perma.cc/FE7W-J74X>].

61. POSNER, *supra* note 15, at 249; see also Bashman, *supra* note 60 (including Kozinski on his list of 13 leading judicial writers); David Lat, *Black’s Law Dictionary: An Interview With Bryan A. Garner*, ABOVE THE L. (July 2, 2014), <http://abovethelaw.com/2014/07/blacks-law-dictionary-an-interview-with-bryan-a-garner/> [<https://perma.cc/85UE-FQ55>] (including Kozinski on Garner’s list of his favorite judicial writers).

ultimately issue under his name are undoubtedly his own. His opinions are the result of a painstaking process of editing and collaboration with his clerks in which a single opinion might go through fifty drafts.⁶²

While fifty drafts might be on the high side, Judge Kozinski is not alone in terms of working closely with his law clerks to transform a clerk-written first draft into a polished judicial opinion. Here is how Judge Martin of the Eleventh Circuit handles her editorial process:

Once I get the draft, I sit with my clerk who wrote it, go through the draft, and ask questions. If my discussion of the draft alerts me that there is something about the case I do not understand, my clerk sits with me and teaches me until I do. This regularly requires several meetings, with intermissions for me to read and reread relevant case law as well as parts of the record. As a part of this process, I often press my clerk about whether we could say something in another way that makes the topic more understandable to me.⁶³

This is definitely not a judge rubber-stamping her clerk's work product, nor is it an abdication of judicial responsibility. In the words of Judge Lipez of the First Circuit, who describes a similar process for crafting his opinions:

Is every word in the finished opinion mine? No. Have the law clerks contributed some thoughts of their own? Yes. But I have no reservations about describing the result of this collaboration as my opinion. I decided the case after careful preparation for oral argument and attentiveness to the argument. I provided the initial direction for the preparation of the first draft. I then spent many hours refining and rewriting the draft before circulating it to my colleagues.⁶⁴

Admittedly, there might be a certain amount of self-selection in terms of which judges are willing to describe their opinion-writing process—judges who come closer to the proverbial “rubber stamp” are less likely to discuss their process, or if they do discuss it, they are unlikely to admit how little they edit. But these anecdotal accounts do suggest that judges take their responsibilities seriously.⁶⁵ At the very least, judges feel the pressure of institutional norms within the judiciary to

62. Carl Tobias, *A New No. 1 at the 9th Circuit*, L.A. TIMES (Nov. 30, 2007), <http://articles.latimes.com/2007/nov/30/opinion/oe-tobias30> [<https://perma.cc/8S83-TBS5>].

63. Martin, *supra* note 40, at 48.

64. Lipez, *supra* note 25, at 114.

65. Judges aren't the only defenders of letting law clerks draft opinions; former law clerks defend the practice as well. In the words of Emily Bazelon (a former First Circuit clerk) and Dahlia Lithwick (a former Ninth Circuit clerk), “If you give clear and detailed direction for a piece of writing, laying out its argument, order, and building blocks, and then you edit it extensively, you're the one in control. That's reportedly the norm on the Supreme Court. And it was how work proceeded in the appeals court chambers we each worked in.” Emily Bazelon & Dahlia Lithwick, *Endangered Elitist Species: In Defense of the Supreme Court Law Clerk*, SLATE (June 13, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/06/endangered_elitist_species.2.html [<https://perma.cc/7CHG-RMSW>].

work closely with their clerks if they are going to entrust the clerks with drafting.

Of course, the amount of judicial editing that a clerk-written draft requires will vary depending on the nature of the case, the complexity and significance of the issues, and whether the opinion will be published and precedential or unpublished and non-precedential. In some cases, the judge might edit the clerk's draft very lightly, or not at all—and that might be entirely appropriate under the circumstances.

As Posner notes, it's often the case that "federal court of appeals judges, who have a mandatory jurisdiction—who cannot pick and choose the cases they hear, as the U.S. Supreme Court does—really are engaged in objective, ideology-free decision making."⁶⁶ If a particular case is "ideology-free," has a proper outcome that all or almost all judges would agree upon, and can be resolved with an unpublished and non-precedential disposition, it makes perfect sense for a clerk to draft a short and straightforward decision and for a judge to edit it lightly and quickly.

As Judge Sykes of the Seventh Circuit explains, she revises clerk-written drafts extensively for precedential opinions, with the final published opinion often amounting to "sixty percent or seventy-five percent" of her own writing.⁶⁷ But for "the more routine opinions and in unpublished dispositions, I do light editing of the law-clerk draft, and they tend to do a fine job of giving me what I need."⁶⁸

Imagine, for example, a straightforward appeal, squarely controlled by existing law, that practically all judges across the ideological spectrum would agree requires nothing more than an unpublished, non-precedential affirmance. The law clerk drafts a three-page summary disposition. The judge reads it over but doesn't have a single edit. The ruling gets issued under the judge's name.

Is it a problem that the judge did not draft this decision herself and did not revise it in any way? If the ruling is correct on the facts and on the law, it's hard to see anything wrong. As Judge Stinson states in my novel, *Supreme Ambitions*:

66. POSNER, *supra* note 15, at 106.

67. *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, *supra* note 45, at 451.

