"The Judicial Clerkship:
A Venerable American Institution"

Address of U.S. Senior Circuit Judge Frank M. Coffin,
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Although you new law clerks here assembled may think that you are merely embarking on a short term of employment with a particular judge, you are, in a deeper sense, becoming part of an already hallowed institution. My purpose tonight is to sharpen your sensitivity concerning this institution.

To accomplish this purpose, I first draw upon not only little known but nonexistent shards of history. Probing the origin of the clerkship idea has led me into arcane archaeological research that has thrown new light on the institution we celebrate.

Most of you will be familiar with the Book of Exodus. In Chapter 18 (verses 17 through 27) Jethro, the father-in-law of Moses, chides Moses for trying to adjudicate all the disputes that his people bring to him, and urges him to share the burden by searching "for capable, God-fearing men among all the people, honest and incorruptible men, and appoint them over the people as officers over units of a thousand, of a hundred, of fifty or of ten." These would be a permanent court for the people, deciding the simple cases, and leaving the difficult ones for Moses. And this of course is what happened.

But, left out of the final text was this fragment, which I designate as verse 27A, deciphered with difficulty from a crumbling potsherd:

> And for the rulers of thousands and rulers of hundreds, that they may better bear the burden, thou shalt select from the youth of the land those of pure hearts and luminous minds who shall be to the rulers as a spring of cold water to the parched traveler.

My subsequent searches have led me to one telling instance showing the kinds of services rendered by these long overlooked and invaluable youths. It is found in a book in the Apocrypha, Daniel and Susanna. This is the famous story of the beautiful and devout Susanna who was wont to walk in her garden in the heat of the day and sometimes to bathe there. Two elders, described in the book -- quite irresponsibly, I think -- as newly appointed judges hid in the bushes to spy on her. When Susanna's maids had left, the two ran to Susanna and demanded that she yield to them; if not, they threatened that they would say that they had seen a young man with her. Susanna, faced with this dilemma, refused to give herself to them, whereupon they gathered a crowd and told their story. Susanna was quickly condemned to death.

But in the audience was Daniel, a devout and judicious man, who chided the company for not making any inquiry to find out the truth. The elders of the community, impressed, said that God had given Daniel the standing of an elder and bade him join their councils. At this point in the story, there is blurring in some of the old texts. After considerable use of the latest microscopy and consulting with linguists, I made out the missing sentence. It read, "As Daniel pondered what he should do next, he was drawn aside by his young friend Zebulon, who had just come from his legal studies at the temple." Then, as we all know, the text goes on to say that

Daniel asked that the two elders be kept separate as he asked them to say under what tree they saw Susanna and the young man. Of course, one said a clove tree and the other a yew. . . and the jig was up.

This story of Daniel caused me to follow another thread. You remember the famous scene in The Merchant of Venice about Shylock foreclosing on the bond of the luckless Antonio, whose ships were reported sunk. As you recall, Portia, his loved one, posing as a learned doctor of laws, proved herself an admirable strict constructionist, first refused a request "To do a great right, [by doing] a little wrong" by invalidating Antonio's bond. When she held that in Venice there was no power to alter a decree, Shylock broke into rapture: "A Daniel come to judgment! yea, a Daniel!" Portia then twice sought without success to ameliorate the penalty by first offering thrice the monetary amount and then inquiring if Shylock had a surgeon handy to stop the bleeding, but then faithfully adhered to the dread command of the bond, earning Shylock's plaudits four more times. Finally came the most imaginative judicial holding of the Elizabethan era:

> Tarry a little; there is something else.
> This bond doth give thee here no jot of blood;
> * * *
> Shed thou no blood; nor cut thou less, nor more,
> But just a pound of flesh; if thou tak'st more,
> * * *
> Thou diest and all thy goods are confiscate.

