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Abstract

Do law clerks influence the decisions made by justices on the U.S. Supreme Court? Although numerous studies of law clerk influence exist, none has controlled for alternative factors that lead a justice to behave in a particular way even absent the actions of the law clerk. Turning to the Court's agenda-setting stage, we draw from archival materials contained in the private papers of Justice Harry A. Blackmun to address this precise issue. Our results suggest that once a justice's initial voting inclinations in a case are controlled for, the ability of a law clerk to systematically alter a justice's vote is conditioned on the quality of the petition, the direction of the clerk's recommendation, and the ideological closeness of the pool clerk and voting justice. Given the closeness of many agenda-setting votes, we suggest that clerk influence could be the determining factor in whether a case is granted review by the Court.

Keywords

U.S. Supreme Court, agenda setting, law clerks, petitions for certiorari, pool memos

Do Supreme Court law clerks influence the decisions made by justices? In 1957, a young William Rehnquist, having just completed a clerkship at the

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Court, published an article on law clerk influence in *U.S. News and World Report*. Reporting on his year spent working for Justice Robert H. Jackson, Rehnquist noted the possibility of a *subconscious* liberal bias among his fellow clerks but was otherwise skeptical of (if not hostile to) the idea of conscious efforts by clerks to exert influence (Rehnquist, 1957).

In the fifty years since, the role and influence of law clerks has been a perennial topic of interest for scholars, journalists, and other commentators. Previous efforts at assessing influence have, for example, plumbed the private papers of retired justices to examine agreement between a clerk's recommendation and a justice's behavior (Brenner & Palmer, 1990; Palmer & Brenner, 1995). More recently, enterprising scholars have gathered survey data on law clerks as a way to examine the influence of a clerk's ideology on her employing justice's behavior (Peppers & Zorn, 2008).

Though certainly informative, no existing study that we are aware of controls for the bevy of additional influences that may push a justice to prefer an outcome even *absent* the actions of the law clerk. In this article, we seek to fill that void. Drawing from evidence within the personal papers of Justice Harry A. Blackmun, we focus on the role of law clerks during the Supreme Court's agenda-setting stage. The Court's agenda-setting process provides an ideal location to examine influence because, for reasons we discuss in detail below, a law clerk's recommendation regarding the certiorari (cert) vote is distributed to not just her own justice but to a majority of the Court's members.

This line of inquiry is important for a variety of reasons. First, it helps shed additional light on the unique role played by law clerks at the Court. Such perspective is critical given the expansive role they play in aiding justices during virtually every stage of the Court's decision-making process. Clerks are responsible for conducting the preliminary review of cert petitions, compiling preoral argument bench memoranda that summarize the relevant issues in a case and, perhaps most controversially, drafting initial version of opinions circulated during the Court's opinion-writing stage (Peppers, 2006; Ward & Weiden, 2006). Although law clerks work in close proximity to their employing justice, they are far removed from public scrutiny. While would-be justices are subject to confirmation hearings and deep probing of their background and beliefs, the decision to hire a law clerk is a discretionary one made only by a specific individual justice.

Second, the research design we use and statistical controls we deploy represent a significant advance over existing studies. In particular, we draw on a deep and theoretically rich literature on the Court's agenda-setting process to develop an *ex ante* prediction about how a justice would behave in the absence of a law clerk's recommendation. In so doing, we provide a level of rigor heretofore absent in earlier studies.

Relatedly, we also make important contributions to the broader literatures on both agenda setting and the role of advisors more generally. With regard to the former, although law clerks are intimately involved in assisting the justices during this stage of the decision making, existing accounts of the process fail to consider how their involvement leads the Court to set its discretionary agenda. By focusing on the agenda-setting decision, we capitalize on a unique vantage point to see how justices respond to law clerks who do *not* work for them and provide a novel perspective on one of the most secretive and complex aspects of the Court's decision-making process.

What is more, while our political institution of primary interest is the U.S. Supreme Court, our theory and results have potential applicability in other branches of government. Indeed, modern political decision makers are surrounded by a sizable contingent of advisors and staff. Since the early 20th century, as the job of U.S. political elites has become more complex, the number of individuals serving in advisory roles across the branches has increased dramatically. Concurrently, the amount and type of responsibilities entrusted to these support actors has also grown exponentially. In Congress, advisors participate in policy development, conduct research, draft legislation, and communicate and negotiate on behalf of their member (Fox & Hammond, 1977, p. 2). In the White House, advisors develop policy expertise and act as information filters for the chief executive when it comes to their area of specialization (Patterson, 1988, p. 47).

In short, we believe that law clerk influence is an important topic to study and that our analysis makes a useful contribution to scholarly understanding of the role of law clerks, the Court's agenda-setting stage more generally, and the broader impact of how political elites make decisions. By way of preview, in our empirical examination of cert petitions from four terms at the Court, we find that once a justice's initial beliefs or leanings are controlled for, the ability of a clerk to *systematically* alter a justice's behavior is limited but not nonexistent. Given the closeness of many agenda-setting votes, this clerk-based effect can make the difference in whether a petition is ultimately granted plenary review by the Court.

The Role of Law Clerks at Cert

The most time-consuming, and perhaps most critical, duty performed by Supreme Court law clerks is the evaluation of petitions for cert. Cert is the process by which the Supreme Court discretionarily sets its agenda. Each year, thousands of losing litigants petition the Supreme Court for a final chance to obtain relief. Of these, the modern Supreme Court grants just more than 1% review on the merits. Simply put, without the assistance of law clerks

in this process, the systematic winnowing down of these petitions would not be possible.

A clerk's agenda-setting role is also of interest because it is the only venue where she takes on duties that are for the benefit of justices other than just the individual justice who hired her. Since 1972, various justices on the Court have used the cert pool as a mechanism to reduce the time burden posed by cert petitions. In the cert pool, participating justices combine their clerks' labor so as to divide the workload of summarizing both the content and the merit of each petition.¹ Each new petition is randomly assigned to one of the pool clerks, who is responsible for producing a pool memorandum (pool memo) for that petition. Drawing on the materials submitted to the Court, pool memos follow a standardized format and begin with a summary of the case facts, lower court proceedings, and the arguments of the parties and any amici curiae. The pool author then provides an analysis of the petition's worthiness for review and, finally, a recommendation regarding what action should be taken by the Court.

