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SALVAGING THE 2013 FEDERAL LAW CLERK HIRING SEASON

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Ten years ago, the judiciary instituted the Federal Law Clerk Hiring Plan,¹ an employment system meant to regularize hiring in which most circuit and district court jurists voluntarily participated. Throughout the succeeding decade, this process operated effectively for innumerable trial judges, but functioned less well for appellate jurists. In early 2013, the U.S. Court of Appeals for the District of Columbia Circuit revealed that all its members “will hire law clerks at such times as each individual judge determines to be appropriate,” concomitantly explaining “the plan is [apparently] no longer working.”² With these statements, the D.C. Circuit explicitly acknowledged what had been the reality for the last decade regarding much court of appeals employment. However, the notice sparked a critical hiring frenzy among *district* jurists.

Because that phenomenon of early district court hires may eviscerate the 2003 Hiring Plan, which substantially reduced the complications that had acutely infected the process since the 1980s, this problematic development merits review. I initially detail the clerk hiring process’ relatively checkered history, ascertaining previous endeavors to improve the clerkship scheme lacked efficacy, although the practices formulated in 2003 were successful. The piece next scrutinizes the present season, detecting that certain actions by jurists closely resemble troubling elements of measures in place before. Finding the plan’s imminent collapse essentially imposes disadvantages on law students that eclipse its benefits and finding no alternative regimen preferable, I suggest that districts and members remain committed to the procedures that have served applicants, legal education, courts and jurists well for ten years.

* Williams Chair in Law, University of Richmond. Thanks to Jay Bybee, Michael Higdon, Peggy Sanner, and University of Richmond colleagues for ideas, Mindy Fenick for processing, Cassie Sheehan for research, the *Washington University Law Review* editors for editing, and Russell Williams and the Hunton Williams Summer Endowment Fund for generous, continuing support. Errors that remain are mine.

1. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL LAW CLERK HIRING PLAN INFORMATION (Apr. 2013), available at https://oscar.uscourts.gov/assets/Federal_Law_Clerk_Hiring_Plan_for_Download.pdf.

2. U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, NOTICE REGARDING LAW CLERK HIRING BY D.C. CIRCUIT JUDGES FOR THE 2014–2015 TERM (Jan. 29, 2013), <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Human%20Resources%20-Law%20Clerk%20Hiring>; see David Lat, *The Law Clerk Hiring Plan: Really, Really Dead Now*, ABOVE THE LAW (Jan. 30, 2013, 12:38 PM), <http://abovethelaw.com/2013/01/the-law-clerk-hiring-plan-really-really-dead-now/>.

I. A BRIEF HISTORY OF THE HIRING PLAN

Between 1985 and 2002, hiring grew more chaotic. The process steadily accelerated, while increasing numbers of judges engaged in cutthroat and unseemly competition for applicants whom they considered the best and the brightest.³ Judges premised clerk employment on limited information and, thus, could even have selected people with deficient legal, research and drafting capabilities or nominal interpersonal skills.⁴ To combat perceived deficiencies with the employment process, preeminent jurists of the thirteen appeals courts, whom Third Circuit Chief Judge Edward Becker and D.C. Circuit Judge Harry Edwards assembled, crafted a novel hiring plan that appeared in a March 2002 report.⁵ The system placed a 2002 voluntary moratorium upon recruitment, while it encouraged jurists to interview and employ law clerks beginning their fifth semester in the next year and the future.⁶ The plan that emerged, capitalized on the Tuesday following Labor Day as the benchmark when students could first proffer, and courts receive, applications. Judges, correspondingly, were to delay one week before routinely scheduling possible interviews to commence seven days later, after which members could grant offers.

Those practices remedied the signature difficulties, which plagued law clerk hiring some twenty years, rectifying or ameliorating concerns that prior approaches entailed. For instance, the pre-2003 approach deleteriously affected students not located in metropolitan centers, principally on the Eastern Seaboard, where proximity facilitated travel among chambers, seeming to benefit numerous applicants and jurists in the areas.

