

Academic highlight: The influence of the Supreme Court clerk

Marquette Law School recently hosted the first academic symposium devoted to the role of the law clerk, with a particular focus on the U.S. Supreme Court. Most of the contributors indicated that law clerks exercise significant influence over all aspects of the Court's work, from the grant of certiorari petitions to the questions asked at oral argument and the Court's decision. Participants also studied the Court's hiring practices over the years, as well as the career trajectories of former Supreme Court clerks. For those curious about this under-studied institution, the Marquette symposium is a treasure trove of data and analysis.

The symposium was organized by Chad Oldfather and Todd Peppers, both scholars of the federal judiciary. In their introduction, Oldfather and Peppers note that law clerks have played an important role ever since Supreme Court Justice Horace Gray hired the first law clerk in 1882, paying a newly minted Harvard Law School graduate out of his own pocket until Congress finally granted funds for the hiring of "stenographic clerks" in 1886. Over the years, the value of Court's law clerks has been subject to debate. Karl Llewellyn applauded the "impact of a *young* junior in the task as the best medicine yet discovered by man against the hardening of a senior's mind and imagination," but William Rehnquist expressed concern that clerks might have too much influence (though he expressed that view before he joined the Court). Some have blamed law clerks for enabling the Justices to write separately, leading to fractured decisions that promote the individual's reputation over the benefit of having the Court speak with one voice.

The contributors to the symposium grappled with some of those questions, in part by seeking to measure the impact of law clerks on work of the Court.

Ryan Black, Christina Boyd, and Amanda Bryan reviewed the certiorari grants from eight Terms (1986-1993), as well as the papers of Justice Harry Blackmun, to determine the influence of "cert. pool" memos—a memo by a single law clerk analyzing a petition for writ of certiorari that is shared with all participating chambers. Their study confirms that law clerks have special influence at the cert. stage. They found that in seventy-five percent of the approximately 9500 votes studied, the Justices followed the recommendation made by the law clerk. They also found that a Justice is most likely to follow the advice of his or her own clerk, as well as the clerks of Justices who are "ideologically proximate." As the

authors report, this should not be surprising considering the “strength of the principal-agent relationship between a Justice and his hired clerk.”

Timothy Johnson and Ryan Black, along with Minnesota Supreme Court Justice (and former SCOTUSblog contributor) David Stras, examined the influence of law clerks on Supreme Court oral arguments by comparing the bench memos prepared for Justice Harry Blackmun with the questions Blackmun asked while on the bench. Bench memos typically include a list of questions for the Justice to ask during oral argument. The authors found that Justice Blackmun asked over forty percent of the questions his clerk suggested, which “provide(s) another important link to demonstrate Supreme Court clerks can and do affect how their Justices evaluate cases.”

Finally, Albert Yoon discussed recent evidence indicating that federal judges — including Supreme Court Justices — increasingly rely on their clerks to write significant portions of judicial decisions. Yoon suggests that reducing caseloads and increasing salaries might help to reverse this trend.

In addition to these studies of law clerk influence, the symposium also included papers describing the hiring process and how it has changed over the years, as well as the role of the clerk in shedding light on the behind-the-scenes work of the Court.

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