The pool memo is distributed to all justices in the cert pool.² Before a petition can receive a recorded grant or deny vote, it must make the Court's discuss list. All petitions not making the discuss list are summarily denied review. The discuss list is initially created by the Chief Justice. After the Chief circulates the first draft, each associate justice can add (but not subtract) petitions to the discuss list. A petition making the list must receive at least four votes in favor of review in order to be granted; otherwise it is denied (Rehnquist, 2001).

Theory and Hypotheses

A Justice and Her Clerk: Principal-Agency Theory

Like others before us, we begin by suggesting that the relationship between an individual justice and her law clerks can be accurately characterized by principal-agent theory, where the justice is the principal and the law clerk is the agent (Ditslear & Baum, 2001; Palmer & Brenner, 1995; Peppers, 2006; Peppers & Zorn, 2008; Wahlbeck, Spriggs, & Sigelman, 2002). In short, the relationship is one where the principal delegates certain aspects of decision making to her agent.

In this relationship, the principal must be concerned about potential avoidance of duty or shirking on the part of the agent, which can arise when there is a divergence between the preferences of the two parties. Of course, the principal is neither unaware nor impotent in reacting to this potential issue.

Indeed, while diverging preferences might tempt the agent to act against the principal's best interests, the principal has several tools at her disposal to reduce this risk. These tools include the initial screening process for selecting potential agents, on-the-job monitoring of the agent's performance, and the creation of incentives by the principal to induce compliance (e.g., Miller & Moe, 1986, p. 756). Such incentives can include, for example, appealing to the agent's desire to maintain a solid reputation and other more general career-based concerns.

In hiring a law clerk to work for her, a justice is entrusting the clerk to work on her behalf and provide assistance as she works to pursue her goals. More generally, this includes a justice's desire to see her policy preferences etched into law (Epstein & Knight, 1998). What is more, from a theoretical perspective, we have several reasons to believe that a justice has the tools necessary to ensure that her own law clerks act as dutiful and loyal agents with a low risk of shirking.

An initial tool is the justice's selection of her law clerks. While federal law authorizes the justices to have law clerks, each justice has complete discretion with regards to (a) who she selects and (b) what process she uses to select them. This creates ample opportunity for a justice to develop a detailed understanding of each applicant and select only those individuals who she can trust will pursue her policy goals.³

To assess the extent to which a potential clerk would be a loyal agent, a justice has a large amount of information from which to draw. Supreme Court law clerks predominantly come from elite law schools, from which a justice often has numerous trusted friends and former colleagues whose advice she trusts. Endorsement from someone in this network or other groups trusted by the justice (e.g., the Federalist Society) can help allay concerns about a would-be clerk's loyalty.

The most important source of information likely relates to the applicant's post-law school experience. As Ward and Weiden (2006) note, 98% of clerks serving during the Rehnquist Court had some form of experience clerking for a lower court judge, with well over 90% of those individuals having clerked for a U.S. Court of Appeals judge (p. 77). Such experience can communicate more than mere qualifications to a hiring justice. As Ditslear and Baum (2001) describe,

. . . [T]he hiring of a clerk by a [lower court] judge with a particular ideological bent indicates a degree of confidence that the clerk will follow the judge's ideological lead and thus the justice's lead as well. If the clerk has already served at least part of a term with the judge, as is often

the case by the time a justice chooses clerks, the judge's satisfaction with the clerk's work conveys even more information. (p. 871)

Combined, these aspects of how law clerks are selected provide a justice with a very strong opportunity to find clerks whose ideological beliefs are proximate to her own. What is more, empirical evidence suggests that justices do exactly that. Drawing upon a survey of former law clerks, Peppers and Zorn (2008) find that the most conservative justices were more than five times as likely as the most liberal justices to pick a law clerk who self-identified as a Republican (pp. 66-68; see also Ditslear & Baum, 2001).

A justice's ability to prevent shirking does not end with the initial decision to hire a clerk. Once on the job, a justice can still monitor the law clerk's work by auditing the clerk's decisions. In the cert context, for example, while the law clerk responsible for writing the pool memo has cultivated a higher level of expertise about that *specific* petition, each justice still has access to the raw information the clerk drew upon, meaning that there is no "structural" barrier that prevents a justice from rectifying the informational imbalance. The fact that the possibility of an audit exists serves as yet another tool at the justice's disposal to reduce the risk of shirking.

The potential consequences for a disloyal clerk are also seemingly great. This stems from the incentives a justice can offer to the law clerk for being a faithful agent. Obtaining a Supreme Court clerkship is the single biggest accomplishment possible for a newly minted attorney, carrying with it a tremendous amount of prestige and the potential for very large monetary rewards in the years that follow. Being held in low regard by one's former justice would surely dampen the postclerkship benefits an individual expects to receive. Of course, in the extreme, nothing prevents a justice from firing a shirking law clerk.

Viewed together, and based on principal-agency theory, these reasons lead us to expect much similarity between the behavior of a justice's own law clerk and what the justice would have done herself. Accordingly, we expect that when faced with a recommendation from one of her own law clerks, a justice should be highly likely to follow it.

Other Justices and the Pool Clerk: Signaling Theory

In most instances, a clerk's interactions and work are limited to aiding her employing justice. As we note above, however, the existence of the cert pool makes the agenda-setting process unique because a law clerk's memo and recommendation are distributed to and relied upon by chambers *other* than

that of her own justice. During the 1992 term, for example, a pool memo written by one of Justice Blackmun's clerks would also go to Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas.

While all justices receive the same memo, only the justice who originally hired the law clerk has the ability to use the supervision tools described above. Justice Scalia, for example, has no influence in selecting or overseeing the clerks hired by Justice Blackmun. In short, while principal-agent theory can aid our understanding of a relationship between a law clerk and her employing justice, its utility in generalizing to the cert pool context is limited. As a result, we must look beyond principal-agent theory to offer predictions about how, for example, Justice Ginsburg might react to a cert recommendation from one of Justice Thomas' law clerks.

