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2021

### Clerking for Roger J. Traynor

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#### Publication Information & Recommended Citation

Brandel, Roland E. and James E. Krier. "Clerking for Roger J. Traynor." In *Of Courtiers & Princes: Stories of Lower Court Clerks and Their Judges*, edited by Todd C. Peppers. Constitutionalism and Democracy. Charlottesville: University of Virginia Press, 2020.

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OF *Stories of Lower Court  
Clerks and Their Judges*  
COURTIERS  
& PRINCES

Edited by Todd C. Peppers

## Clerking for Roger J. Traynor

Justice Roger J. Traynor was born in Utah in 1900, the son of a miner and drayman. He left after high school to undertake undergraduate and graduate studies at the University of California, Berkeley, eventually earning (simultaneously) a Ph.D. in political science and a law degree from Boalt Hall, the university's law school. He practiced law for just a few months, then returned to the university to teach in its political science department. A year later, in 1930, he joined the law faculty, where he worked until his appointment to the California Supreme Court in 1940. He became chief justice in 1964, retired in 1970, and died in 1983.<sup>1</sup>

Justice Traynor's obituary in the *New York Times* said he "was often called one of the greatest judicial talents never to sit on the United States Supreme Court and was voted one of the nation's outstanding judges whenever his professional colleagues were polled."<sup>2</sup> Other tributes spoke of him as "the ablest judge of his generation," and "an acknowledged leader in every field that he touched."<sup>3</sup> These memorial statements merely confirmed a long-standing reputation. Walter Schaefer, another great state supreme court justice, said in 1961 that Justice Traynor was, and had been for many years, "the nation's number one state court judge." Five years later, Schaefer "removed the state court qualification."<sup>4</sup>

Schaefer called Justice Traynor "a judge's judge," but he was also a law professor's judge, not least, perhaps, because he had been a law professor himself and went about his judicial work in a famously scholarly way. He published law review articles regularly throughout his years as a judge and wrote judicial opinions that still figure prominently in law school casebooks—especially those focused on contracts, torts, and choice of law. He built personal and professional relationships with law professors, and—of particular interest here—relied on them to recommend law clerks for his chambers.

The selection process was more informal than the practice of many prominent judges then and still is, in two important respects. First, there was no

formal Traynor clerk selection committee, but rather a wide and shifting network of law professors from across the country, whose individual judgment he trusted. This virtually guaranteed a geographically diverse pool of candidates. Second, although he used personal interviews with candidates, he did not insist upon them.

Traynor clerks came from law schools located throughout the United States, with those from California included but not treated preferentially. All of our group of five who worked in his chambers from mid-1966 to mid-1967 came from out of state: the University of Chicago, Columbia University, the University of Illinois, New York University, and the University of Wisconsin. As is typical of law clerks, we were fresh out of school, but the authors of this essay were several years older than our colleagues, thanks to time in the military between college and law school.

There were career employees on Justice Traynor's legal staff as well, most prominently Don Barrett. He was hired by the justice right out of law school in 1948. A year later, Barrett became the senior staff attorney and continued in that position until the justice's retirement in 1970 (he also served, from 1964 until his own retirement in 1981, as principal attorney for the California Supreme Court). We are not sure of the total number of Traynor staffers during our year of clerking, but do know that Donald Wright, who succeeded Justice Traynor as chief justice, had a total of twelve, eight of them career employees. Judges, lawyers, and legal scholars across the country have long held the California Supreme Court in high esteem, and clerkships with any of its justices were coveted positions (a Traynor clerkship especially so). It opened doors to future opportunities, including clerkships with justices of the United States Supreme Court. It forged important personal and professional relationships. It put one in regular company with a stimulating group of excellent attorneys—fellow clerks, the clerks in other chambers, and attorneys from the attorney general's primary office housed in the court's complex. (The building's cafeteria was shared by all, as was an abiding interest in the legal and political issues of the tumultuous 1960s.) And all of this in marvelous San Francisco!

