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Timothy R. Johnson, David R. Stras, and Ryan C. Black, *Advice from the Bench (Memo): Clerk Influence on Supreme Court Oral Arguments*, 98 Marq. L. Rev. (2014).

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ADVICE FROM THE BENCH (MEMO): CLERK INFLUENCE ON SUPREME COURT ORAL ARGUMENTS

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Scholars of the U.S. Supreme Court have long debated the role, and possible influence, of clerks on the decisions their Justices make. In this Paper, we take a novel approach to analyze this phenomenon. We utilize pre-oral argument bench memos sent to Justice Harry A. Blackmun from his clerks. Specifically, we use these memos to determine whether Justice Blackmun asked questions of counsel that were recommended by his clerks in the memos. Our data indicate Justice Blackmun often followed his clerks' advice. Accordingly, we provide another important link to demonstrate Supreme Court clerks can and do affect how their Justices evaluate cases.

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I. INTRODUCTION

One of the most notorious political scandals in United States history involved a break-in of the Democratic National Committee headquarters at the Watergate Hotel on June 17, 1972. Certainly, the issues involved in the Watergate scandal are sordid and called into question the ethics of President Richard Nixon's administration, the role of special prosecutors, and, more generally, the separation of powers. The scandal came to an end when the Supreme Court of the United States ruled that President Nixon was required to hand over audio tapes (and their transcripts) requested by a special prosecutor. These tapes and transcripts would later prove the White House was involved in the crime and in the ensuing cover up.

When the Supreme Court granted certiorari in *United States v. Nixon*,¹ the Justices knew they had to work quickly given the looming constitutional crisis. Unsurprisingly, this was not an easy task considering the range of complex legal issues at play. Because of the condensed timeline (and due to mounting political and public pressure), clerks may have taken on an even more important role than usual to help their Justices effectively grapple with the difficult constitutional issues presented in the case.² This would have been especially true during the Justices' initial foray into the case: the oral arguments.³

In this paper, we are interested in Justice Harry A. Blackmun's involvement in this process and in how his clerks prepared him to engage with the issues on which the case would turn.⁴ Specifically, we investigate the point at which Justice Blackmun began to think about the legal issues presented in the case and how his clerks assisted him in

1. 418 U.S. 683 (1974).

2. The Court granted certiorari on June 15, 1974, heard arguments on July 8, 1974, and decided the case on July 24, 1974. *See Nixon*, 418 U.S. at 683, 690.

3. While the Justices had the parties' briefs, they certainly did not have much time to prepare after they were submitted. Thus, the oral arguments took on added significance, especially in light of the empirical evidence that these proceedings help the Justices decide issues presented in the cases before them. *See generally* TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (Robert J. Spitzer ed., 2004); Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RES. 331 (2001).

4. For a discussion of how clerks assist Justices in preparing for oral arguments and the use of bench memos more generally, see Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and His Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 326, 326-35 (Todd C. Peppers & Artemus Ward eds., 2012) [hereinafter IN CHAMBERS].

preparing for oral argument. Of course, the answers may never be revealed fully, but we can glean some insight by turning to the papers Justice Blackmun left behind when he retired from the bench.⁵ These papers, housed at the Library of Congress, contain a variety of writings and memoranda about cases the Court decided during Justice Blackmun's tenure including, for our purposes, vital pre-oral argument bench memos written by his law clerks in almost every case in which he participated from 1970 to 1994.⁶

Consistent with the protocol in his chambers, Justice Blackmun received a bench memo from one of his law clerks prior to ascending the bench for oral arguments in *United States v. Nixon* on July 8, 1974.⁷ This particular memo (like almost all of his clerks' bench memos) concluded with a list of questions the clerk believed Justice Blackmun should consider asking during the proceedings. Several of the questions focused on the facts of the case, while others focused on the Court's authority to hear the case. Still others focused on precedent surrounding executive privilege and the separation of powers.

Figure 1 depicts three examples that involve these key issues. Question 3 was intended for James St. Clair, who argued on behalf of President Nixon. It asked about the scope of the President's actual assertion of executive privilege in the case. Question 4 was meant for the Special Prosecutor, as it focused on court rules and the law surrounding the subpoena issued in the case. Finally, Question 6, also for the Special Prosecutor, sought to determine the Court's authority to interfere with presidential actions in light of existing separation-of-powers jurisprudence.

The other item of note in these examples is found in Questions 3 and 6. Specifically, unlike most of the memos we analyze below, the bench memo in *Nixon* included another important (and interesting) feature. Indeed, the clerk who wrote it actually stated the purpose of the question and the possible answer it may elicit. In short, the memo provided a great deal of information for Justice Blackmun as he sat on the bench during the arguments.

5. HARRY A. BLACKMUN PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON, D.C.; see also MANUSCRIPT DIV., LIBRARY OF CONG., HARRY A. BLACKMUN PAPERS: A FINDING AID TO THE COLLECTIONS IN THE LIBRARY OF CONGRESS 3-7 (rev. ed. 2010), available at <http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2003/ms003030.pdf>, archived at <http://perma.cc/JQ6P-S3VF>.

6. Bezanson, *supra* note 4, at 330-32.

7. BLACKMUN PAPERS, *supra* note 5, at Box 191.

Figure 1
Three Questions Proposed by Justice Blackmun's
Clerk in *United States v. Nixon*

✓ 3. In note 25 of your reply brief you appear to state that the President has not claimed privilege for those tapes which have been transcribed and made public. Are these conversations going to be submitted to Judge Sirica? (This will force a response to the letter sent by Jaworski to St. Clair)

4. If the Court should find as to specific items you have failed to make an adequate Rule 17(c) showing under Bowman and Iozia, what do you argue the standard should be with regard to the fact that ✓ the subpoena is directed to a third party?