To generate our predictions for the impact of law clerks on justices other than their own, we turn to general insights from signaling theory (Crawford & Sobel, 1982). A signaling model consists of communication between two actors: a sender and a receiver. Critically, the sender has some informational advantage over the receiver and, as the interests of the sender and receiver move further apart, the value of the communication (i.e., the signal) decreases. In recent years, signaling theory has been used to understand a variety of substantive problems in studying the Supreme Court, including, for example, the interactions between justices and the Solicitor General (Bailey, Kamoie, & Maltzman, 2005) and the Supreme Court's overall decision to grant or deny cert (Black & Owens, in press; Cameron, Segal, & Songer, 2000).

For our purposes, the law clerk is the sender and gains private information while preparing the cert pool memo. During this process, the pool clerk reads the complete record of a case, including the litigants' briefs and any lower court opinions. Additional information in hand, the clerk then sends a signal by making a recommendation to the members of the cert pool. After receiving the cert recommendation, the other justices in the pool (our receivers) recognize that the recommendation made by the law clerk might be wrong or incomplete. Such signaling "errors" might be related to the clerk's skill at interpreting the private information or could be deliberate efforts to influence the receiver. In theory, a skeptical justice could simply examine the record in the case, but owing to the time required, it is a strategy that a justice will only rarely pursue. Accordingly, a justice must turn to efficient and readily available sources of information to assess the validity of the pool clerk's recommendation.

In our context, these sources are (a) the compatibility of the policy preferences between a receiving justice and the pool clerk, (b) the presence of informational cues about the underlying quality of a petition, and (c) the direction of the clerk's recommendation. Turning to the first of these, as noted above,

the behavior of an individual law clerk should closely mirror the preferences of her employing justice. Following this logic, when the ideological distance between a justice and the chambers of the pool clerk's justice increases, so too should the gap between the interests of these two actors. Stated more concretely, when ideological distance is high, the quality of the signal will be doubted, and the receiving justice should be less likely to follow that recommendation. Conversely, if the cert recommendation comes from a clerk of an ideological ally's chambers, it should be viewed more acceptingly. Returning to the previous example, our theory predicts that Justice Ginsburg would, all else equal, eschew a recommendation from one of Justice Thomas' law clerks while accepting a recommendation from one of Justice Souter's law clerks.

In addition to including the clerk's recommendation to grant or deny cert, the pool memo also provides a summary of the factual elements within a petition and the legal arguments being made by the litigants—features that previous studies of agenda setting have documented as important in influencing a justice's cert vote (Tanenhaus, Schick, & Rosen, 1963, p. 118). These informational cues—both positive and negative—provide a justice with a basic way of assessing the underlying importance or “certworthiness” of a given petition. Petitions with many positive cues should be, in a justice's mind, more plausible candidates for cert (i.e., more certworthy) than those with fewer positive cues or more negative cues. For example, when the petition involves a circuit split on a legal question of broad importance a justice should be likely to grant review, even if the petition clashes with her own policy preferences (e.g., Black & Owens, 2009a; Perry, 1991). Conversely, IFP petitions (filed by indigent litigants) should be less likely to be granted review, as they are less likely to contain circuit splits, more likely to be seeking review of an unpublished opinion, and more likely to be filed without the aid of an attorney (Black & Boyd, 2012; Watson, 2006).

These informational cues are likely to operate in connection with the clerk's final grant/deny recommendation. Indeed, we expect that signals that comport with a justice's prior expectation for a petition should be more likely to be followed than those that conflict with a justice's prior belief. To put it more simply, if a petition is considered “certworthy” (i.e., possessing positive cues) and the clerk recommends granting it, then this recommendation should be more likely to be followed than if the law clerk recommends denying the same high-quality petition. However, if a petition is not certworthy, then a deny recommendation should be more likely to be followed than a recommendation to grant. In the above examples, this means that a justice would be more likely to follow a grant recommendation for the petition with conflict and a deny recommendation for the petition submitted by an indigent.

Furthermore, we also posit that the conditional certworthiness–recommendation relationship itself will be affected by ideological distance. When confronting a petition that (a) is certworthy and (b) has a grant recommendation attached to it, a justice should be more likely to follow that recommendation when the policy preferences of the pool clerk (and, in turn, her parent justice) are similar to the voting justice’s own preferences. This intuition is driven by the notion that justices are forward-looking and consider the policy consequences of granting review (Black & Owens, 2009a; Caldeira, Wright, & Zorn, 1999; Owens, 2010). It also implies, for example, that even if the petition is relatively certworthy *and* the pool clerk recommends granting review, Chief Justice Rehnquist would *still* potentially discount a recommendation coming from an ideologically distant chamber such as Justice Blackmun’s more than if the recommendation came from someone like Justice Thomas.

In short, using insights from signaling theory we suggest that two types of conditional relationships are at play. First, the impact of a petition’s certworthiness will be affected by the ultimate recommendation made by a law clerk in the petition. Second, this interplay will itself be conditioned by the level of ideological agreement between a voting justice and the law clerk who wrote the cert pool memo. Together, these expectations form Hypothesis 1, our conditional influence hypothesis. More specifically, we expect the following:

Hypothesis 1a: Pool clerk recommendations to deny noncertworthy petitions should be more likely to be followed than grant recommendations of similarly noncertworthy petitions.

Hypothesis 1b: Pool clerk recommendations to grant certworthy petitions should be more likely to be followed than deny recommendations of similarly certworthy petitions.

Hypothesis 1c: Pool clerk recommendations to grant certworthy petitions should be more likely to be followed by justices ideologically similar to the recommending pool clerk.

Beyond these interactive relationships, studies of advisor influence suggest that other aspects specific to both a justice and the petitions she votes on will affect the probability that a pool clerk’s recommendation will be followed. For example, previous research has shown that a justice’s behavior is not constant over time (Hagle, 1993; Hurwitz & Stefko, 2004). In particular, a newly appointed justice must become accustomed to the unique culture, workload, and responsibilities that come with being a justice on the Court. This effect has also been suggested in the context of new members of Congress, who will be in particular need of advisor assistance so as to help

smooth their transition into their new job (e.g., Leal & Hess, 2004). In the context of cert, this is Hypothesis 2, our justice tenure hypothesis, and with it, we anticipate that these new justices will be especially likely to agree with the recommendations contained in the pool memos.