Rereading this recently, I was struck by the stage direction preceding this scene, in Act IV, Scene One, between lines 18 and 19, concerning Portia's friend and coconspirator, Nerissa: "Enter Nerissa [dressed like a lawyer's clerk]." In one of the scraps of play texts that I suspect dated from years before public performances were banned in 1642, Shakespeare was obviously toying with doing much more with Nerissa. It is obvious to anyone acquainted with how judges work that Portia had, by being a strict constructionist, painted herself into a corner. It just isn't credible that she could, all of a sudden, make such a magnificent leap, without help from her clerk. But Shakespeare was a realist and had to acknowledge the fact that in England the law clerk, as we understand the term, did not exist, and he had to scrap any whispered wisdom from Nerissa.

Somehow, during the 1000 years in which English legal and judicial traditions blossomed and flourished, the potential of judges' law clerks was simply overlooked. Greater sensitivity to this potential would have ruled out such desperate devices as trial by water, trial by ordeal, and the Star Chamber. Not even today is there recognition of the utility of a substantive judicial assistant versed in law. I have visited one friend in London who is a Law Lord, the equivalent of a Supreme Court Justice. Like all top judges, he has an assistant, a civilian analogue of the English officer's batman, a gopher, very useful in bringing tea and crumpets, or perhaps even in arranging theater tickets, but not at all in helping ease judicial burdens.

No. The judicial clerkship is a peculiarly American institution, if we ignore, as I am afraid everybody does, my forays into history, legend, and literature. Even so, it is already venerable. The institution is now 121 years old. Massachusetts Chief Justice Horace Gray initiated the idea, and continued the practice when he became a Justice of the Supreme Court in 1882. Holmes, succeeding Gray twenty years later, followed suit. Then, according to Karl Llewellyn, in his book, The Common Law Tradition -- Deciding appeals, it was perhaps Felix Frankfurter's greatest contribution that he turned this "two-judge idiosyncrasy into what shows

high possibility of becoming a pervasive American legal institution."

History has proven Llewellyn a good prophet. Almost fifty years ago, in the spring of 1947, I reported for duty to a new federal district judge in Maine as the first law clerk to serve in that state in either state or federal court. I can recall meeting the retiring district judge, an awesome, stern, white-haired personage who scratched with his pen at a stand-up desk. After introducing myself, he paused, incredulous, and asked, "What is a law clerk?" At that point, I had only the foggiest idea. Now, after 31 years on the bench, I have hired a total of 62 clerks. Two years ago, in On Appeal, I wrote that some 2600 clerks were serving federal judicial officials and at least an equal number serving state judges. Today there must be even more.

Somehow we have a penchant for creating institutions by practice rather than precept, by evolving actions rather than written prescription. Like the president's cabinet, and indeed the vast network of executive departments, like political parties, even the judicial review of statutes and the regulatory state and the vast field of administrative law, the judicial clerkship has developed wholly independently of any prefabricated constitutional or statutory scheme. And unlike many highly valued and skilled occupations, a judicial clerkship usually offers not only not a career path but a very limited tenure; it does not require intensive specific training; and the criteria for selection are as varied as all of you gathered in this room.

Judicial clerkships, moreover, are unlike most innovations bearing the American imprint. They are not associated with the mass production of a Henry Ford, the high tech apparatus of Hewlett-Packard, or the glitzy, sound bite appeal of television. They involve highly individualized work, one-on-one relationships, a focus on quality and substance rather than on marketability or quantity. Your chambers community will be the smallest law firm you probably will ever experience. In short, the whole concept is not only pre-industrial but medieval. I have likened it in my books to the studio or bottega of a Renaissance master painter, where junior and senior apprentices work with varying degrees of autonomy under the surveillance of the master. Today, of course, I have to acknowledge that this medieval setting is also equipped with computers, E-mail, Internet, Fax, and Website.

Like any self-respecting institution, as this Orientation Seminar demonstrates, the judicial clerkship today is a far cry from the day I reported for duty to my newly appointed judge. Neither one of us had more than a glimmer of understanding about our job. For me, "winging it" was a phrase of very poignant meaning. Today you are surrounded and guided by a host of procedures, folkways, Code of Ethics, techniques, and information about frequently encountered areas of the law. I would not attempt to improve on the orientation you are receiving.

But beyond the nuts and bolts of your new, if temporary, profession, I would endeavor to give you a larger perspective of your job and of the institutions you serve --- the clerkship itself and the court system beyond. I want to touch briefly on four subjects: what you bring to chambers; what you will receive from the experience; what you probably won't receive but will need to acquire; and what you take with you when you leave.