6. You cite Mississippi v. Johnson, 4 Wall. (71 US) 475) in your brief as controlling of issues in the present case. How do you reconcile that case with Youngstown Sheet & Tube v. Sawyer for what the cases say about this Court's jurisdiction to interfere with a discretionary act of the President? (The answer will likely be something to do with the usurpation of a Congressional power to make laws in Youngstown whereas here and in Johnson there was no question of executive exercise of legislative power.) Doesn't that reaffirm the Court's jurisdiction to at least clarify the nature of the power exercised?

For his part, Justice Blackmun seems to have used the memo because he edited some of the questions and then asked almost one-third (3 of 11) of them in open court. In turn, Justice Blackmun (and the full Court) used the answers to these questions in their unanimous opinion. The conclusion we draw is that the clerk who wrote the bench memo in *Nixon* had some influence over Justice Blackmun's actions at oral argument, which in turn affected his thoughts about the substantive issues presented in the case.⁸

The puzzle for us is whether Justice Blackmun's behavior in *Nixon* is an anomaly or whether he was likely to follow his clerks' suggestions for questions as a general rule. While we only have a small sample of cases from which to draw for this initial analysis, we can leverage these data as a starting point to determine the extent to which such influence existed beyond this one, highly salient, case.

The Article proceeds as follows. In the next section, we discuss the literature that focuses on clerks generally to provide a sense of how they may influence their Justices. From there, we turn to a discussion of the small, but rich, literature that concerns clerks and bench memos. Next, we provide a short description of the data we analyze and how we coded them. Finally, we discuss our results and offer a few tentative conclusions about our findings.

II. LAW CLERKS AND THEIR JUSTICES ON THE U.S. SUPREME COURT

In the past twenty years, a number of scholars have examined whether, and to what extent, Supreme Court clerks affect or influence the decisions Justices make. Much of this work is recent because, until about twenty-five years ago, it was virtually impossible to gauge the relationship between clerks and their Justices because clerks conduct their work in private and are bound by a code of confidentiality that binds them even after their Justices have retired from the bench.⁹

8. Of course, we cannot fully resolve the issue of behavioral equivalence—meaning it is possible Justice Blackmun would have asked these questions absent prompting from his clerk. However, while Justice Blackmun could have done so, his clerks wrote questions for him in every case in which he participated, which indicates this was the process used in his chambers to prepare for oral arguments. From this fact, we conclude that he relied on his clerks and that they therefore played a key role in prompting Justice Blackmun to ask particular questions.

9. The confidentiality rules are contained in a “Code of Conduct.” See Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 104–05 (2012); David Lane, Current Development, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL

However, in 1991, when Justice Thurgood Marshall opened his papers to the public, scholars were able to gain a glimpse into the relationship between clerks and Justices.¹⁰ Since that time, the papers of many other Justices have become available, and most of the documents detail the behind-the-scenes work done at the Court, including Justices' interactions with their clerks.¹¹

In this section, we consider the circumstances in which clerks may influence their Justices. Specifically, we focus on influence at the certiorari stage and during the writing of the majority opinion. From there, we discuss the use of bench memos by Justices both past and present.

A. Clerks and Agenda Setting

In terms of the Court's agenda-setting process at the certiorari stage, Saul Brenner and Jan Palmer provided what is probably the first systematic assessment of agreement between a law clerk's recommendation and a Justice's vote.¹² Using Chief Justice Vinson's papers, Brenner and Palmer found that Chief Justice Vinson followed the recommendation of his law clerks in eighty-six percent of cases.¹³ The authors also make clever use of voting data from other Justices to show that the clerks' recommendations likely had a liberal slant during (at least) some terms, as evidenced by the level of agreement between the recommendations of Chief Justice Vinson's clerks and the votes of

ETHICS 863, 868 (2005). Of course, some clerks do violate the confidentiality requirement. See, e.g., EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT, at v-vi (Penguin 2005) (1998).

10. THURGOOD MARSHALL PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON, D.C.; see also MANUSCRIPT DIV., LIBRARY OF CONGRESS, THURGOOD MARSHALL PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS 2-5 (rev. 2010), available at <http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/2001/ms001047.pdf>, archived at <http://perma.cc/6MUT-RP6F>. Earlier work relied on the papers of Chief Justice Fred Vinson, but the newer archives, particularly those of Justice Blackmun, provide a greater window into the relationship between clerks and Justices. *Guide to the Frederick Moore Vinson Collection, 1907-1953, Special Collections*, U. KY. LIBR., <http://kdl.kyvl.org/catalog/xt7msb3wtd0h/guide> (last visited Nov. 5, 2014), archived at <http://perma.cc/AAF9-Q5MG>.

11. For a listing of where to find these papers, see Ronald Collins, *Accessing the Papers of Supreme Court Justices: Online & Other Resources*, SCOTUSBLOG (Aug. 22, 2013, 10:28 AM), <http://www.scotusblog.com/2013/08/accessing-the-papers-of-supreme-court-justices-online-other-resources/>, archived at <http://perma.cc/E3X8-M47H>.

12. Saul Brenner & Jan Palmer, *The Law Clerks' Recommendations and Chief Justice Vinson's Vote on Certiorari*, 18 AM. POL. Q. 68 (1990).

13. *Id.* at 74.