Finally, petitions with an extensive procedural history or that involve particularly complicated materials will be more likely to require supplementary review and study by the justices themselves (Wahlbeck, Spriggs, & Maltzman, 1998). One consequence of such further study is that a justice will be more likely to turn to the original petition materials used by the pool clerk. As a result, the size of the initial information asymmetry between the law clerk and receiving justice will decrease. As this information asymmetry is, holding all else equal, what drives the power of the law clerk's signal, we expect, with Hypothesis 3, or our procedural complexity hypothesis, that justices will be less likely to follow the law clerk's recommendation in petitions with complex procedural backgrounds.

Data and Measurement

To test these expectations, we analyzed a subset of the petitions considered by the Supreme Court. Using the conference discuss lists in Justice Harry A. Blackmun's files (housed at the Library of Congress),⁴ we created a list of all nondeath penalty⁵ docket numbers for cert petitions that made the discuss list during the 1986, 1987, 1991, and 1992 terms—a total of 1,025 unique docket numbers. We then randomly sampled and coded 305 petitions that yielded a total of 2,036 cert votes.⁶

Our dependent variable is whether there is agreement between the law clerk's pool memo recommendation and the final cert vote cast by a justice in the cert pool. The dependent variable is coded as 1 when a law clerk recommends grant (deny) and the voting justice votes to grant (deny). Otherwise it is coded as 0. Justice votes were coding using Justice Blackmun's docket sheets, and the law clerk's recommendation was obtained by examining the pool memo in each petition.⁷ We obtained both of these materials from Epstein, Segal, and Spaeth (2007).

Operationalizing our conditional influence hypothesis requires three variables: petition importance or certworthiness, ideological distance between pool clerk and pool justice, and clerk recommendation. To understand what aspects of a petition make it certworthy, we turn to a series of important studies on agenda setting (e.g., Bowie & Songer, 2009; Caldeira et al., 1999; Caldeira & Wright, 1988; Tanenhaus et al., 1963; Ulmer, Hintz, & Kirklosky, 1972). Using the findings of this existing research, we construct our certworthiness

variable as a summary of the various informational cues used by justices in their decision making at the cert stage. Specific details about how we measure this summary measure and how we code its underlying variables are presented in the appendix. The resulting variable, Certworthiness, has a mean of 0.35, a standard deviation of 0.31, and a range from 0.01 to 0.98.

The second component of our signaling hypothesis is the ideological distance between a voting justice and the chambers of the clerk who authored the pool memo. We operationalize this component by including Ideological Distance, which is coded as the absolute value of the difference between a voting justice's Martin-Quinn score and the score of the justice whose law clerk authored the pool memo (Martin & Quinn, 2002). When the memo is authored by a justice's own law clerk there is no spatial distance and the variable takes on a value of 0.

The third and final interactive component is the pool memo writer's recommendation. We code Clerk Recommendation as 0 when the law clerk recommends deny and 1 when the clerk recommends grant for a petition.

Turning to our justice tenure and complexity hypotheses, we capitalize on important recent developments in the study of acclimation effects (e.g., Collins, 2008; Kaheny, Haire, & Benesh, 2008) and measure Justice Tenure as the number of years that a justice had been on the bench before casting her agenda-setting vote.⁸ Finally, we include Procedural Complexity, which we operationalize as the proportion of pages in a cert pool memo that were devoted to discussing the facts of the case and proceedings of the lower court(s). When a petition has a complex set of facts or case history in the lower courts—that is, the one that a justice might be more likely to investigate herself—this should be reflected in the pool memo by the clerk's need to spend comparatively more time discussing such issues. On average, 44% of a pool memo is devoted to the procedural history, with a standard deviation of 16%.

Method and Results

Our dependent variable is dichotomous, so we estimate a logistic regression model. Table 1 reports the results for this model. As both the statistical significance and the sign of an interactive term can change across a variable's range (Berry, DeMeritt, & Esarey, 2010; Kam & Franzese, 2007),⁹ we follow the advice of King, Tomz, and Wittenberg (2000) and Brambor, Clark, and Golder (2006) and present our key results visually. Doing this allows us to better test Hypothesis 1 and examine the combined effect of deny or grant recommendations, petitions' certworthiness, and the ideological distance between pool clerks and pool justices, each across their different values.

Table 1. Logistic Regression Results of Agreement Between a Law Clerk's Recommendation Regarding a Cert Petition and a Justice's Vote

Variable	Coefficient	Robust SE
Justice tenure	-0.037*	0.006
Procedural complexity	0.603	0.375
Clerk recommendation	-2.756*	0.397
Ideological distance	-0.066	0.095
Certworthiness	-4.006*	0.500
Certworthiness × Ideological distance	0.258	0.303
Certworthiness × Clerk recommendation	6.142*	0.721
Clerk recommendation × Ideological distance	-0.176	0.237
Certworthiness × Clerk recommendation × Ideological distance	-0.204	0.431
Constant	2.588*	0.233
Observations	2,035	
Pseudo R^2	0.121	
Log likelihood	-969.601	
% correctly predicted	78.0	
Proportional reduction in error	5.3	

Note: Robust standard errors are reported in the right-hand column. See the text and Figures 1 through 4 for interpretation of the interaction terms across all values. To allay concerns about unmodeled dependence among our observations, we follow the advice of Zorn (2006) and reestimated the model with standard errors clustered on justice and petition. The substantive results we report below are unchanged when we use these different error structures. * $p < .05$ (two-tailed).