The 2003 plan clearly advantaged certain students, professors, and schools. For example, this permitted students two complete years in which

3. I rely here and in the remainder of this piece on Edward S. Adams, *A Market-Based Solution to the Judicial Clerkship Selection Process*, 59 MD. L. REV. 129, 132–34 (2000); Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem and the Modest March 1 Solution*, 104 YALE L.J. 207, 208–12 (1994); Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1714–18 (1991).

4. For a capricious, and apparently apocryphal, variation on these ideas, see Richard D. Cudahy, *Judge Clueless Hires a Law Clerk*, 60 OHIO ST. L.J. 2017 (1999); see also Aaron Zelinsky, *Fixing the Judicial Clerkship Crisis*, HUFFINGTON POST POLITICS BLOG (Jan. 30, 2013, 2:54 PM), http://www.huffingtonpost.com/aaron-zelinsky/fixing-the-clerkship-cris_b_2583485.html.

5. MEMORANDUM OF THE AD HOC COMMITTEE ON LAW CLERK HIRING (2002); Jason Hoppin, *Caution Flag is Raised in Clerk Derby*, THE RECORDER, Mar. 12, 2002, at 1.

6. MEMORANDUM, *supra* note 5; see Jeff Blumenthal, *Circuit Judges to Focus on 3Ls for Clerk Hiring*, LEGAL INTELLIGENCER, Mar. 12, 2002, at 1; Hoppin, *supra* note 5.

they acquired and demonstrated competence and reviewed promising career options.⁷ The scheme provided application and interviewing procedures that were less disruptive of routine operations, notably classes, as students could easily arrange multiple potential clerkship interviews across locales. The solution provided jurists four semesters' academic performance on which to depend when hiring clerks. Vast numbers of trial level jurists strongly respected the plan, but their appellate counterparts decreasingly honored this alternative.⁸

II. THE 2013 SEASON

Several factors complicate efforts to identify exactly what happened after the D.C. Circuit announced tribunal judges would cease following the plan. Most relevant information is difficult to collect, evaluate and synthesize, primarily because it seems to not be publicly available, and much of the remaining applicable material is anecdotal. There correspondingly are myriad complex variations among, and within, the country's educational institutions that help students and the ninety-four federal courts and 1300 jurists, while applicants have diversely responded. However, I offer a descriptive catalog of recent hiring approaches essentially by relying upon accessible current information.⁹

Numerous prospective clerks appeared unclear about how to seek clerkships after the D.C. Circuit posting; as they had only commenced their fourth semesters, most were assuming time-intensive editorial board duties on law reviews, and few judges publicly stated 2013 hiring practices. A number of schools were uncertain about precisely how to advise students because they lacked concrete information on most jurists'

7. Adams, *supra* note 3, at 135; Annette E. Clark, *On Comparing Apples and Oranges: The Judicial Clerk Selection Process and the Medical Matching Model*, 83 GEO. L.J. 1749, 1751–53 (1995); Louis F. Oberdorfer & Michael N. Levy, *On Clerkship Selection: A Reply to the Bad Apple*, 101 YALE L.J. 1097, 1100 (1992).

8. The D.C. Circuit notice affirms this and suggests that its judges were disadvantaged when others did not honor the plan. Why jurists defect is unclear and varies. Some oppose cartels, want more freedom of action, or find the plan tolerates inefficiency, nontransparency, “cheating,” and “exploding offers.” Kozinski, *supra* note 3, at 1716 (advocating a free market approach); Aaron L. Nielson, *The Law Clerk Hiring Plan is Dead, and Good Riddance*, NAT'L L.J., Feb. 4, 2013, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202586922678&The_law_clerk_hiring_plan_is_dead_and_good_riddance (same); Ilya Somin, *The Collapse of the Judicial Law Clerk Hiring Cartel*, VOLOKH CONSPIRACY (Feb. 5, 2013, 12:00 AM), <http://www.volokh.com/2013/02/05/the-collapse-of-the-judicial-law-clerk-hiring-cartel/>; but see Oberdorfer & Levy, *supra* note 7 (responding specifically to Judge Kozinski's article and advocating for a centralized hiring plan).