68. *Id.*; see also Martin, *supra* note 40, at 49 ("[I]t would not be true to say that all of the drafts written by my law clerks engender the extent of my involvement and the extensive back and forth I have just described. Sometimes I receive a draft from them with the correct result that seems easily understandable. Because of the limits on my time, I let these opinions go more quickly and with less discussion.").

Some judges take pride in drowning their clerks' drafts in red ink, but that's not my approach. I don't believe in editing for the sake of editing; it's a waste of time and resources. If a clerk gives me a good draft opinion that reaches the right result for the right reasons, I'm not going to take the thing apart and put it back together again just for kicks, or to gratify my own ego by putting the opinion more in my own voice.⁶⁹

Or to quote a real-life judge—specifically, Judge James A. Wynn, Jr., of the Fourth Circuit—“Ultimately, this job is not about me. It's about the end product. What does it matter how the opinion gets out there as long as it's a good opinion?”⁷⁰ As the old saying goes, “If it ain't broke, don't fix it.”

Notwithstanding their flowing black robes, federal judges are not wizards, and a judge's red pen is not some magic wand that transforms clerkly dross into judicial gold. If a clerk has drafted a solid decision in a straightforward case, it's a waste of a judge's time to rewrite that opinion—and it would have been an even bigger waste of time for the judge to have drafted the decision herself, which is why she delegated it to her clerk in the first place.⁷¹

CONCLUSION

It cannot be denied: there is something a little sad about a charismatic judge who writes his own opinions, a lone genius like Justice Robert H. Jackson, being replaced by a Weberian bureaucrat overseeing his law clerks' production of impeccably bluebooked, timely, but ultimately colorless opinions.⁷² This type of development

69. LAT, *supra* note 20, at 139.

70. *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, *supra* note 45, at 453.

71. It should also be noted that having a judge write an opinion himself is no guarantee of excellence. As Posner writes of his experience clerking at the Supreme Court, “I was stunned to discover that Supreme Court Justices didn't write all their own judicial opinions ([Justice William O.] Douglas did – and his were the weakest, though not because he was dumb – rather because he was bored).” POSNER, *supra* note 15, at 21. Meanwhile, Posner found impressive a number of opinions issued by his own boss, Justice William J. Brennan, Jr., even though Posner later learned that these opinions had been written by a clerk. *Id.* Posner adds that “law clerks, being selected by judges rather than, as the judges are, by politicians, are often abler legal analysts and writers than their judge.” *Id.*

This raises, by the way, another problem with the model of the authoring judge: even if some clerks might be better at legal analysis or writing than their judges, clerks will be reluctant to criticize opinions drafted by their judges because of the status differential between them. Steps can be taken to try and minimize this divide—Posner, for example, requires his law clerks to address him by his first name to promote equality and candor in chambers, *see id.* at 128—but at the end of the day, the clerk is still the clerk, and the judge is still the judge.

72. Max Weber, *Theory of Social and Economic Organization*, in ON CHARISMA AND INSTITUTION BUILDING: SELECTED PAPERS 46, 47–62 (S.N. Eisenstadt ed., A.K. Henderson & Talcott Parsons trans., 1968) (1945) (discussing the “routinization” of “charismatic authority”);

“reflects the decline of the literary culture in America,” as Judge Posner puts it.⁷³

Lawyers, law students, and citizens more generally should be thankful to have on the federal bench great legal minds like Richard Posner and Frank Easterbrook, who can produce superb and timely opinions that they’ve drafted themselves. But it’s unrealistic to expect a federal judiciary full of Posners and Easterbrooks—and it might not even be desirable.⁷⁴

The genie can’t be put back into the bottle, as Judge Diane Sykes wisely observes.⁷⁵ The need for direct expression of distinct judicial voices must be balanced against the need for comprehensive, non-conclusory, and efficiently delivered opinions—and if that requires judges to edit and to manage rather than to write, then so be it.

see also Yoon, *supra* note 2, at 146 (noting scholarship discussing “a bureaucratization of the judiciary”).

73. POSNER, *supra* note 15, at 246.

74. Unprepared oral advocates would certainly not want a bench full of Posners and Easterbrooks. Both judges are famously demanding questioners at oral argument. *See, e.g.*, David Lat, *The Benchslap Dispatches: I Pity The Fool Who Tries To Talk Over Judge Posner*, ABOVE THE L., <http://abovethelaw.com/2014/02/the-benchslap-dispatches-i-pity-the-fool-who-tries-to-talk-over-judge-posner/> [https://perma.cc/5UUE-WAU6] (discussing an oral argument in which Judge Posner was “at his cantankerous best”); David Lat, *Benchslap Of The Day: You Won’t Like Judge Easterbrook When He’s Mad*, ABOVE THE L., <http://abovethelaw.com/2014/02/benchslap-of-the-day-you-wont-like-judge-easterbrook-when-hes-mad/> [https://perma.cc/9AZS-9MG3] (listing cases in which Judge Easterbrook and other Seventh Circuit judges have been tough on oral advocates).

75. *Judges’ Perspectives on Law Clerk Hiring, Utilization, and Influence*, *supra* note 45, at 453.