We begin by examining the impact of the recommendation (signal) sent by the law clerk to pool justices. The top panel of Figure 1 displays the predicted probability of justice-law clerk agreement in a petition with a low level of certworthiness, conditional on the pool memo's recommendation (i.e., grant vs. deny). The x -axis in this figure portrays the ideological distance variable, which ranges from 0 (i.e., a justice's own clerk is making the recommendation) to a maximum value of approximately 4.4, which is substantively equivalent to Justice Thomas considering a recommendation from Justice

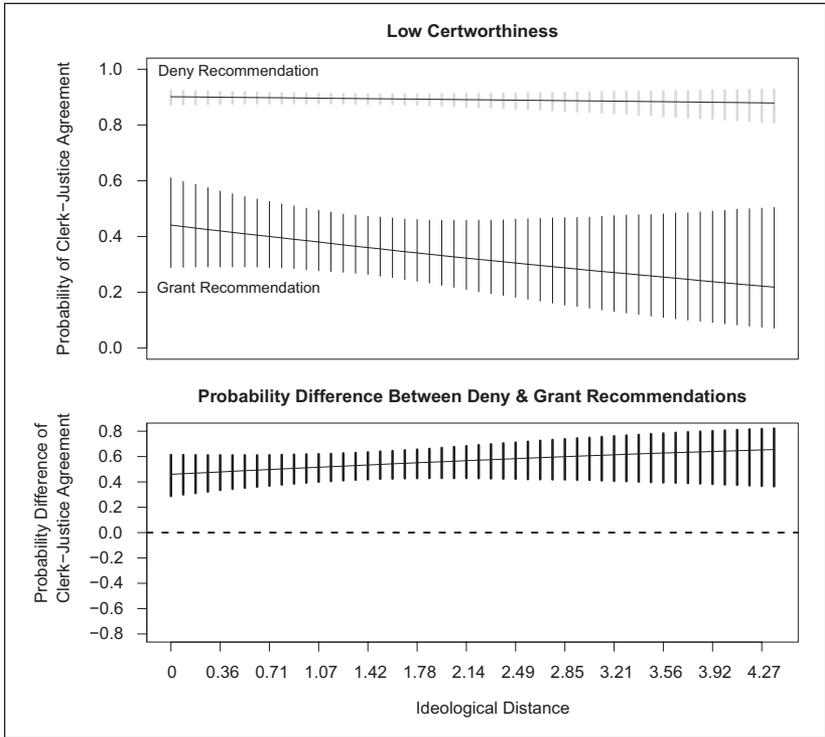


Figure 1. Predicted probability of clerk–justice voting agreement (top panel) and the difference in predicted probability between a grant versus deny recommendation (bottom panel) for a petition of low certworthiness
Note: Low certworthiness petitions have a probability of being granted of 0.05. Horizontal lines represent the point estimates and the vertical lines are equivalent to 95% confidence intervals. Values obtained through stochastic simulations similar to Clarify.

Blackmun’s chambers. As the figure makes clear, given a low level of certworthiness, a recommendation of deny has roughly a 0.90 probability of being followed. By contrast, a grant recommendation has, at best, a 0.44 probability of being followed. What is more, as evidenced by the utter flatness of the prediction line, the deny recommendation is unaffected by the role of ideological distance. Stated differently, presented with a deny recommendation from a clerk of Justice Scalia in a case that appears to be of low certworthiness, Justice Thomas, an ideological ally, is just as likely to follow it as Justice Blackmun, an ideological opponent. Both justices are willing to take Scalia’s clerk’s word that the petition in question is not worthy of review.

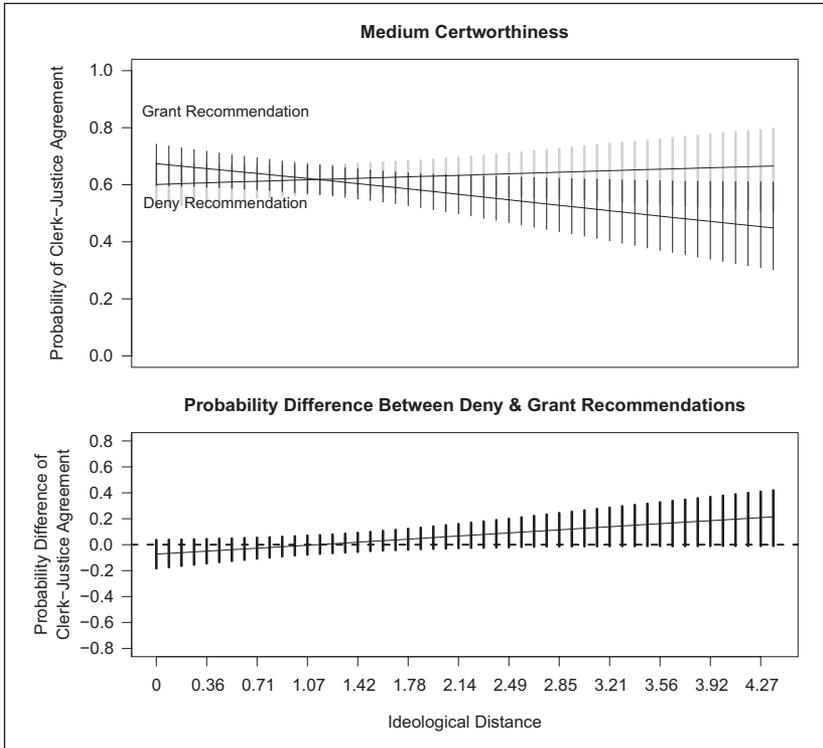


Figure 2. Predicted probability of clerk–justice voting agreement (top panel) and the difference in predicted probability between a grant versus deny recommendation (bottom panel) for a petition of medium certworthiness. Note: Medium certworthiness petitions have a probability of being granted of 0.50. Horizontal lines represent the point estimates and the vertical lines are equivalent to 95% confidence intervals. Values obtained through stochastic simulations similar to Clarify.

Substantively speaking, this is an important finding, as a significant portion of cert petitions considered by the justices will ultimately fall into this category where the clerk’s deny recommendation is the final word.