9. The information below is premised on conversations and emails with many federal judges, law faculty, career services officers, and law students throughout the U.S. and on hiring information that jurists provide.

endeavors and closely followed the guidance of the National Association for Law Placement (NALP), which initially devised a minimalist strategy for responding to the D.C. Circuit pronouncement. Nevertheless, during early April, the OSCAR (Online System for Clerkship Application and Review) Working Group judges made June 28, not late August, the pertinent date when third-year students could first apply, while the committee reverted to one day for initially proffering submissions, efficaciously arranging interviews, conducting them, and providing offers.¹⁰ However, early last year, a few schools, prominently including Stanford and Georgetown, had carefully advised that 2013 graduates contemplate applying in the spring of 2012, material that has plainly received extensive circulation since its prescription, while numerous schools promulgated similar advice this year.¹¹

A plethora of complicated variations in clerkship hiring procedures exists among and within the courts. Most jurists reacted slowly to the D.C. Circuit proclamation, and others have not clearly addressed the missive. Since January, increasing numbers decided against complying with the previous guidelines. A multitude of judges who employed clerks ahead of OSCAR's proposed starting time furnished minimal notice or relevant information through any medium, namely OSCAR.

Many eschewing the plan seem to be concentrated in areas whose clerkships are deemed prestigious and competitive, encompassing Philadelphia, San Francisco, and Washington, D.C., or in venues considered rather desirable places to reside, notably Austin, Eugene, and San Diego. For instance, D.C. District Court jurists rapidly entertained applications, conducted interviews, and hired clerks by March.¹²

10. Federal *Law Clerk Hiring Plan Date Change*, OSCAR BLOG (Apr. 10, 2013, 4:30 PM), https://oscar.uscourts.gov/blog_post/_1/14/hiring-plan-date-change. This seemed meant to salvage the flagging plan. The one date “could be a recipe for an utterly shambolic process, a mad scramble for talent full of hastily conducted interviews, exploding offers, and questionable” judge and applicant behavior. David Lat, *Clerkship Hiring Is Getting Earlier and Earlier*, ABOVE THE LAW (Apr. 11, 2013, 2:25 PM), <http://abovethelaw.com/2013/04/clerkship-hiring-is-getting-earlier>. OSCAR is a secure, user-friendly online resource, which facilitates law clerk hiring. OSCAR's Working Group is responsible for setting dates and requirements for the Plan and encouraging judges to comply. United States Courts, *OSCAR More Popular Than Ever* (Dec. 2011), http://www.uscourts.gov/news/TheThirdBRANCH/11-12-01/Oscar_More_Popular_Than_Ever.aspx.

11. Open Letter from Larry Kramer, Dean, Stanford Law Sch., to Federal Judges (June 29, 2012); Memorandum from Georgetown Univ. Law Ctr. on Clerkship Application Process (June 1, 2012); see Memorandum from Harvard Law Sch. on Clerkship Application Process to the Rising 3Ls and Faculty (June 3, 2012); see also David Lat, *The Law Clerk Hiring Plan, R.I.P.*, ABOVE THE LAW (June 11, 2012, 3:46 PM), <http://abovethelaw.com/2012/06/the-law-clerk-hiring-plan-r-i-p/> (posting excerpts from the letter and memoranda).

12. This was unsurprising both because D.C. District Court clerkships have long been prestigious and competitive and because of the D.C. Circuit announcement.

Numerous judges on the Maryland District and the Southern Districts of California and Texas completed employment in May.¹³ Pennsylvania's Eastern District abandoned the suggested plan, while numbers of jurists had concluded their interviews by May and were cautiously awaiting fourth semester grades before extending offers.

A few urban courts with relatively large numbers of active jurists appear comparatively atypical. For example, a Northern District of Illinois OSCAR search for jurists who posted clerkship openings by late May revealed that eight were complying with the hiring plan, three were not, and a majority had yet to comprehensively indicate salient preferences.¹⁴ Numerous Eastern District of Michigan judges and New York Eastern and Southern District members correspondingly relied on the newly-prescribed June benchmark,¹⁵ although several tendered May offers. Practically half the Central District of California jurists signaled that they would respect the plan, but several deviated and the remainder has yet to publicly announce clerkship schemes.