A common benefit of judicial clerkships is some degree of regular face-to-face meetings with the boss, but sitting daily at the feet of the master was not a feature of our year of clerking. That was a marked shift from his practice in the quarter century before his appointment as chief justice, when he regularly worked through, in one-on-one sessions with his clerks, every detail of an opinion, from an insistence on precise, critical thinking to close scrutiny of word choice. Once he became chief justice, the extraordinary and time-consuming

duties of managing California's vast judicial system made such close ongoing supervision impossible.

Happily, however, we enjoyed a very close alternative to the real thing, which gets us back to Don Barrett, the senior staff attorney. Don, a big, gangly man with a ready smile and a subtle sense of humor, was our shepherd. Merely being in his presence eased any anxieties we might be suffering about our clerking duties. He took over the supervisory tasks that Justice Traynor had previously performed personally, and it is hard to imagine a better surrogate. We quickly learned that with Don supervising every step of our work, it would turn out fine in the end. It is not hyperbole to say that he had a complete mastery of California law (including the pages on which it appeared) and any other body of law, state or federal, that might have a bearing on whatever issues we had at hand. If what we submitted for his approval had problems, they would be fixed—by us! Never did he tell us what to do. He would simply ask questions, usually with a Cheshire grin that we knew to be a tease. Had we considered a certain judicial opinion unmentioned in our draft? Noticed that a federal statute was involved in our case? Read a certain law review article by Justice Traynor? This was Don's version of the Socratic method.

And we *did* have some time with our judge. The decision process at the court during our tenure had several stages. Litigants would submit petitions for hearing, bunches of which were submitted to the chambers of each justice, who would in turn assign them to the law clerks, who would in turn write conference memoranda recommending a grant or denial. When a petition was granted, the case would be assigned to a justice, who would have a clerk prepare a calendar memorandum, in essence a full, carefully researched draft opinion circulated among all the justices (sometimes we were asked by Justice Traynor to review calendar memos prepared by other chambers). After discussion, the justices tentatively voted on the calendar memorandum prior to the time at which oral arguments were heard.

California attorneys were familiar with this process, but oftentimes unaware of Justice Traynor's particular approach to oral arguments. His practice at arguments was to interject leading questions designed to assist counsel in making their case by helping them clarify points made in their briefs or at the oral argument itself. His intentions were entirely beneficent, but based on our observations at arguments, we came to suspect that nervous counsel, wary that they were being led into a highly public and fatal trap, feared otherwise. So an exchange might all too often proceed as: "Traynor: Counsel, with respect to your characterization of case A, didn't you mean to say X?" (Interpretation X

was supportive of counsel's goal and completely consistent with the already written tentative opinion.) Wary counsel might say: "Oh no, your honor. I must have been misunderstood," and proceed to take several rhetorical steps backward on the otherwise road to victory.

Justice Traynor's clerks were assigned other projects in addition to drafting memoranda, such as researching and drafting speeches or law review articles for him. But far and away the most intimidating task was drafting calendar memos and final opinions. We knew that the justice took very seriously not only the task of resolving every dispute before the court, but also determining how the resolution of the particular dispute would impact the future development of the bodies of substantive and procedural law that were involved in the particular case; that he welcomed academic critiques of his decisions and drew from them to develop and refine his ideas; and that his opinions received careful attention and had enormous impact on state and federal judicial and legislative developments, on academic scholarship, and on future generations of law students.

This made drafting a heady, and weighty, experience, to say the least. Yet the Traynor approach was to figuratively drop a case file on our desks with an instruction to write the calendar memo that would ultimately become the draft opinion. That instruction and nothing more. There was not so much as a hint (from Justice Traynor or Don Barrett) at the desired result nor the reasoning to get there. But once the inevitable "there must be some mistake, I haven't even passed the bar exam yet, what do I do?" emotional crisis subsided, all of the Traynor clerks launched into the challenge with vigor. That method put a premium on independent thinking, research, and cogitation on what the justice's views most likely would be, as well as a largely unavailing effort to think like and write like one of the nation's most respected doctrinal jurists.