Turning next to Figure 2, which illustrates the identical quantities for a petition on the cusp of certworthiness, we see a much different set of results. Note that, for low values of ideological distance, the ordering of the grant and deny lines is reversed from Figure 1. From viewing the figure, a grant recommendation appears to be slightly more likely to be followed than a recommendation to deny. To examine whether this difference is statistically significant,

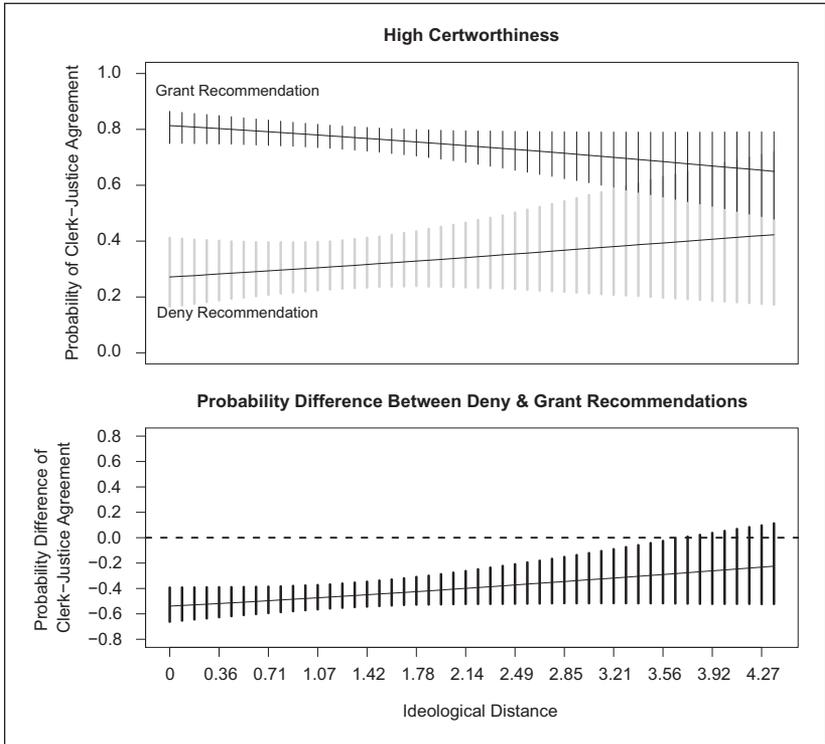


Figure 3. Predicted probability of clerk–justice voting agreement (top panel) and the difference in predicted probability between a grant versus deny recommendation (bottom panel) for a petition of high certworthiness. Note: High certworthiness petitions have a probability of being granted of 0.85. Horizontal lines represent the point estimates and the vertical lines are equivalent to 95% confidence intervals. Values obtained through stochastic simulations similar to Clarify.

however, we turn to the bottom panel of the figure, which plots the *difference* in the probability clerk–justice agreement for these two types of recommendations. Since the vertical 95% confidence intervals in this panel intersect with 0 across all values of ideological distance, the difference between a grant and deny recommendation is never statistically significant for petitions of medium certworthiness. In other words, for petitions that are of moderate quality, the recommendation from the law clerk is regarded by *any* pool justice, *regardless* of her ideological distance from the clerk, as being uninformative.

Figure 3 shows these same quantities for a petition of high certworthiness. Here, a grant recommendation is always more likely to be followed than a

deny recommendation, and this difference is substantial. We also find that the size of this difference is conditioned by the amount of ideological distance between the law clerk and the voting justice. This is evidenced by the upward slope on the line in the bottom panel of the figure, which indicates that the magnitude of the difference is decreasing as ideological distance increases. A clerk who recommends denying a certworthy petition to her own justice can expect roughly a 0.54 decrease in the probability that her justice will follow her recommendation. When that same recommendation hits the desk of a more ideologically distant justice, however, the justice's probability of not following the recommendation drops by only 0.22. What is more, for the most ideologically distant justices, the deny recommendation will not be penalized at all, as indicated by the fact that for large values of ideological distance the confidence interval contains zero. As expected, these justices, skeptical of whatever recommendation comes from the law clerk of an ideological opponent, appear to place very little informational value on the substantive advice offered by the cert pool when the petition is a likely candidate for cert.

Across all three of the previous figures, the predicted probability of justice-clerk agreement, when the pool clerk recommends grant, appears to be influenced by the value of ideological distance. That is, regardless of the certworthiness of a petition, the likelihood of agreement for a *grant* recommendation decreases as ideological distance increases. To shed further light on this relationship, we turn to Figure 4 which plots, across the range of certworthiness values (on the *x*-axis), the difference in the probability that a justice will agree with the pool clerk's recommendation when that clerk is from that justice's chambers and when that clerk is from an ideologically distant chamber (measured at two standard deviations above the mean ideological distance). Here, this increase is, in substantive terms, the equivalent of Justice Blackmun looking at a memo authored by his own clerk versus looking at one authored by a clerk of Justice Scalia's (or vice versa). The figure thus allows us to directly assess, as part of our conditional influence hypothesis, if and when ideology conditions the apparent influence of law clerks when making grant recommendations.

Figure 4 suggests that the answer to this question is "sometimes." In particular, we note that for low levels of certworthiness, ideological distance does not appear to affect the likelihood of justice-clerk agreement. For generally low values of quality (specifically from 0.01 up through 0.30), receipt of a recommendation from an ideological opponent versus a trusted ally does not make a justice any more or less likely to vote consistent with the clerk's

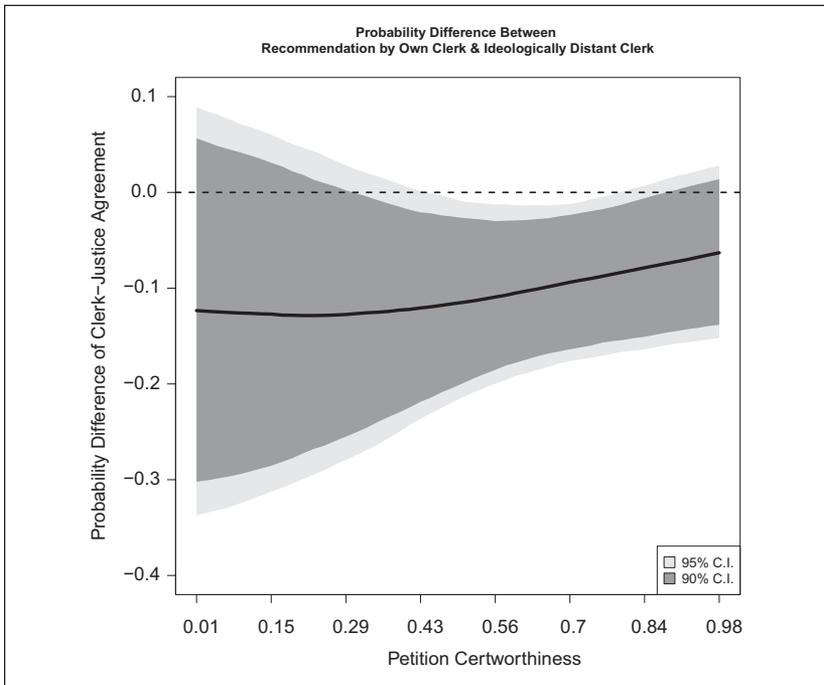


Figure 4. Marginal effect of having one’s own clerk author the pool memo making a grant recommendation versus a justice who is ideologically distant (i.e., two standard deviations away) on the likelihood of justice–clerk agreement. The solid black line is the point estimate and the shaded area represents the confidence interval around that estimate. Values obtained through stochastic simulations similar to Clarify.