Chief Justice Vinson's more liberal colleagues on the Court.¹⁴ The more general claim in the article, however, is that clerks can and do have an effect on how their Justices vote on petitions for certiorari.¹⁵

A few years later, Barbara Palmer conducted a more contemporary analysis of the clerks' role in the agenda-setting process.¹⁶ In particular, she sought an answer to the question of whether the cert. pool, which assigns a single law clerk to prepare one memorandum for all members of the pool, influenced the Justices' votes on petitions for certiorari.¹⁷ Based on the papers of Justice Powell,¹⁸ Palmer found four or more of the Justices followed the cert. pool recommendation in fifty-five percent of all cases during the 1984 and 1985 terms.¹⁹ Based on the data, Palmer concluded that a pool clerk has the ability to affect whether a case is ultimately granted.²⁰ This is a significant finding because, when combined with the findings of Brenner and Palmer, it at least suggests clerks directly influence the agenda-setting process. However, both of these studies are limited because they focus on a single Justice (Brenner and Palmer) or on just two terms (Palmer) of data. In addition, both could only account for cases in which review was granted, not the larger universe of cases denied review, because neither Justice Powell nor Chief Justice Vinson kept records of Justices' votes in denied cases.

Studies of clerk influence at the cert. stage (and studies of agenda setting more generally) took a large step forward in 2004, when the papers of Justice Blackmun were opened to the public. Justice Blackmun, unlike his predecessors, retained the pool memoranda for all cases decided during his tenure on the Court, including the tens of thousands of cases denied review. David Stras was one of the first to examine these data, with his analysis of four Terms (1984, 1985, 1991,

14. *Id.* at 75–76. The members of the Court denominated as liberal by Brenner and Palmer included Justices Murphy, Rutledge, Douglas, and Black.

15. *Id.* at 68–69, 74.

16. Barbara Palmer, *The “Bermuda Triangle?” The Cert Pool and Its Influence Over the Supreme Court’s Agenda*, 18 CONST. COMMENT. 105, 106 (2001).

17. *Id.* at 114. For a description of the cert. pool, see Ryan C. Black & Christina L. Boyd, *The Role of Law Clerks in the U.S. Supreme Court’s Agenda-Setting Process*, 40 AM. POL. RES. 147, 149–50 (2012).

18. Lewis F. Powell Jr. Papers, 1921–1998, Lewis F. Powell, Jr. Archives, Washington and Lee University, Lexington, VA; see also *A Guide to the Lewis F. Powell Jr. Papers, 1921–1998*, WASH. & LEE U, [http://ead.lib.virginia.edu/vivaxtf/view?docId=wl-law/vilxwl00013.xml; query=](http://ead.lib.virginia.edu/vivaxtf/view?docId=wl-law/vilxwl00013.xml;query=); (last visited Nov. 5, 2014), archived at <http://perma.cc/D9ZQ-3ATK>.

19. See Palmer, *supra* note 16, at 117–18.

20. *Id.* at 119.

and 1992).²¹ After examining the data, he found an overall agreement rate above ninety-eight percent between the Justices and the recommendations made in the pool memos.²² Interestingly, when Stras considered only the most controversial recommendations, those urging the Court to grant review, the agreement rate dropped to just below seventy percent—still a very high rate.²³ The point is that even when Justices are most likely to follow their own ideological predilections—in cases of high political and legal salience—the clerks still seem to have a large effect on the Court’s agenda-setting decisions. Again, however, while Stras’s analysis improved on earlier work, it still focused on only four Terms—two in the Burger Court and two in the early Rehnquist Court.²⁴ Thus, a complete understanding of law clerk influence at the agenda-setting stage was still not yet in grasp.

More recently, Ryan Black and Christina Boyd built on prior studies to explore the ability of law clerks to alter a Justice’s vote in decisions regarding whether to grant or deny certiorari.²⁵ They do so by focusing on so-called certworthiness, which assesses the importance of the petition and the issues presented; the clerk’s recommendation—that is, whether to grant or deny the petition; and the ideological distance between the pool clerk and the voting Justice.²⁶ They focus on two theories, principal-agent theory and signaling theory, to analyze whether clerks influence their own Justice’s decisions and the decisions made by other Justices in the cert. pool.²⁷ Application of these two theories led them to three hypotheses, the most interesting of which was that grant recommendations would be more likely to result in a vote to grant if the ideology of the voting Justice was similar to that of the pool clerk.²⁸ To test their hypotheses, Black and Boyd still focus only on four

21. David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947 (2007) (reviewing TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006); ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006)).

22. *Id.* at 993.

23. *Id.*

24. *See id.* at 977.

25. Black & Boyd, *supra* note 17, at 147.

26. *See id.* at 155.

27. *See id.* at 150–53.

28. *See id.* at 155.

Terms (1986, 1987, 1991, and 1992), but they utilized a much larger sample of more than 2,000 votes from 305 petitions for certiorari.²⁹

Their results suggest an ideological component to the influence of clerks. In particular, when clerk recommendations to grant review come from an ideologically distant chambers, the voting Justice is less likely to follow the recommendation than if the recommendation came from his or her own law clerk or the clerk of an ideological ally.³⁰ The bottom line is that clerks do have some influence at the cert. stage, and the cert. pool is an effective means of exercising that influence. However, the influence and effect of the cert. pool seem to turn on ideological relationships.

Overall, the combination of the descriptive and systematic analyses discussed here suggests that clerks can and do play a role in the Justices' decisions about which cases to take. However, agenda setting is not the only, or even most important, part of the decision-making process in which clerks may influence Justices. We turn next to decisions on the merits.