First, what you bring. To begin, you bring a freshness, openness, and curiosity that go a long way toward flushing out our tired arteries. Then, if we have slackened in our interest in "thinking like a lawyer," you are able to make us feel the heat of an unanswerable hypothetical or a reductio ad absurdum. In addition to high standards of analysis, you often give us a bonus in the form of insights into doctrines, apercus, and theories of law faculty luminaries on the cutting edge. But beyond these you bring yourselves, with your family and school backgrounds, your work and extra-curricular experiences, your hobbies, sports, talents, passions, and, above all, your friendship. These, over the years, are a guaranty for us judges against narrowing horizons.

And, finally, you are generally folk who have not abandoned idealism. Although law and justice may diverge more often than we would wish, you are a constant force to minimize the gap.

My second category is what you receive from a year in chambers. In the first place, although you bring to us judges the most sophisticated thoughtways, you will quickly meet a looming presence -- the record, whether it be the testimony, documents, and exhibits before the district judge or the appendix available to the circuit judge. Facts, context, tone, procedural posture -- all this must be thoroughly absorbed before theory or logic is applied. In like manner you will see the importance of a full and fair statement of facts; selective reporting is not part of a judge's weaponry. You will also begin to develop a sixth sense of the jugular, as the judge tries to get to the heart of a case. Often the jugular means the weakest and thus perhaps the hidden or understated part of a litigant's case. . . or the weakest part of a judicial opinion. Dealing with that is the name of the game.

Still another kind of activity new to you, especially in appellate chambers but not absent from those of a trial judge, is working harmoniously and tactfully with other judges. You will learn how a judge deals with the sensitivities, biases, and fixations of her fellows. You will also come up against the realities of prudential justice -- a concern over implications for future cases or the reality of restraints counseling a narrow holding rather than a broader one. And, just as one of your most lasting contributions to chambers is yourselves, so the judge's most significant contribution is herself or himself, meaning character, personality, and demeanor.

It is appropriate to recognize that you who are clerking for district judges will be enriched in ways different from those of you who are clerking for circuit judges. Each way of life, each role is different, and the activities of lawyers are different. And each kind of clerkship is uniquely valuable. The district judicial clerkship offers a ringside seat to a wide range of lawyering: hearings on motions, pre-trial conferences, trials, bench conferences, post-trial hearings. For the district judge clerk there is the unparalleled opportunity to learn advocacy by observation. For the appellate clerk, the opportunity to learn by observation is limited to the reading of briefs and the hearing of arguments. The unique source of enrichment stems from work in chambers, before and after the lawyers have left: the painstaking research, the hard analysis and wide-ranging discussion, and the challenge of writing fairly, succinctly, and clearly.

In my litany of what you and your judge receive during your clerkship, I must signal a couple of things that you may not receive, through no one's fault. These are qualities that you must be aware of and try to achieve in other ways. One is an ability which will be central to almost anything you may do in law after your clerkship. This is an ability to sift the more important from the less important, to prioritize, to set and keep internal deadlines, in a word, to produce on schedule. One of the luxuries in a judge's life is that he may, in an important case, spend as much time as necessary in order to come to the right decision with the right rationale. I add the caveat that, these days, the judge's total caseload allows no time for lollygagging; the pressures are there. But still there are not the external deadlines set by clients, partners, or courts that a practicing lawyer must live with. So, even during your clerkship year, whether time pressures are heavy or not, it should be part of your own goal to develop the ability to prioritize and set a work schedule.

The other quality that you probably will have to put on the back burner for a while is the ability to serve a client with zeal and to blend that duty to your duty to the court and to the profession in general. As I have indicated, those who clerk for a district judge will have the greater opportunity to observe. You should take notes of outstanding performances. But at bottom this is probably on your agenda for the future.

My final category concerns what you take with you and keep with you in the long years after you have bid farewell to your judge and chambers. In the first place, I must add quickly that you never really say "Goodbye." For, whether you realized this or not, you have married into a family. Not only are you a part of the judge's extended family but you are part of the growing community of the judge's former clerks. This is a lifelong relationship and one of the sweetest blessings arising out of a judicial clerkship. Prize it and nourish it.