The above courts and judges were not alone. A multitude of district courts throughout the nation accelerated employment. However, the processes in fact varied considerably among, and even within courts. For instance, Eastern District of Virginia jurists received applications this spring, while most—a number with chambers in Alexandria—offered clerkships by May. Nearly all Middle and Southern District of Georgia judges enjoyed rather prompt candidate submissions and completed hiring in April, when the Northern District members were beginning their review. A couple of Arizona District Court jurists and Florida Southern District judges had clerkship applications and readily proffered employment in May.¹⁶

Notwithstanding these courtwide and specific jurist defections from the 2003 plan, which the recent OSCAR guidance supplemented, quite a few

13. Some Texas jurists honor the plan. Diverse reasons seem to motivate judges. For instance, the Maryland jurists always hired early. Each Southern District of California judge decides. Several follow the plan, others' preferences are not public and few use OSCAR. A number hired by May, employing interns or extending clerks' terms or making them career clerks. These measures resemble those in Florida's Southern District.

14. *N.D. Ill. Positions*, OSCAR, https://oscar.uscourts.gov/applicant/positions/judges/judges_list?s=ApplicantPositionSection&mode=list&tab=judge&tabmode=list&subtab=searchresults (login required). Some posted on websites.

15. Some Southern District Judges reviewed applications on a rolling basis but did not interview or make offers before June 28. The court has a website with most judges' practices. David Lat, *A Quick Update on Law Clerk Hiring*, ABOVE THE LAW (June 4, 2013, 5:17 PM), <http://abovethelaw.com/2013/06/a-quick-update-on-law-clerk-hiring/>.

16. Some judges on each court honor the plan. *See supra* note 13.

judges kept following the advice, including jurists on California's Eastern District and the Pennsylvania Middle District. Some districts and judges in rural or less populated areas honored the suggested procedures or employed aspirants later. For instance, several Montana District jurists will apparently recruit next year for clerkships that begin August 2014. A number of chief district judges and myriad colleagues, encompassing those from Illinois's Northern District Court and the Eastern District of Michigan, adhered to the plan.¹⁷

Specific ideas explain continued application of the 2003 plan. Particular chief judges find the system effective or perhaps recognize that departure would set a bad precedent for additional court members. Jurists may also respect the vaunted practice for diverse reasons. Some believe the notion is efficacious or apparently want to maintain a regime that has proved workable until the courts as a whole conclude that they will abrogate or change the nuanced option. A few may see as inappropriate or distasteful the pitfalls which characterized the 2013 season, and a number of judges may appreciate that the clerkship applicant pool's rich nature essentially shows there is little purpose to entering the stampede, while loyalty, habit or inertia probably underlay compliance by others.

The detrimental effects of this year's regimen to date outweigh the advantages for students. Major concerns included limited information about the hiring efforts which individual courts and jurists deploy, negligible transparency, and complications entailed in gathering pertinent material. Even ambitious, creative, and competitive applicants who contacted judges and chambers realized little success. Absent clear precise data on applying, students were unable to be part of specific jurists' processes and simply received no consideration. This approach directly penalized court members who subscribed to the plan by shrinking the pool, which seemingly fueled their participation in the hunt. Several anonymous law faculty essentially reaffirmed these descriptions. One from Indiana trenchantly remarked: "whatever pastoral order there [was to consistent student] application dates has essentially given way to a post-apocalyptic hellscape." A second in Missouri reflected: employment comprises "a free for all and judges are certainly not binding themselves to a particular timeline." Another from Ohio contended that jurists "are all over the map."¹⁸

17. See *supra* notes 14–15 and accompanying text.

18. Certain additional observers, albeit less colorfully, echoed these notions. Did you actually think that I would reveal my sources?

A crucial lack of information and access hindered students outside districts believed relatively desirable vis-à-vis prestige, competition and location. Unfamiliarity with the legal culture and connections in the applicable communities frequently hampered endeavors to glean useful information regarding judges. More specifically, geographic distance plagued efforts to schedule potential interviews with numerous jurists on a lone trip or arrange multiple visits. Even when numbers of impressive students acquired constructive material which implicated hiring and correspondingly applied, they experienced numerous competitive disadvantages vis-à-vis informational and economic resources to capture interviews, excel in them, and consequently extract offers.