B. Clerks and Decisions on the Merits

While setting the Court's agenda takes up a large amount of time for Justices and their clerks, the Justices' most important task is to decide the merits of the constitutional, statutory, and other cases they have accepted for review. At the merits stage, clerks may also have some influence on the Justices. In fact, they may have influence on two aspects of the process: the votes cast by the Justices on the disposition of the case and the reasoning adopted in opinions. This section considers the possibility of clerk influence on both decisions.

As with decisions on the Court's certiorari votes, clerks may also have influence on the votes cast by Justices on the merits. Again, testing this hypothesis was virtually impossible prior to the public availability of the Justices' papers and, in particular, the papers of Justice Blackmun. Nevertheless, work did exist in this area. The first study to analyze the impact of clerks on the Justices' votes cast on the merits examined the

29. *Id.* at 156.

30. *Id.* at 162; see also Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process*, 98 MARQ. L. REV. 75, 88 (2014).

papers of Justice Harold Burton.³¹ In that study, Jan Palmer and Saul Brenner analyzed Justice Burton's votes on the merits—that is, whether to affirm or reverse in a case—in an effort to determine whether he voted in accordance with his clerks' recommendations.³² Specifically, they analyzed Burton's conference votes on the merits during the Vinson Court era (1946–1948).³³ They found that Burton's agreement rate with his own clerks exceeded his agreement rate with his colleagues.³⁴ The converse was also true: his clerks agreed with him more often than they did with his colleagues.³⁵

Like Palmer and Brenner, Todd Peppers and Christopher Zorn explored the extent to which clerks influence their Justice's votes on the merits.³⁶ Unlike Palmer and Brenner, however, Peppers and Zorn examined votes across Justices and multiple Terms.³⁷ Empirically, they modeled the probability a Justice would cast a liberal vote as a function of both the Justice's policy preferences and the partisanship of his or her law clerks.³⁸ Across nearly a dozen different model specifications, Peppers and Zorn uncovered a statistically significant relationship between aggregate clerk partisanship for a particular Term and a Justice's propensity to vote liberally, even after controlling for a Justice's preexisting ideological tendencies.³⁹ They found, for example, that a Justice who goes from a chambers full of Republican clerks to a chambers full of Democratic clerks would be thirty-three percent more likely to cast a liberal vote.⁴⁰

The point is that the votes of Justices correlate highly with their clerks' ideology, although Peppers and Zorn concede their findings do not support “any particular causal model of that influence.”⁴¹ While

31. Jan Palmer & Saul Brenner, Research Note, *The Law Clerks' Recommendations and the Conference Vote On-The-Merits on the U.S. Supreme Court*, 18 JUST. SYS. J. 185, 186 (1995).

32. *Id.*

33. *Id.*

34. *Id.* at 190.

35. *Id.* at 192.

36. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008).

37. *See id.* at 70–71.

38. *Id.* at 70–75.

39. *Id.* at 75.

40. *Id.* at 74–75.

41. *Id.* at 75. In fact, like Peppers and Zorn, we do not make any normative judgments about whether clerks exercise too much influence over the decisions made by Justices. After

compelling, these findings do not demonstrate a direct effect by law clerks on Justices.

In addition to works that focus on the votes of the Justices using raw data, Artemus Ward and David Weiden provided anecdotal evidence to determine the extent to which clerks may influence Supreme Court decision making.⁴² Sometimes, former clerks indicated they had no influence on their Justices. For example, John P. Frank, who clerked for Justice Black, said he witnessed Black “ma[ke] approximately one thousand decisions, and I had precisely no influence on any of them.”⁴³ On the other hand, Robert von Mehren, who clerked for Justice Reed, indicated clerks in his chambers would discuss complex cases together and that, during the course of the discussions, Reed would sometimes change his views of the case.⁴⁴

Perhaps the most interesting anecdote of clerk influence on a merits vote (and on the substance of a case) comes from the files of Justice Powell.⁴⁵ In *Erznoznik v. City of Jacksonville*,⁴⁶ a case involving whether a city may ban movies that depict nudity in outdoor theaters, Justice Powell initially sided with the City of Jacksonville. However, based upon the memorandum depicted in Figure 2, it is clear he changed his mind because of a discussion with his clerks. According to the memo, two of his clerks made clear to him that it is not bad for children to be exposed to nudity.

all, there is nothing wrong with a Justice changing his or her mind based on substantive discussions with the clerks, particularly if it is the discussion itself, and not the persuasion exerted by the clerks, that leads to the change.

42. WARD & WEIDEN, *supra* note 21, at 150–51.

43. *Id.* at 152 (quoting JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 118 (1958)) (internal quotation mark omitted).

44. *Id.* (quoting Interview by William Cooper with Robert von Mehren (June 11, 1985), in STANLEY F. REED ORAL HISTORY PROJECT, https://nyx.uky.edu/oh/render.php?cachefile=1985OH121_Reed22_Mehren.xml, archived at <http://perma.cc/WYX5-VNHX>).

45. *See supra* note 18. One of the authors, Tim Johnson, obtained this memo from the archives of Justice Powell.

46. 422 U.S. 205 (1975).

Figure 2
Memo from Justice Powell in *Erznoznik v. City of Jacksonville*

No. 73-1942 *Erznoznik v. Jacksonville*

Dear Chief:

Sally Smith and Joel Klein have persuaded me that
it's OK for kids to look at bare breasts and bare buttocks
and accordingly I reverse my vote.

