ENDING THE MAD SCRAMBLE

AN EXPERIMENTAL MATCHING PLAN FOR FEDERAL CLERKSHIPS

Richard A. Epstein

EACH FALL SEES A RISING APPREHENSION among the best law students at the elite law schools about the impending clerkship process. The sources of their unease are two. One is that students who have known only success fear rejection and disappointment. And for that risk, they understand, there is no institutional cure. But their second source of unease does raise institutional issues of the first order. It involves the mad scramble to arrange for clerkship interviews once the official gong sounds, coupled with the fear of setting an impossible transcontinental travel schedule that leads to exploding offers that often blow up in their faces.[1] These fixed features of the clerkship market do not depend on the personalities of individual judges or of the individual students. Rather, they depend on the incentive structure established by the durable, and many would say, unfortunate rules for clerkship selection that are embodied in the present Federal Judges

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Richard Epstein is James Parker Hall Distinguished Service Professor of Law and Director of the Law and Economics Program at the University of Chicago Law School.

[1] See Christopher Avery et al., *The Market for Federal Judicial Law Clerks,* 68 U. CHI. L. REV. 793 (2001); Edward R. Becker et al., *The Federal Judicial Law Clerk Hiring Problem & the Modest March 1 Solution*, 104 YALE L.J. 207 (1994).

Law Clerk Hiring Plan (the "Plan").[2] A fundamental restructuring of the clerkship selection process is necessary. The answer, as I shall develop later, is an experimental matching program based on the medical residency model that is strictly binding on all participants on both sides of the market.

BACKGROUND

Before we get ahead of our story, it is necessary to understand the current Plan. For the 2006 cycle, this Plan had three critical dates. For Fall 2006, the first of these was Tuesday, September 5, 2006, which is the first date on which third-year students (but not any law school graduates) could send their applications to the federal judges. Any earlier submission was a form of claim jumping, for which, however, there were no specified sanctions. The filing of the applications was often accompanied simultaneously by letters of recommendation from faculty, which could not be sent before September 5. In line with standard economic theory, we saw large numbers of students with many applications throwing elbows as they all lurched forward simultaneously to the starting line. The second time and date was high noon (EDT), Thursday, September 14, 2006, which was the first second at which judges could schedule interviews. This time was carefully picked to give judges in all three time zones an equal shot at scheduling interviews with the perceived small pool of highly coveted applicants.

For those judges playing within the rules, the only viable strategy required that all the judge's current clerks hit the phones and the email buttons at 12:00.01 EDT, thus putting the applicant horde in the familiar bind. What to do if you were in Tennessee and judges in both Norfolk, Virginia, and Portland, Oregon, requested your presence in their chambers promptly at the opening of business on the third key date, Thursday, September 21, 2006, when interviewing began? More than one student despaired about the need to juggle impatient judges with the high cost of airline tickets. The rational

[2] See www.cadc.uscourts.gov/internet/lawclerk.nsf/Home?OpenForm.

calculations of price and probability and sequencing were completed under maximal conditions of pressure and confusion. And once again at its second and third stages, the Plan contained no institutional sanctions against cheating by judges who jumped the queue to snag the most desirable clerks.

Over the years, more than one student has regretted the awkwardness of having acceded to a judge's request, but very few, understandably, have been willing to say no to a distinguished judge whose early phone call sends a strong signal that a desired clerkship is only a plane ride, or if lucky, a cab ride away. The process is every bit as difficult even for judges who play within the rules by putting out exploding offers – discouraged but perfectly permitted – that force students to make take-it-or-leave-it choices before interviewing with their preferred judges. And the best survey evidence suggests that the strategy works, as many students capitulate.[3] Desperation also breeds judicial counterstrategies. One promising counterstrategy is to instruct potential applicants that they will be offered an interview some days hence only if they agree, here and now, not to accept any offer in the interim.

Sometimes, the process gets quite ugly. This past term has had at least one, perhaps more, of the following sequence of unfortunate events. Stage one: the judge extracts a promise from an applicant not to accept any other offers until the applicant interviews with the judge. It is not explicitly stated, but strongly implied, that a position will be kept open in good faith. After all, no sane applicant would take the offer from any judge who explicitly stated that the position could evaporate before the interview takes place. Stage two: the student postpones taking or encouraging other offers and flies off at great personal expense for the appointed interview. Stage three: the judge says, "Sorry, all my positions have been filled."

Why does this happen? Perhaps in some cases it is because of an undisclosed, but credible, exploding student offer to the judge, which says: "Judge, I'd love to work for you, but I have to know right now because I have to decide on Judge X's offer within the

[3] Avery et al., 68 U. CHI. L. REV. at 815.

next hour." But in the incident described in the previous paragraph, this scenario seems not to have taken place, because the same judge that refused to grant the interview had rescinded an offer made the day before to another candidate. Clearly, the judge made offers in excess of the number of available spots to be sure of getting a full complement of clerks in the first round.