recommendation. Among the highest quality petitions, this effect again disappears. However, when certworthiness takes on values in the middle to middle-high range of the spectrum—that is, between 0.31 and 0.88—the effect of ideology is statistically significant. For these petitions, the same increase in ideological distance between pool clerk and pool justice does have a statistically meaningful effect. In particular, if the petition is equally likely to be granted or denied review (i.e., quality is 0.50), having the grant recommendation come from an opponent’s clerk as opposed to one’s own reduces the probability of agreement by 0.11, which represents a relative decrease of roughly 20%. Approximately, 27% of our observations fall within this interval where the effect is significant.¹⁰

Beyond our conditional influence hypothesis, we find mixed support for our other two hypotheses of interest. We fail to find a systematic relationship between a petition's complexity and the likelihood of justice-clerk agreement (Hypothesis 3). We do find, however, that, as predicted in Hypothesis 2, our justice tenure hypothesis, that newcomers to the Court are systematically more likely to follow a pool memo recommendation than are their more senior colleagues. A justice with a few months of experience (i.e., a value of 0.35 years) on the Court follows a pool recommendation with a predicted probability of 0.81, whereas a justice with roughly 30 years of experience is predicted to follow a pool recommendation with only a probability of 0.59 ($p < .05$, two-tailed test).¹¹

Discussion

We began this article with a simple yet important question: Do law clerks influence the justices' cert decision-making process? As we noted at the outset of this article, this inquiry is an important one because it provides insight into the Court, its agenda-setting process, and the critical role played by law clerks. As law clerks, unlike the justices they work for at the Court, do not have a direct constitutional connection (via Article III) to the other political branches, detecting and examining the influence that they may have on the Court's outputs becomes all the more critical. While previous studies have found evidence not inconsistent with influence, they have been limited in their ability to control for a justice's likely action *absent* the clerk's advice. Having controlled for this essential component, we find conditional evidence of clerks influencing the likelihood of justices voting against their prior beliefs in decisions to grant or deny cert.

Indeed, our results indicate that the complexities of the Court's agenda-setting process interplay with one another to lead to clerk influence on justice cert voting. In particular, the law clerk's cert recommendation interacts with the quality of the petition and the comparative ideology of the voting justice. At times, this can lead to justice voting that we would not otherwise expect.

To see the potential consequences of this conditional influence unveiled in this study, consider a situation with a highly certworthy petition where the cert pool author recommends deny instead of grant. We estimate approximately a 25% chance of a justice ignoring the petition's general certworthiness and following a recommendation urging that the petition be denied review. When the threshold for review is only four votes, even a single vote switch could

have a tremendous impact on the shaping of the Court's docket. Indeed, of the petitions in our sample, just below 20% were either granted review with a minimum winning coalition of four votes or denied review having fallen only one vote short. In short, our findings suggest law clerks' influence can make the difference in whether a petition is granted or denied review. Given the high stakes involved when the Court sets legal policy, this is a reasonably large amount of influence to be wielded by a small number of newly minted (and generally inexperienced) lawyers.

Our results also have meaningful ramifications for the Court as an institution and, in particular, the usefulness of the cert pool. We find, for example, that the likelihood of a justice agreeing with a clerk's recommendation is inversely related to the ideological distance between the two, meaning that clerks apparently carry their justices' ideological preferences with them while crafting cert memos for the pool. While this might aid the employing justice as she pursues her policy preferences, it runs contrary to the intended goal of the cert pool: to provide a factual and efficiency-based service for participating justices. Our findings thus seem to indicate that, perhaps unsurprisingly, the internal politics and conflicts that characterize other aspects of decision making on the Court trace back to the earliest moments of when the Court contemplates reviewing a case.

More generally, our results also have implications for the ongoing debate over the selection and role of political advisors. Contemporary events that underscore the lack of political accountability for advisors fuel this controversy. For example, in early 2006, newly appointed Supreme Court Justice Samuel Alito hired as a law clerk a former counselor and close personal advisor to then Attorney General John Ashcroft, a move that generated some media attention and concern as to the ideological agendas of law clerks (Lane, 2006). This criticism also extends beyond the Court. During President Bush's two terms in office, he was criticized for selecting very conservative staff members and for allowing some in his inner circle to have a substantial voice in White House policy (e.g., Mann, 2004).

The evidence we present here suggests that these concerns may not be completely unfounded. Although future efforts are needed to generalize these findings across the other branches of government, we have little reason to doubt that advisor influence is any weaker for legislators and presidents—though it might be more difficult to measure and document. As such, if taken seriously and studied rigorously, the question of advisor influence over political principals could lead to a more complete understanding of the factors that affect political decision making.

Appendix

Measuring Certworthiness

As noted in the main text, our certworthiness variable is a summary of the various informational cues used by Supreme Court justices in their agenda setting decision making. These underlying cues fall into four broad categories (legal conflict, U.S. position, lower court decision characteristics, and petition characteristics) and are detailed in Table A1. To produce a summary of these various components, we first estimated a logistic regression model at the *petition* level, where the dependent variable was coded as 0 if the Court ultimately denied a petition and 1 if the Court granted the petition. This model, reported in Table A2, successfully predicts roughly 82% of the petition outcomes, which translates into a 48% reduction in error overguess the modal petition outcome (i.e., deny). We then used these estimates to generate the predicted probability that each petition would be granted review (conditional on its values for these independent variables), which ultimately serves as the certworthiness variable that we use in our main model.