The advantages, which the 2013 clerkships season provides, are less compelling and less obvious. For instance, this system benefits judges who principally hope to diminish competition for stronger prospects by facilitating their evaluation, interviews and employment. The scheme favors applicants whose personal contacts, schools, geographic proximity, information and capabilities enable students to readily access jurists' clerkship procedures, apply, secure interviews, perform successfully and provoke offers. A few judges and some professors claim that this alternative sharply decreases cartels' troubling parameters, actually limits the East Coast advantage, fostering closer review of students and better clerks' more widespread distribution, and restricts other questionable devices, which include cheating and exploding offers.¹⁹

In short, the deleterious elements of the 2013 process outstrip its benefits and jeopardize the 2003 solution's viability. Because no comparable approach exists, suggestions which could remedy or temper the plan's looming demise require scrutiny.

III. SUGGESTIONS FOR IMPROVEMENT

Particular judges, individual districts, and the federal courts as a whole should eliminate or reduce the crucial adverse impacts which the coming disintegration effects. Article III clearly affords remarkable independence to federal court jurists, who ultimately choose exactly how they will proceed.²⁰ Accordingly, the best method would be initially tendering recommendations for specific judges, next particular courts, and finally the entire bench.

19. See *supra* note 8.

20. See sources cited *supra* note 3. But see Zelinsky, *supra* note 4.

Therefore, the 600 current active, and 450 present, senior district jurists might closely assess the possibility of retaining the 2003 concept, which the OSCAR Working Group succinctly elaborated, as it has capably functioned across ten years. Judges, who have proffered clerkships beginning in 2014, which students accepted, will honor the commitments, yet those who have not actually offered might seriously evaluate continued adherence to the plan. The jurists can simply announce that they will follow the OSCAR clerkship practices, solicit applications by posting notice whenever the court members wish, screen the applications, interview candidates, and extend offers in line with the new benchmark.²¹ Judges who eschew the 2003 process because they surmise that the advantages that could accrue from this year's clerk hiring regime surpass the detriments or for additional important reasons, encompassing opposition to cartels and peer pressure,²² must, however, insure they afford comprehensive notice of salient practices which maximize applicants' opportunities for equitable consideration.²³

The ninety-four districts may correspondingly ask that jurists in specific courts assiduously comply with the 2003 guidance, which the OSCAR Working Group advice now cautiously augments. The chief judges, who possess major administrative responsibility for the districts, should urge or encourage colleagues to respect the decade-old guidelines, supplemented by the Working Group notions, or widely report significant information on plan deviations while stating publicly the mechanisms which they employ.

A system-wide plea for sustaining the 2003 plan and recent cogent advice or for supplying complete notice of departures and the clerkship procedures used could also be advisable. One individual who can relatively expeditiously and felicitously send this message is Thomas Hogan, the preeminent former D.C. District Chief Judge and Administrative Office of the U.S. Courts Director, who enjoys substantial nationwide regard among district court jurists.²⁴ Over the longer term, the OSCAR Working Group must immediately and efficaciously remedy or diminish problems the 2003 regimen could impose and enhance the suggested plan.²⁵

21. The Southern District Judges' notice is illustrative and exemplary. *See supra* note 15.

22. *See supra* note 8.

23. Transparency should be the touchstone. *See supra* notes 15 and 21.

24. Of course, the U.S. Chief Justice John Roberts, who is the "face of the federal judiciary," might also express these sentiments.

25. It can realize efficiencies or streamline measures, as the Group recently did by limiting applications to 100. *See* https://oscar.uscourts.gov/blog_post/_1/13/OSCAR_Version_7_limit_of_100_

IV. CONCLUSION

In sum, nascent experience with district law clerk hiring across the 2013 season is redolent of the confusion and disadvantages that had constantly roiled the process before the 2003 strategy's advent. The complications encountered this year undermine these practices, although the difficulties can be repaired. Districts and judges in fact could salvage the venerable plan by exercising more restraint and deploying the June 28 starting point. Once the hemorrhaging ceases, time remains before the next season to improve the measures, which operated effectively for ten years.

Clerkship_Applications (login required); Lat, *supra* note 10. However, substantive objections may defy remediation, while comprehensive analysis might even reveal the 2003 plan's detriments outweigh the benefits or the disadvantages are irreparable or more effective alternatives. *See supra* note 8 and accompanying text.