The downward spiral is steeper than we might have imagined. Reneging on job offers given is inexcusable. And refusing to conduct offered interviews that were accepted in good faith is an equally big-league breach of this bargain: "I forbear to accept any intermediate offer that comes my way, and you agree to allow me to interview, without prejudice, at some later day." No judge would accept the judge's private necessity defense, when the judge's promise, express or strongly implied, is made to provide reassurance against just that risk. Nor is anyone likely to be impressed by the causation argument: "But I may not (would not) have given you the offer anyhow." Uncertainty is no excuse for bad faith conduct. And forget about the legal remedy. It is too easy to say, "Let's just calculate damages by looking at the odds of landing the clerkship or equivalent cover and give proportionate recovery." But of what? The cost of airfare? The difference in expected prestige of the two clerkships as it bears on possible Supreme Court clerkships, job bonuses, or employment opportunities? Damages ex post are, as the law and economics crowd likes to say, undercompensatory.

The correct institutional response, therefore, takes a different tack. Avoid the repetition of scenarios that make young candidates give up real opportunities and incur real financial outlays, for nothing. Lawyers might well be sanctioned for shabby conduct. But judges are beyond sanction, under the current system, which is why the level of contempt on all sides for the entire process is at such high levels.[4]

Breakdowns of this sort seem to be increasing as the process becomes ever more frantic. The real question is Lenin's: what is to be done? One response is incremental change. For example, improve

[4] See Avery et al., 68 U. CHI. L. REV. at 864-66.

the information flow, such as by constantly updating a central registry that indicates which clerkship positions remain open.[5] Another tack is to protest loudly in the hopes of getting more substantial reform. One notable example is Dennis Hutchinson, who is the chair of the faculty clerkship committee at the University of Chicago Law School. Professor Hutchinson wrote a scathing memo to a member of the seventeen-judge Ad Hoc Committee on Law Clerk Hiring. The memo named names, and further indicated that the situation for clerkship applications has been deteriorating markedly. I quote the relevant passage in full:

> A further point on the clerkship process: the word is around, of course, about judges who stiff applicants on interviews. One natural consequence will be to suppress applications, which may take one of two forms: either shifting applicants from applying as 3Ls to applying as post-graduates, or discouraging applications at all. Applications were down this year, substantially (prompting queries from judges … who wanted to know why our students were not applying to them). I have speculated on the reasons for this, which include two-career couples with limited geographical options and the accelerating opportunity costs ($50K+ clerking vs. $125-145K in private practice, not counting bonus), not to mention a growing perception (too often reinforced) that applicants must be ideologically congruent with their employers; nonetheless, bad-faith interview offers may be a new factor next year. And in a world of small numbers – 30 to 40 applicants a year among 3Ls – small shifts means big percentages: this year there were 16% fewer clerkship applicants in the top decile of the class, 14% fewer in the top quartile. Overall applications were down 27% this year.

Hutchinson is right on at least two points. First, the ugliness of the process deters able students from joining in.[6] Second, he is correct not to overstate his case: the entire downward glide in the clerkship market cannot be attributed solely to the bad actions of

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[5] See the Federal Law Clerk Information System, https://lawclerks.ao.uscourts.gov/web/jobSearch, which does not begin to keep up in the crunch.

[6] Avery et al., 68 U. CHI. L. REV. at 829.

some judges. I am not sure whether ideological issues reduce the number of clerkship applicants, or just reduce the total number of applications submitted, to take into account their information about a judge's preferences. Yet lest we cavil on details, Hutchinson is clearly correct to insist that the willingness of students to go through the process will diminish if they perceive that some judges won't comply with rules already rigged for their benefit. As the price of a clerkship goes up, the demand for clerkships will go down. There are, I believe, quiet efforts within the current framework to better organize. Judges might decide, for example, to rely on teleconferencing as a modern form of speed dating in order to reduce the cost of the usual interview melee. Perhaps the current websites devoted to student responses to clerkships will mention by name judges who misbehave, but I doubt it will happen very often.

Any such incremental changes are surely welcome, even if their effect is limited. But direct sanctions against judges who stiff applicants before interviews are not in the cards. It is hard to buck the stubborn tradition of the independence of the judiciary, which, however indispensable for good judicial work, certainly plays havoc with the clerkship process. So long as there are hard cut-offs for interview calls and interviews, nothing will eliminate the mad scramble and the constant cheating. The question is whether one looks for a systematic solution that goes against the grain of the strong autonomy tradition that now determines the shape of the clerkship application process.