Table A1. Certworthiness Control Variable Measurement Summary

Broad area	Variable name	Measurement
Legal conflict	Legal conflict alleged	Does petitioner allege conflict between decision below and Supreme Court or Court of Appeals precedent? 0 = <i>no</i> , 1 = <i>yes</i> .
	Legal conflict exists	Does clerk note conflict alleged by petitioner is real? 0 = <i>no</i> , 1 = <i>yes</i> .
U.S. position	U.S. supports grant	Does U.S. ask for review either as petitioner or through participation as <i>amicus curiae</i> ? 0 = <i>no</i> , 1 = <i>yes</i> .
	U.S. opposes grant	Is the U.S. the respondent to a petition or has it filed a brief in opposition to the granting of reviewing as <i>amicus curiae</i> ? 0 = <i>no</i> , 1 = <i>yes</i> .
Lower court decision characteristics	Dissenting opinion present	Did a judge in the court immediate below the Supreme Court write a dissenting opinion in the case? 0 = <i>no</i> , 1 = <i>yes</i> .
	Lower court opinion unpublished	Was the opinion of the lower court published in the relevant federal or state reporter? 0 = <i>published</i> , 1 = <i>unpublished</i> .

(continued)

Table A1. (continued)

Broad area	Variable name	Measurement
	Lower court reversed	Did the court immediately below the Supreme Court reverse the decision of the court below it (usually a trial court)? 0 = no, 1 = yes.
Petition characteristics	Constitutional claim	Does the petitioner allege that his or her constitutional rights have been violated by the decision of the lower court? 0 = no, 1 = yes.
	IFP petitioner	Is the petitioner filing his or her petition <i>in forma pauperis</i> ("in the form of a pauper")? 0 = no, 1 = yes.
	Civil liberties	Does the case raise a legal question that falls into the areas of criminal procedure, due process, the First Amendment, civil rights, privacy, or attorneys? 0 = no, 1 = yes. We take this definition of civil liberties from (Segal & Spaeth, 2002).
	Amicus briefs	The number of briefs filed both supporting and opposing the granting of cert by friends of the court (<i>amici curiae</i>).

Table A2. Logistic Regression Model of Petition Certworthiness Used to Generate Our Certworthiness Variable

Variable	Coefficient	Robust SE
Legal conflict alleged	0.476	0.411
Legal conflict exists	2.748*	0.397
U.S. supports grant	1.753*	0.484
U.S. opposes grant	-0.182	0.375
Dissenting opinion present	0.512	0.387
Lower court reversed	0.325	0.361
Constitutional claim	-0.175	0.388
IFP petitioner	-1.924*	0.541
Lower court opinion unpublished	0.188	0.426
Civil liberties	-0.580	0.431
Amicus briefs	0.299	0.215
Constant	-1.780*	0.410

(continued)

Table A2. (continued)

Variable	Coefficient	Robust SE
Observations	305	
Pseudo R ²	0.365	
Log likelihood	-125.090	
% correctly predicted	82.0	
Proportional reduction in error	48.1	

* $p < .05$ (two-tailed).

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Notes

1. The decision to participate in the cert pool was and continues to be one made by each individual justice. Clerks in nonpool chambers are responsible for reviewing (although not necessarily writing memos on) nearly all of the petitions for cert before the Court (Stevens, 1982, p. 179).

2. Interview-based evidence from Perry (1991) suggests that some nonpool clerks would, on occasion, use social connections with other clerks to get information from the pool memo (pp. 54-55). As a formal matter, however, the pool memo was not distributed to nonpool chambers.

Although the treatment of this memo varies by chamber, most justices have their clerks engage in some level of markup (Peppers, 2006). In Justice Blackmun's chambers, one of his clerks would review the pool memo and then provide his or her own recommendation as to whether the petition should be granted cert including, on occasion, a paragraph or more, arguing for a wholly different substantive outcome from the pool clerk.

3. We note this trust can arise through at least two possible mechanisms: First, a justice could hire a clerk whose sincere preferences are similar to her own. Second, however, a justice could still hire someone whose preferences are divergent and receive useful information since, as suggested by Calvert (1985), the nature of that bias will be known by the justice. Moreover, we suggest that the incentives a justice can offer (detailed below) will further dissuade an ideologically distant clerk from shirking against her employing justice.
4. As the formation of the discuss list is a nonrandom process and those petitions not making the list are summarily denied (Caldeira & Wright, 1990), there is an initial selection process that we do not directly account for in this study. We ultimately believe this limitation biases against finding the level of influence that we report below. This stems from the fact that petitions that fail to make the discuss list are, by definition, of lower certworthiness than those that do make it. Moreover, as our results show (e.g., Figure 1), it is precisely in these low certworthy petitions that we observe the highest levels of justice-clerk agreement.
5. During the terms analyzed, the Court had a separate decision-making process for reviewing death penalty cases. First, all death penalty petitions were automatically added to the discuss list. Second, it was the standing policy of Justices Brennan and Marshall to vote to grant the petition, vacate the death penalty portion of the lower court decision and remand the case for further proceedings (Lazarus, 2005). These facts counsel against considering them in conjunction with nondeath penalty cases.
6. Evidence presented by (Black & Owens, 2009b) demonstrates that Blackmun's agenda-setting voting records are very reliable.
7. We follow Spaeth (2001) and coded a justice as voting to grant both when she actually voted to grant and also when she voted to "Join 3," which becomes a grant vote if there are three other votes to grant. Our results remain the same if we recode Join-3 votes as missing data.
8. We note that our results are substantively the same if we use the dichotomous coding protocol suggested by Hagle (1993) and Maltzman, Spriggs, and Wahlbeck

- (2000; i.e., the first two complete terms a justice serves). Our results are also the same if we take the natural logarithm of a justice's tenure.
9. In other words, that some of the interaction variables in Table 1 do not appear to be statistically significant does *not* ultimately mean the variable is not statistically or substantively significant. Additional postestimation calculations are required to assess their effects (Berry et al., 2010).
 10. Note that Figure 4 presents two levels of confidence intervals for our point estimates. We use the 90% intervals to arrive at the 27% value. The same effect is statistically significant at the 95% and 80% levels for around 15% and 75% of our observations, respectively. All confidence levels are two-tailed. We report multiple levels owing to the fact that the selection of a particular level is ultimately somewhat arbitrary (see, for example, Gelman & Stern, 2006; Gill, 1999).
 11. These are the 5th and 95th percentile values of Justice Tenure, respectively.

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