Finally, several studies analyze perhaps the most controversial element of law clerk influence: the role of clerks in drafting the Court's opinions. The first of these studies, conducted by Paul Wahlbeck, James Spriggs, and Lee Siegelman, examined draft opinions circulated by Justices Powell and Marshall during the 1985 Term to identify linguistic "fingerprints" that may be attributable to law clerks.⁴⁷ Knowing which clerk wrote each of the drafts allowed the authors to determine whether, and the extent to which, Justices altered the drafts written by their clerks.⁴⁸ Interestingly, their work revealed significant differences between the two chambers.⁴⁹ Indeed, while there was not an overly discernible influence from Justice Powell's clerks on draft opinions, there were clear stylistic attributes that could be traced to Justice Marshall's clerks.⁵⁰ Thus, while clerks may influence how opinions are written (and the content of those opinions), the amount of influence varies across chambers.

Nearly a decade later, Jeffrey Rosenthal and Albert Yoon approached the same topic from a longitudinal perspective.⁵¹ In so

47. Paul J. Wahlbeck, James F. Spriggs II & Lee Sigelman, *Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL. RES. 166, 168 (2002). One potential weakness of stylistic variability scores is that clerks can adopt their Justice's preferred writing style over time. Thus, to the extent such variability scores decrease over time, studies relying on stylistic variability could underestimate the role of law clerks in the opinion-drafting process.

48. *Id.* at 175, 180.

49. *Id.* at 178.

50. *Id.* at 182.

51. Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307 (2011) [hereinafter Rosenthal & Yoon, *Judicial Ghostwriting*]; see also Jeffrey S. Rosenthal & Albert H. Yoon, *Detecting Multiple Authorship*

doing, they used sixty-three function words (e.g., also, from, such, when, and would) to identify a Justice’s personal writing style and then determine whether that style exhibited significant variability across opinions.⁵² Specifically, they calculated “variability scores,” which provided evidence about whether “the law clerk ha[d] received at least part of the Justice’s writing responsibilities.”⁵³ The variability scores across all Justices ranged from a high of 3.85 for Justice O’Connor to a low of 2.11 for Justice McReynolds.⁵⁴ Moreover, the variability scores were consistent with anecdotal accounts of the extent to which certain Justices wrote their own opinions.⁵⁵ For example, Justices Scalia and Douglas, both of whom are known for drafting many of their own opinions, had relatively low variability scores among the modern Justices included in the study.⁵⁶ The findings comport with the conventional wisdom that Justices vary in their use of clerks in the opinion-drafting process.⁵⁷

In general, then, research suggests clerks, to varying degrees, influence both the substantive decisions made by Justices and the opinion-drafting process. Although the scholarly literature has not shown a direct effect, it does provide evidence of clerk influence. In the next section, we extend the research on clerk influence to a new focus: pre-oral argument bench memos.

C. Clerks and Bench Memos

The memo in Figure 2 provides a good point of reference for our relationship of interest: the extent to which pre-oral argument bench memos may influence a Justice’s behavior on the bench. To date, scholars have not analyzed these memos in any systematic way. Despite this gap in the literature, scholars and former clerks have written about the potential importance of bench memos.

of United States Supreme Court Legal Decisions Using Function Words, 5 ANNALS APPLIED STAT. 283 (2011).

52. Rosenthal & Yoon, *Judicial Ghostwriting*, *supra* note 51, at 1314–15.

53. *Id.* at 1315.

54. *Id.* at 1319–20. A higher variability score, according to Rosenthal and Yoon, was consistent with the hypothesis that the Justice relied more heavily on clerks to draft majority opinions. *Id.* at 1318.

55. *Id.* at 1320.

56. *Id.*

57. *Id.* at 1320–21.

Justices in the early twentieth century did not seem to use bench memos in the same way that they are used today—if they even used them at all. For instance, Justice Louis Brandeis was

emphatic in refusing to permit what many of the Justices today require, a bench memorandum or précis of the case from their law clerks to give them the gist of the matter before the argument. To Justice Brandeis . . . this was a profanation of advocacy. He owed it to counsel—who he always hoped . . . would be advocates to—to present them with a judicial mind unscratched by the scribblings of clerks.⁵⁸

Similarly, Justice Frankfurter rarely asked his clerks to write bench memos. Todd Peppers, for example, wrote that, occasionally

Frankfurter had his law clerks write bench memos in cases that interested him. When asked to quantify the number of bench memoranda he drafted, [Andrew] Kaufman replied, “I wouldn’t say it was a steady diet.” Other former law clerks [to Justice Frankfurter] do not mention bench memoranda as part of their job duties.⁵⁹

Justices Frankfurter and Brandeis were typical of how Justices used their law clerks through the end of the Vinson Court.⁶⁰ However, when Earl Warren became Chief Justice in 1953, he changed the norms of how clerks interacted with their Justices. In his own chambers, Chief Justice Warren clearly had his clerks prepare memos for him, both on petitions for certiorari and on the merits of cases. Jesse Choper, a former Warren clerk, explained the process:

First, we wrote a short memo to the Chief on each cert petition—some might be very brief, just a few pages; others could run to more than twenty pages. Second, we wrote considerably longer bench memos discussing the briefs in cases

58. Todd C. Peppers, *Isaiah and His Young Disciples: Justice Louis Brandeis and His Law Clerks*, in IN CHAMBERS, *supra* note 4, at 67, 72–73 (quoting DEAN ACHESON, MORNING AND NOON 96–97 (1965)).

59. See Todd C. Peppers & Beth See Driver, *Half Clerk, Half Son: Justice Felix Frankfurter and His Law Clerks*, in IN CHAMBERS, *supra* note 4, at 141, 147 (footnote omitted) (quoting Interview by Todd C. Peppers with Andrew Kaufman).