THE MEDICAL MATCH

These hiring problems are not unique to judges. They will occur whenever large numbers of applicants and employers hit the market at the same time. It is well understood that this problem arose in the mid-20th century with the placement of graduating medical students in various internships and residencies.[7] Before the

[7] The seminal article in this area is Alvin E. Roth, *The Evolution of the Labor Market for Medical Interns and Residents*, 92 J. POL. ECON. 991 (1984). For excellent and exhaustive accounts of the process, see Kristin Madison, *The Residency Match: Com-*

introduction of the medical match program, all students and hospitals were on their own. Confusion and congestion reigned; moreover the system was, if anything, more nearly chaotic than the clerkship market because the number of medical students seeking graduate placement was (and is) far greater than the number of law school students seeking clerkships.

But by the early 1950s, a tolerable solution was only a simple computer program away. The key feature was that all medical institutions agreed to participate in a medical matching process run by the National Resident Matching Program on behalf of a large number of powerful medical organizations and particular institutions.[8] These practices have been carefully and exhaustively studied, so I shall give only a brief review of them here to set the stage for my concrete proposal.

The basic object of any matching program is to adopt a collective solution that eliminates the mad scramble out of the starting gate. The medical match solution runs like this. On the medical side, all institutions agree to a match process to assign graduates to particular programs. Each potential applicant lists the internships and residencies that he or she would like to join in the order of preference. Each institution lists the applicants it would like to employ in order of preference. A computer program then combines the two lists in an effort to satisfy two simple conditions: (1) no applicant is assigned to a internship or residency if there is some other that the applicant prefers that also prefers that applicant, and (2) no institution receives an applicant if there is available some other applicant that it prefers.

The procedures for achieving this result are relatively straightforward. The computer program starts with, say, the list of applicants and searches out their first preferences. If the corresponding

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petitive Restraints in an Imperfect World, 42 HOUSTON L. REV. 759 (2005), and George L. Priest, *Reexamining the Market for Judicial Clerks & Other Assortative Matching Markets*, 22 YALE J. ON REG. 123 (2005). For a general account of its possible application to the clerkship market, see Avery et al., 68 U. CHI. L. REV. 793

[8] See www.nrmp.org.

medical institution lists the applicant on its first round, then the match is made, and both the applicant and the institution are bound to each other, no questions asked. If the applicant is not chosen (or not chosen first) by his or her first preferred institution, then the computer searches his or her next choice to see if there is a match. If so, then that pair is taken out of the system, with a binding contract. No matter which side of the market comes up first, the same matches are reached.

The use of this system completely changes the behavior of both applicants and institutions prior to contract formation. Applicants have no incentive to engage in any form of strategic behavior for, unlike the clerkship scramble, all interviews and recruiting necessarily take place prior to the match. In contrast to the clerkship market, the timing of visits does not matter, because all decisions are blocked until the appointed day. Parties can signal to each other positive or negative responses, which do help, for they give some sense as to how many applications to file or review and how many interviews to conduct. But none of this binds. Owing to the structure of this game, players on both sides have no incentive to take a weak offer rather than hold out for a stronger one, because they know that the match guarantees them their most favorable pairing. Exploding offers are a thing of the past. The entire match takes literally seconds to perform for the roster of applicants and institutions involved.

How well does the medical match work? Its benefits are apparent, but there are potential costs in the form of potential antitrust behavior. The argument against the match, as explained in a recently filed case, is that it is a horizontal conspiracy in restraint of trade – a per se violation of the Sherman Act.[9] The case reveals a deep clash between the per se approach in antitrust law and the obvious coordination benefits of the practice. Priest's informative critique of the case stresses the benefits from unraveling, including competition over price and a differential return to those candidates

[9] See Complaint, *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119 (D.D.C. 2004) (No. CIV.A.02-0873 PLF).

who have better skills than their rivals.[10] The former strikes me as a legitimate consideration in the medical markets, because it does seem odd that all specialties go at the same rate, and that employers do not use differential pricing for sorting candidates by quality. Hence the sensible proposal that, prior to the match, the parties should enter into contingent contracts that include a wage term that can vary across applicants and specialties within the framework of the match.[11]

None of this matters, of course, within the context of federal judicial clerkships. Even though the judges (rightly) think of hiring a clerk as entering into a personal services contract that has none of the impersonality of a medical residency, they have no freedom to vary wage or other contract terms. All judges make standardized offers under terms dictated by the General Services Administration. Competition on price terms in this market would be possible if judges were given an overall budget with which to hire clerks and staff at their discretion. But that transformation will depend on a revolution from the center, not likely in any large government administration.