A second thing you will take with you is a parallel ability to being able to think like a lawyer. It is the ability to think like a judge. When you are in the throes of a hard fought litigation, or when you are counseling a client prior to litigation, or arguing a motion, or writing a brief, or trying a case or arguing an appeal, whatever may be your focus at the time, try to keep asking yourself in the back of your mind, "How will this appear to my judge?" "What will she feel is most important?" This is a pearl of great price. I suspect that it cannot be taught but is something that is absorbed through the pores as you work side by side in many different situations with your judge.

All of this leads me to conclude that your very experience imposes a lasting obligation on you to consider yourselves, as former clerks, part of a cadre of the most knowledgeable, understanding, and effective supporters of our court system. I speak of "system" in the singular, meaning to include both the federal and the state components. This reflects the intent of the Founders, for, as Hamilton wrote in The Federalist, No. 82, "[T]he national and State systems are to be regarded as ONE WHOLE." This also reflects the fact that, for most Americans most of the time, justice must be sought in the state courts where 85 to 90 percent of appeals are decided and 98 to 99 percent of trials are held.

You come from all regions in the country; you will pursue the careers you have so well begun in virtually every state. Some of you will become state or federal judges. But all of you will know more about how judges and courts work and what they need to do their job better than any other group of laymen or lawyers. You will have lived intimately for a year or more within the system. You will have bred into your bones an appreciation of what is unique and worth preserving: the integrity of individual work demanding rigorous intellectual activity, sensitivity, and sound judgment, made possible by adequate space, facilities, and staff, enriched by the close association of a few peers; a manageable caseload allowing ample time for the trial and address of hard cases as well as some time for refreshment of mind and broadening of perspective; sufficient compensation to attract and keep a judiciary of diversity and excellence; and, perhaps most important, a popular and institutional respect for the continued independence of the judiciary.

We live in a time when we cannot take these conditions for granted. On the federal side we see remorsely increasing caseloads, exacerbated by a quick-fix psychology that deems problems solved by federalizing what traditionally have been state offenses, and by the imposition on both trial and appellate courts of the vast new jurisprudence of criminal sentencing; a creeping administrative overburden of committees, meetings, and reports; enhanced congressional monitoring and oversight approaching micromanagement; and the obdurate refusal to face the fact that failure to allow judicial salaries to keep pace with inflation foreshadows the foreclosing of a significant part of the practicing bar from judicial possibilities.

On the state side we see an even grimmer picture. During the past decade the third branch has been treated like just another state agency. Court budgets for space, facilities, modern equipment, staff, continuing education, juries, pensions and compensation have been slashed to the point where, in 1992, the American Bar Association's Special Committee on Funding the

Justice System could say, "[T]he American justice system is under siege and its very existence is threatened as never before." In addition to being underfunded, state court systems -- some fifteen of them -- still labor in the indignity of being overpoliticized through partisan elections. Not only is there a lack of fit between the role of a judge and the concept of a partisan constituency, but the image building, polling, mass mailings and stump speaking, the compelled raising of sometimes astronomical sums, and the time spent in such activities turn, as I wrote in On Appeal, "any dream of justice into a nightmare."

All of this points to the need to involve knowledgeable and concerned citizens in sustained efforts to defend, support, and preserve the conditions under which a competent and independent judiciary can survive and flourish. Lawyers and the organized bar can and should be catalysts of and stimulators of such efforts. And you as former clerks will have your unique experiences and insights to contribute.

While preparing this talk, I received a letter from the President of the Nebraska State Bar Association, David S. Houghton. He wrote, referring to my book and the kind of plea I have just made: "The problem of adequate support for the judiciary is critical. The soundness of your conclusion that the solution to public support for the judicial system has to be led by the Bar struck me as correct." He enclosed a memorandum announcing the establishment of a Coalition for Community Justice, which would encourage action at the community level through local partnerships and programs to enhance the delivery of justice. He signed his letter, "Proud to be a Nebraska Lawyer."

At some future time, may you also go and do likewise. . . and be proud to say you once were a judicial clerk.