60. See Brenner & Palmer, *supra* note 12, at 69–70.

scheduled for oral argument. (We made a recommendation to the Chief in both sets of memos.)⁶¹

More generally, Peppers posited that, “[u]pon his arrival at the Supreme Court, Earl Warren adopted a clerkship model in which law clerks continued the traditional role of writing cert. memoranda but assumed two new duties: preparing bench memoranda and drafting opinions.”⁶² In fact, Peppers suggested that, when new Justices joined the bench during the Warren Court era, each adopted some variation of the new clerkship model, including Justice Charles Whittaker.⁶³ As biographer Craig Alan Smith noted,

[d]uring Whittaker’s first full term his two clerks, Alan Kohn and Ken Dam, performed duties familiar to most law clerks from that time: they read petitions for certiorari and summarized them for the justice, and they wrote bench memoranda on the cases accepted for oral argument.⁶⁴

Indeed, the bench memoranda in Justice Whittaker’s chambers were longer than in other chambers, and “averaged ten to fifteen pages in length.”⁶⁵

Despite this new norm on the bench, there was clear variation in whether Justices, over the latter half of the twentieth century, had their clerks write bench memos. For instance, prior to the Rehnquist Court, Chief Justice Burger and Justices Blackmun, Marshall, Powell, Warren, White, and Whittaker required bench memos from their clerks.⁶⁶ On the other hand, Justices Brennan and Stewart only occasionally asked the clerks to prepare bench memos.⁶⁷ Finally, Justices Fortas and Harlan II rarely assigned such duties to their clerks.⁶⁸ Interestingly, by the time Rehnquist became Chief Justice in 1986,

[a]ll justices except Justice Stevens routinely assigned their clerks the task of preparing the first draft of opinions, and the majority

61. Jesse H. Choper, *Clerking for Chief Justice Earl Warren*, in IN CHAMBERS, *supra* note 4, at 263, 265.

62. PEPPERS, *supra* note 21, at 151.

63. *Id.* at 151–52.

64. Craig Alan Smith, *Strained Relations: Justice Charles Evan Whittaker and His Law Clerks*, in IN CHAMBERS, *supra* note 4, at 243, 249–50.

65. PEPPERS, *supra* note 21, at 161.

66. *Id.* at 190.

67. *See id.* at 158, 162, 190–91.

68. *Id.* at 190.

of the justices depended on bench memoranda to prepare them for oral argument. There is no evidence to suggest that any of these practices have changed during the first term of the Roberts Court.⁶⁹

The point is that the role of law clerks appears to have steadily expanded over time.⁷⁰

Similar to Justice Blackmun, Justices Ginsburg and O'Connor required their clerks to draft bench memos that included proposed questions for them to ask during oral argument. Peppers revealed that,

[i]n the majority of cases set for oral argument, Justice Ginsburg requires her clerks to prepare written bench memoranda. The purpose of the bench memoranda is to highlight the salient issues and provide a framework for resolving the appeal. The memoranda include a summary of the dispositive legal issues, suggested questions for oral argument, and a recommended disposition.⁷¹

Justice O'Connor often chatted with her clerks about individual cases, but before these discussions, the clerks would write memoranda that included “a case summary, analysis of the briefs, a personal recommendation as to case disposition, and suggested questions for oral argument.”⁷²

Finally, we return to the object of our study—Justice Blackmun—who finished his career during the first eight Terms of the Rehnquist Court. Like many of the Justices discussed above, Blackmun asked his clerks to write bench memos. As Randall Bezanson wrote, “In Justice Blackmun’s chambers, a bench memo was prepared by a clerk (the clerks tended to divvy up the memos, too) for each case to be argued during the term.”⁷³ These memos are the focus of our analysis. Specifically, *we test for a law clerk effect by comparing the questions Justice Blackmun’s clerks recommended he should ask during oral arguments with whether he actually asked those questions.*

69. *Id.* at 191.

70. In contrast to many of the Justices during the modern era, Justice Stevens did not ask his law clerks to prepare bench memoranda prior to oral argument. Rather, he followed the “old” clerkship model—that is, the one that prevailed prior to the Warren Court. Even so, Justice Stevens required his clerks to pay attention to the record, briefs, and lower court opinions in preparation for informal talks with him about each case. *See id.* at 196.

71. *Id.* at 199.

72. *Id.* at 197–98.

73. Bezanson, *supra* note 4, at 330.

III. DATA

Although there are now a greater number of studies examining the role Supreme Court clerks play in the decisions that Justices make, the evidence has not produced a smoking gun, so to speak, that definitively establishes clerk influence at any stage of the decision-making process. We believe that such evidence may exist in limited form in the way in which Justice Blackmun's clerks prepared him for oral argument. Indeed, as the memos in Figures 3 and 4 suggest, his clerks wrote questions for him in advance of oral arguments. These questions, and the answers they elicited, would have influenced the lens through which Justice Blackmun viewed the case. In this section, we explain the data we use to support our hypothesis.

As we note in the introduction, Justice Blackmun kept a plethora of memos, drafts, and other correspondence in his papers now housed at the Library of Congress. It has taken scholars at least a decade to fully examine the data contained in those papers—the obvious as well as the hidden. The hidden gems have produced some of the most interesting findings on how, for example, oral arguments affect the decisions Justices make.⁷⁴ Included among those gems are the final pages of the bench memos in merits cases such as *United States v. Nixon*, for it is on these pages that Justice Blackmun's law clerks proposed oral argument questions for his consideration.