In a sense, the price rigidity in the judicial clerkship market makes it a more attractive arena to use the matching system, for this match cannot suppress an element of price competition that is impossible anyhow. But at the same time, there is strong opposition from the judges – usually on the ground that they prefer to limit their interviews to a few select candidates that they can corral (before or) after the interviews take place, typically about eight candidates.[12] Their individual short-term interest of course tends to degrade the quality of the overall applicant pool. Yet so long as some judges, cognizant of this deficit, believe they are at the top of queue, they will not sign-on for a matching program. And the conventional wisdom is that if all, or at least most, of the judges do not sign-on, matching will die a death of a thousand cuts.

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[10] Priest, 22 YALE J. ON REG. 123.

[11] See also Madison, 42 HOUSTON L. REV. at 831-32.

[12] Avery et al., 68 U. CHI. L. REV. at 826, as of six or seven years ago.

Five years ago, Avery and his notable colleagues (Jolls, Posner and Roth) proposed a rule that any clerk who was not hired for an appellate or district court clerkship through a matching system would be precluded from taking a Supreme Court clerkship. The proposal was dead on arrival. The Supreme Court justices would have to buy into this system, and they are at least as fiercely independent as are lower court judges. Nor do they have a congestion problem, because they only hire a few graduates, always after graduation, often years later, and at no particular time. They want the crème de la crème. There is no chance that they will limit their choices or sit in judgment on such disputes as whether X is eligible to apply because he or she has had two clerkships (ever more common today), one with a matching judge, and one not.

FOR AN EXPERIMENTAL MATCH

As an alternative, I propose a three-stage experimental approach that is based on the standard medical-style match, and takes advantage of the brute fact that all clerks are employees of the federal government, not of the individual judges. It does not need the participation of all or even most judges, at least to give it a fair shot.

Stage one is for judges to opt into or out of the experiment. All judges are given a free, but irrevocable (for stage one) choice to decide whether they wish to participate in the experiment or continue to operate on the current system. It should be presumed, at least initially, that all judges who do not opt into this plan choose to remain in the current system. The hope here is that there will be a critical mass of judges, which could be far less than a majority, who are prepared to go ahead with the experimental program. Hence the experiment should go forward if, say, 100 federal judges decide to participate. Stage one should be completed by August 15 or so, after which the judges' names are posted for all applicants to see. At this point, participating judges are barred from hiring any clerks, rising third-year students or otherwise. All activity goes forward through the system. Judges should also be required to post the number of positions that are open as of the time that they join in the program.

Stage two is for applicants to opt into or out of the experiment. All applicants decide whether they wish to participate in the experimental match program or go into the current individual derby. Their choices should be made irrevocable, say, ten days after the original list of judges is posted. If there are more applicants than positions, it is understood that the disappointed applicants can seek individual positions from any federal judge after the initial match (stage three) is concluded. If there are fewer applicants than judges, then the choice is harder. One possibility is to call the experiment off as there is no guarantee of the quality at the bottom of the pool. Better, perhaps, is to keep these judges committed to the match, but only for the applicants they are prepared to designate. Afterwards, if there are any gaps, they can go to the overall roster. Clearly, the more judges who sign into the pool, the more attractive it is for applicants to follow them. My guess is that this experiment will overcome its first hurdle, and that applicants will flock to the program if any respectable number of judges commits to the plan.

Stage three is the match itself – the interviewing, the preparation of preference lists by judges (of applicants) and applicants (of judges), and then the quick and painless running of the computer matching program. It involves the delicious irony that all of the judges and applicants in the match pool can do their interviewing in person or by any other means before the match takes place, but no binding offers can be made or accepted. Which brings us to the key feature of the program. Since all parties have identified whether they are in or out of the match, the General Service Administration enforces the following strict prohibition for all positions until the match is completed: No judge who has agreed to join the match can hire any applicant who is not in the match pool. Vice versa, no judge who is outside the match pool can hire any applicant who is in the pool. Once the match is over, any judge may hire any applicant, and any applicant may accept an offer from any judge. The entire system is enforceable because the GSA will not authorize an employment contract based on an offer that does not meet the conditions of the match.

At this point, my own guess is that applicant preferences for an orderly process will influence those judges on the fence to participate in the first year, which will in turn attract strong students to the pool. And then in the second year, more judges will move into that program once any bugs are worked out. At that point, if fewer judges and fewer applicants participate in the mad scramble, then the matter will have sorted itself out in a way that does nothing to infringe on the (inflated) claims of judicial autonomy that drive commitment to the current system. Ironically, it is the strong state monopoly, here in the form of the GSA, that makes this experiment workable. Given the deep-seated grievances – based at least in part on genuine injustices – that plague the current system, one hopes that the judges on the Ad Hoc Committee on Law Clerk Hiring will give this proposal a real world try. A continuation of the status quo ante is too painful to contemplate.

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"[O]ne does pick up from a clerkship some sort of intuition about the nature of the judicial process. It is so intangible I will not attempt to describe it further, but I think it is valuable especially in appellate brief-writing."

William Rehnquist to Robert Jackson