That aspect of the clerkship was a challenging but wonderfully rewarding experience, in part because it always concluded by meeting with the justice to go over our work in the court's capacious high-ceilinged conference room. Given the setting and the occasion, one might think that these meetings would be intimidating, but they were not. It helped knowing that Don Barrett had approved our work product, but what made all the difference was Justice Traynor's manner. His peers knew him to be a man without arrogance or condescension. In his relationships with us, he was that and more. He made clear that he respected us, and that he had, accordingly, high expectations. He cheered the best of our work with pronounced enthusiasm and noted our shortcomings (including our many embarrassing solecisms) with mild but instructive chiding. All the while, he engaged in his habits of chewing gum, parking it on an

ashtray while he smoked an unfiltered Camel cigarette, finishing the cigarette, and retrieving the gum.

If we didn't sit at the feet of the master, at least a fortunate few of us got to ride with him in a limousine provided by the state. Justice Traynor and Don Barrett drove in to work from Berkeley, where both of them lived. Any Traynor clerks residing in the East Bay were invited to ride along, provided they appeared at the specified pickup points. This was a nice perk for the lowly likes of us. Krier's pickup spot was at a corner next to a gas station. One day as he stood waiting, an employee from the station wandered over to have a cigarette. He asked Krier if he was waiting for a ride to work, and when Krier said he was, the guy said words to the effect, "I hope your ride gets here soon. The boss will be mad if you're late." Then the limo pulled up. The guy looked at Krier and said, "Wow! I guess you're the boss."

Every trip was, in several respects, always the same: Don at the wheel of the limo, the justice in the front passenger seat, the clerk or clerks and sometimes an honored guest in the back. And every trip was devoted to conversation, with no distractions like the car radio. But every trip's conversation was different. We remember discussions of pending cases, a recall drive aimed at the justices, the tension between an independent judiciary and a representative political system, and a wide range of jurisprudential topics. Candor was welcome and practiced. Sometimes the justice would comment on the views expressed by a distinguished guest who rode with us the day before, telling us with amusement the points he thought we scored.

How rare and appreciated was the privilege of those hours of intimate discussion with a jurist of such extraordinary talents, experience, and humanity, not just willing but eager to engage the views of the likes of us—lacking in experience and knowledge, but possessed of the certainty and righteousness of the young.

Justice Traynor was always interested in, and happy to visit with, individual former clerks and to assist them in pursuing their careers with a well-placed phone call or letter of recommendation. He was a warm, considerate, quiet, scholarly, somewhat private man. Time we spent with him was always a pleasure. However, neither he nor his former clerks organized large social events in the nature of reunions.

The clerkship system at the California Supreme Court has changed since our day. Now each justice is supported by a judicial assistant and five career staff attorneys (the chief justice has a larger staff), though several justices have opted to employ annual law clerks in lieu of some of their allotted career

attorney positions. And San Francisco has changed, too. Our annual salary of \$8,500 was enough to make residing in the city affordable, even if we had children and an unemployed spouse. But the cost of housing in San Francisco has far outpaced inflation in general from then to now. Today's clerk would have to devote about 75 percent of their income to rent housing there. We doubt that many of them reside in the City by the Bay.

### Notes

1. Our background sketch is drawn from fuller accounts in Leonard G. Ratner, "Reflections of a Traynor Law Clerk—with Some Emphasis on Conflict of Laws," *Southern California Law Review* 44 (1970); G. Edward White, "Tribute to Roger Traynor," *Virginia Law Review* 69, no. 8 (1983): 1381–86; and Geoffrey C. Hazard Jr., *The Jurisprudence of Justice Roger Traynor: Twenty-Third Chief Justice of California* (San Francisco: University of California, Hastings College of the Law, 2015), 11–17.

2. Les Ledbetter, "Roger J. Traynor, California Justice," *New York Times*, May 17, 1983, 6.

3. The quoted remarks are taken from "In Memoriam—Roger J. Traynor," *California Law Review* 71 (1983):1037–71, collecting essays by, among others, Warren Burger, Henry Friendly, and Walter Schaefer.

4. Walter V. Schaefer, "A Judge's Judge," *California Law Review* 71 (1983): 1050–52.