To determine the extent to which Justice Blackmun used the questions proposed by his law clerks, we examine the bench memos in a small sample of forty cases. In each case, the questions proposed by the law clerks can be found on the last page of the bench memo.⁷⁵

We used a straightforward process for gathering and analyzing these data. First, we examined all the bench memoranda available to us.⁷⁶ We then determined which memos had the final pages still attached.⁷⁷ In

74. See, e.g., Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006); Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429 (2012).

75. We obtained the small sample during the collection of data on another project. See Black & Boyd, *supra* note 17, at 156.

76. We are grateful to Amanda C. Bryan for collecting the data and for realizing their significance when she shared them with us. We are also grateful to Ryan C. Black and Christina L. Boyd, whose various analyses of law clerks led us to these memos and to this project.

77. Because these memoranda were collected for another project, the final page usually was not photographed. The examples we have here, and the forty cases we consider, include

addition, we ensured there was a case identifier on the memo (a docket number, a case name, or both) and dropped from the dataset all cases that could not be identified.

Second, we used Justice Blackmun's fastidious notes of what transpired during oral argument to determine whether he actually asked the questions prepared by his clerks. Specifically, he placed checkmarks next to the questions he asked and left blank those he did not ask.⁷⁸ In *United States v. Brewster*,⁷⁹ for example, Justice Blackmun's clerk proposed eight questions. As Figure 3 demonstrates, however, Justice Blackmun only asked six of those questions—as the checkmarks before numbers 1, 3, 4, 5, 6, and 7 indicate.

However, there is clear variation in the extent to which Justice Blackmun followed the advice of his clerks. In fact, Figure 4 indicates that, in *Argersinger v. Hamlin*,⁸⁰ he did not ask any of the questions in the bench memo. However, he did craft an additional question he decided to ask during the argument. The point is that Justice Blackmun certainly followed his clerks' advice, but not on every question and not in every case.

Third, we examined the transcripts of oral arguments to verify that Justice Blackmun asked each of the checked questions.⁸¹ In addition, we had research assistants review the transcripts to determine whether Justice Blackmun asked any of the questions that he did not check. In particular, they compared questions in the bench memo with the actual questions asked during the oral argument sessions. A combination of these two coding processes led to our dataset, which includes 230 possible questions Justice Blackmun could have asked across the forty cases in the sample. The next section provides some descriptive analysis based on these data.

all of the cases in which the bench memos were photographed in their entirety.

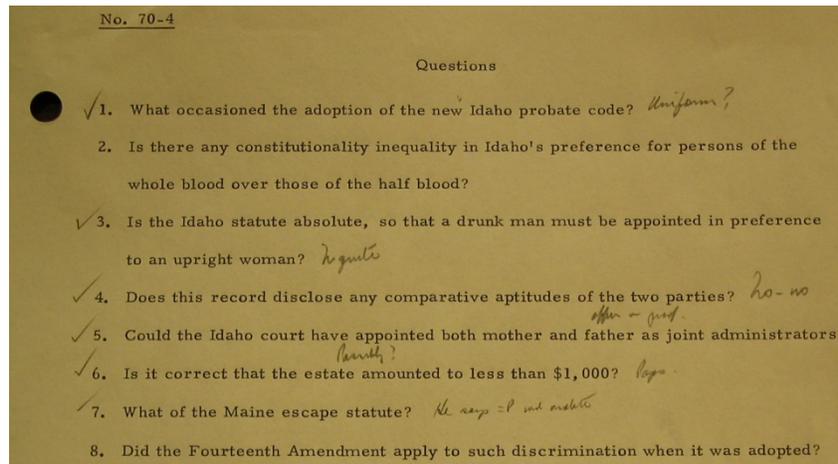
78. Justice Blackmun also occasionally added questions in his own handwriting and recorded the answers that the attorneys gave in response.

79. 408 U.S. 501 (1972).

80. 407 U.S. 25 (1972).

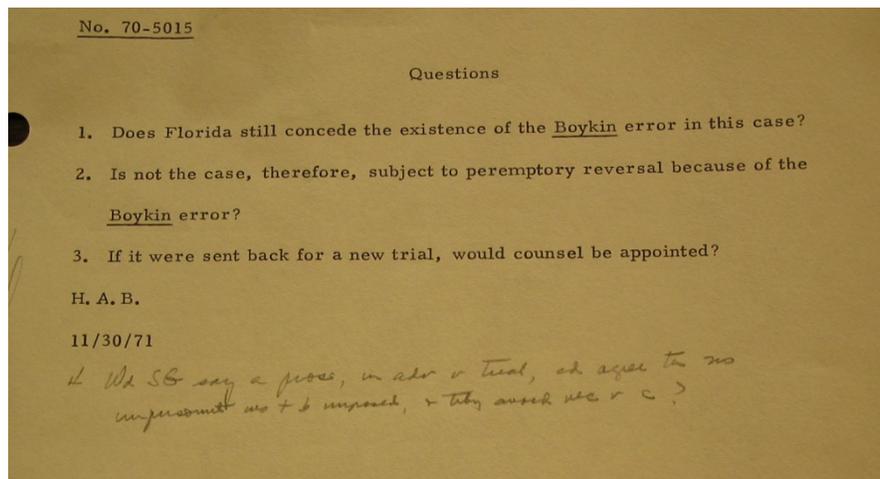
81. We used the transcripts from the Oyez Project. THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, <http://www.oyez.org> (last visited Nov. 5, 2014), archived at <http://perma.cc/7MDB-259Q>.

Figure 3
Bench Memo Questions from *United States v. Brewster*



Note: The checkmarks indicate which questions Justice Blackmun asked during oral argument.

