

Ex Ante

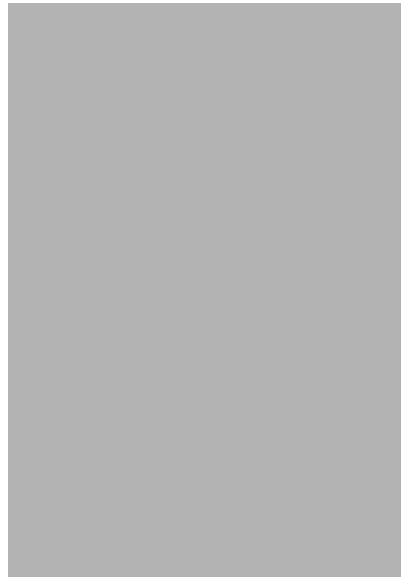
MY LAW CLERK

JUSTICE Louis Brandeis famously observed that federal judges enjoy unusual respect because they “do their own work.” Some writers have suggested that this is no longer the case – that relatively inexperienced lawyers carrying the lowly title of “law clerk” now handle a significant part of the nation’s judicial business. If this were the case, we would expect to see changes in the reporting of the courts’ work product – their decisions and opinions. After all, there was a time when federal legislators did their own work, and congressional documents from those days generally listed only the relevant Representatives or Senators as contributors. Yet take a look at almost any modern-day congressional report, or presidential document for that matter, and you will find ink-on-paper acknowledgment that the heads of those branches of the government are not the only public servants making high-level contributions to the output of their respective departments.

There are at least three good reasons for this practice. First, it is honest. The people – the taxed and the governed – deserve to know who is doing the nation’s work. Second, it is a good management practice because it provides the right incentives. It is a commonplace that when your name is on a product, you are more likely to do a good job and less likely to do something that you will be ashamed of – a combination of accountability and pride of

authorship. Third, it is fair. Good leaders share not only the accountability, but also the glory. It is a small person who enjoys the honor of high office yet cannot bring himself or herself to share the credit with deserving subordinates.

So, we should reasonably expect that on those occasions when a law clerk or other



The honorable Justice John Marshall Harlan.

minion makes a substantial contribution to a piece of federal judicial work product, that judge (or those judges) will do the right thing. And at least some of the time they do. Federal district judges frequently refer in their opinions to the work done by their clerks. Some federal appellate judges occasionally do

the same thing. At the Supreme Court, however, the public record indicates that the Justices continue to labor in the Brandeisian tradition. Once, early in his tenure on the Court, Justice John Paul Stevens noted in a dissent that one of his clerks had done some statistical work, but the Justice did not rely on it. That's about as far as it goes.

With one exception. In the course of our preparation of the multi-volume *In Chambers Opinions of the Justices of the Supreme Court*, we ran across the following line in a footnote in a 1955 opinion by Justice John Marshall Harlan granting an application for bail pending a petition for a writ of certiorari: "The foregoing data comes either from the record in the present case or from the research of my Law Clerk." Justice Harlan had two law clerks that year, so we don't know exactly who should share with the Justice the responsibility and credit for the research in that opinion, but at least we know that it is possible both for a law clerk to do work that merits acknowledgment and for a Justice to acknowledge that work. And as best we can tell, it did not undermine Justice Harlan's reputation or the reputation of the Court.

Alpheus Thomas Mason, *THE SUPREME COURT FROM TAFT TO BURGER* 220 (LSU 1979); *Lambert v. Blackwell*, 2003 U.S. Dist. Lexis 5125, at *184 n.70 (E.D. Pa.) (Brody, J.); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 625 n.* (9th Cir. 1988) (Noonan, J., dissenting); *Hazelwood School District v. United States*, 433 U.S. 299, 318 n.5 (1977) (Stevens, J., dissenting); *Noto v. United States*, 1 Rapp 156 (1955) (Harlan, J., in chambers).

PUBLIC INTELLECTUAL EXPERTISE

THE PAPERBACK EDITION of Judge Richard Posner's *Public Intellectuals* includes a thoughtful new epilogue in which he answers some of his critics. He also shares the following anecdote that nicely captures, we

suspect, both the kinds of experiences that moved Posner to write the book in the first place and the kind of behavior that he hopes his book will inspire in readers:

A story is told about George Wald, a Nobel-prize-winning biologist at Harvard, who in the 1960s had become one of those professors who no longer spoke much about his own field but instead provided ruminations on American foreign policy. After listening to one of these talks, the Columbia physicist I.I. Rabi raised his hand and upon being recognized by Wald asked why homo sapiens had originated in Africa rather than in some other continent. Wald, startled, said, "But that was not at all the subject of my talk." "I know," replied Rabi, "but I thought it might be somewhat closer to your area of expertise."

Richard A. Posner, *Epilogue*, 2003, in *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* 417 (Harvard 2003).

PRONOUNCING DAUBERT

TEN YEARS AGO, Georgetown Professor Michael Gottesman set the record straight on the question of the proper pronunciation of the last name of the lead petitioner in the most prominent Supreme Court decision on the admissibility of expert testimony. Our limited experience indicates that some people may have missed his explanation the first time around. Here it is again:

Beware the academic in barrister's garb. When I left private practice five years ago, I imagined that I had become a dispassionate seeker of truth. Then, on rare occasions, folks began to ask me to moonlight as their lawyer. In my earlier career I had understood that I was an advocate whose views were shaped by my client's needs. In my new scholarly mien, of course, that approach would be unthinkable. But, happily, those who've sought me out have wished me to assert dispassionately arrived-at truths.

Among the handful I've been fortunate to represent in this new capacity have been the