Figure 4
Bench Memo Questions from *Argersinger v. Hamlin*



Note: The checkmarks indicate which questions Justice Blackmun asked during oral argument.

IV. RESULTS

While we do not provide a statistical model in this iteration of the project, the data we employ here are quite convincing. Note, first, that Justice Blackmun did not always heed the advice given to him by his clerks. In fact, most of the time, he did not ask the questions his clerks submitted. However, he did not fully ignore their recommendations either.

Specifically, of the 230 questions suggested by his clerks, Justice Blackmun asked 94, which means he used more than 40% of them. This suggests a relatively strong clerk effect. Indeed, if a clerk submits a question and the Justice actually asks that question, then we can reasonably infer the clerk had some influence over the Justice's behavior. Nevertheless, the data are only suggestive and do not conclusively establish the direct-clerk-influence hypothesis.

However, combining our finding with existing research provides additional support for the hypothesis. In one study, Ringsmuth and her co-authors indicate Justice Blackmun did not begin to prepare his own thoughts about a case until just a few days before the oral argument.⁸² In contrast, most of the bench memos were written much earlier in the process. For instance, while the argument in *Gooding v. Wilson*⁸³ occurred on December 8, 1971, the clerk sent the bench memo for that case to Justice Blackmun on September 17, 1971, nearly three months earlier. The point is that the clerks wrote their questions for Justice Blackmun days, if not months, before Justice Blackmun examined the issues in the case. Although that fact does not guarantee Justice Blackmun would not have asked the same questions without prompting by his clerks, it is highly suggestive.⁸⁴ In addition, the fact that Justice Blackmun only occasionally added his own questions (see Figure 4) indicates he was usually satisfied with his clerks' recommendations.⁸⁵

So far, the data establish that Justice Blackmun generally acted on the advice of his clerks during oral arguments. This alone indicates clerks can directly influence the actions their Justices take. In fact, it may be the best evidence to date, given the timing of the process and the

82. See Ringsmuth, Bryan, & Johnson, *supra* note 74, at 431.

83. 405 U.S. 518 (1972).

84. See *supra* note 8.

85. Interestingly, in our sample, Justice Blackmun never crossed out any of the clerk-suggested questions. While he may have done so in other cases, there is no theoretical reason to believe he did so. Of course, this presents an empirical question that is easily verifiable with another sample of bench memos.

sheer number of suggested questions used by Justice Blackmun. Of course, we cannot make a direct causal claim until we control for other factors that may have affected his behavior.

The next step is to determine if there is any connection among the types of questions Justice Blackmun asked and whether the answers to those questions influenced his opinions. With respect to the types of questions, we analyzed the 94 clerk-written questions Justice Blackmun asked based on Johnson's taxonomy of possible question types.⁸⁶ It allowed us to test whether Justice Blackmun's clerk focused on the type of questions that we would expect a policy-minded, strategic Justice to ask.⁸⁷ Justices who exhibit these tendencies tend to ask questions about policy issues, applicable precedents (the key institutional rule Justices follow), and the views of external actors. Justice Blackmun asked the types of questions we would expect a strategic, policy-minded Justice to ask. In fact, more than half of the questions in the sample were about matters of policy (51 of the 94 questions he asked), while just over 10% focused on precedent (12 of the 94 questions). Interestingly, he asked many fewer questions about the views of external actors (only 2 questions), but the pattern is similar to what Johnson found for other policy-minded and strategic Justices.⁸⁸ The bottom line is that Justice Blackmun's clerks sensed that Justice Blackmun should think about the public policy involved in a case as well as about how a case fit within existing precedent. Justice Blackmun, in turn, asked these types of questions at oral argument.

Finally, we consider how Justice Blackmun used the answers to his questions in his opinions. Unfortunately, in our sample, Justice Blackmun was the opinion's author in only a few cases. In the few opinions he did author, we found only one question submitted by a clerk that found its way into one of his opinions.⁸⁹ While this preliminary finding may cut against the direct-clerk-influence hypothesis, we cannot make any definitive claims about the link between the questions and the

86. JOHNSON, *supra* note 3, at 33 tbl.2.1. Johnson codes for six possible categories of questions, including those about policy content, the preferences of actors beyond the Court, precedent, the facts of the case, constitutional issues, threshold issues, and the implications of a case. *Id.* at 32–33. As with Johnson's original coding, we double counted questions if they fell into more than one category (precedent and policy for instance).

87. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

88. A significant portion of the questions focused on legal (constitutional) issues or on the facts of the case. The latter category was Justice Blackmun's second-most-asked question type.

89. *Swarb v. Lennox*, 405 U.S. 191 (1972).

opinions because we simply do not have enough data. For now, we realize that this aspect of the analysis will have to await a more complete analysis.

V. CONCLUSION

Justice Blackmun was particular about the process he used to make decisions during his tenure on the U.S. Supreme Court. The bench memos we analyze show that his clerks used bench memos as a vehicle to prepare him for oral arguments and that Justice Blackmun used the questions submitted by his clerks as the basis for asking questions of the attorneys in the case.

Of course, our analysis is not definitive. First, we analyze only a single Justice. Second, we analyze only a small sample of cases drawn mostly from cases arising early in Justice Blackmun's tenure on the Court. Even so, we have no reason to believe that Justice Blackmun's processes changed over time. Future research should take these initial findings and expand them with a more systematic analysis across Terms and even across Justices, if possible. Accordingly, we suggest scholars gather and analyze these data to provide a more robust picture of clerk influence at the oral-argument stage of the Court's decision-making process. For now, we have revealed a new wrinkle in the quest for fully understanding the relationship between Justices and their clerks.