

# LAW CLERKS AS ADVISORS: A LOOK AT THE BLACKMUN PAPERS

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*The Justices of the United States Supreme Court seek advice, by way of cert pool memos, when making their consequential agenda-setting decisions. There is some debate over the extent to which these law clerks actually influence the Justices. Focusing on the certiorari stage and on the information and advice provided to the Court via the cert pool memos, we ascertain the extent to which the contents of the memos drive the decision making of the Court. We find that information about conflict, amici, and the position of the United States does indeed influence the Court's votes, but also that the clerks' specific advice, the apparent percolation of the issue, and the perceptions of the strength of the reasoning below matters as well. We conclude with some thoughts on the findings and directions for future research.*

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## I. INTRODUCTION

The articles in this symposium all concern themselves with the role of the judicial law clerk, and given that this symposium is the first of its kind and law clerks have been around for a very long time, it is clear that this attention is long overdue. In this Article, we focus on the potential influence law clerks *as advisors* may have on the Justices of the U.S. Supreme Court by attempting to trace the extent to which the memoranda clerks draft for their Justices regarding petitions for certiorari are influential to the Justices' decision making, both in their recommendation as to cert and in the information they contain.

We begin our discussion with the evolution of the institution of the law clerk and continue with a discussion of the various duties Supreme Court law clerks undertake and of how they are selected for the job. Focusing on the cert pool, we discuss the stage at which the influence of law clerks is plausibly at its apex, detailing the memoranda drafted and their contents and outlining their potential influence on the decisions made by the Justices in setting their agenda. Considering the law clerks to be advisors, not unlike the advisors used by other elites and by people in their everyday lives, we attempt to ascertain whether the advice of the law clerks matters by considering a model of cert decisions that includes the advice of the law clerk (and controls for all other known determinants of the cert vote). We also consider the actual information the advisors provide, ascertaining whether the presence of said information influences the decisions on cert as well. We end with some directions for further research and some thoughts on the role of the law clerk uncovered by our analysis.

## II. HISTORY OF THE SUPREME COURT LAW CLERK

Established in Article III of the United States Constitution in 1789, the Supreme Court of the United States is the highest federal court in the land.<sup>1</sup> Under the Judiciary Act of 1789, Congress provided for a Supreme Court that consisted of six Justices: a Chief Justice, and five

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1. U.S. CONST. art. III, § 1.

Associate Justices.<sup>2</sup> That number was increased to nine in 1869,<sup>3</sup> with eight Associate Justices and one Chief Justice, who presides over impeachment cases in the Senate, is the spokesperson for the Judicial Branch in public and before Congress, and manages the Court's public sessions and oral arguments.<sup>4</sup> Since the Court's inception, the primary role of the Supreme Court has been as an appellate court, hearing appeals from lower state and federal court decisions to ascertain whether the law has been applied correctly and whether appropriate procedures were followed.

Early in the Court's history, the Justices met the demands of appeals on their own, given that the Court's attention was not often sought.<sup>5</sup> However, with the expansion of the United States and the purchase of new territory, as well as an increase in the types of cases the Court could hear, it became evident that the Court needed help.<sup>6</sup> Congress created a system of federal circuit courts to serve as an intermediate appellate court, alleviating some of the increasing demands on the Justices.<sup>7</sup> However, this solution proved to be insufficient, as the Court began to fall behind yet again.<sup>8</sup> This time Congress responded to the Justices' pleas by passing the Certiorari Act of 1925,<sup>9</sup> which allowed the Court greater control over its docket by decreasing automatic appeals and by granting the Court the power to determine whether cases were worthy of its time.<sup>10</sup> Under the Act, most requests for the Court's attention would be made via a petition for a writ of certiorari, and the Court

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2. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

3. Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44, 44.

4. U.S. CONST. art. I, § 3; ELDER WITT, GUIDE TO THE U.S. SUPREME COURT 753 (2d ed. 1990) (citing JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 70–71 (1958)).

5. WILLIAM REHNQUIST, THE SUPREME COURT 8–9 (new ed., Alfred A. Knopf 2001) (1987).

6. *Id.* at 9.

7. Judiciary Act of 1891 (Everts Act), ch. 517, §§ 2, 6, 26 Stat. 826, 826, 828.

8. REHNQUIST, *supra* note 5, at 9.

9. Certiorari Act of 1925, ch. 229, 43 Stat. 936.

10. *Id.* This is, of course, a major grant of power as well. Indeed, one of the leading explanations for Supreme Court decisions, the attitudinal model, explicitly credits the level of docket control afforded to the Court to be a prerequisite to ideologically based decision making. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 93 (2002). By gaining so much control over the cases it hears, the Court can necessarily focus on those cases with the strongest public policy implications, which are, by their nature, less legally clear and more ideologically disputed. *See id.*

would be empowered to accept or deny the cases brought to it, largely as it saw fit.<sup>11</sup>

### III. CREATION OF LAW CLERKS

Of course, as the country modernized and more laws were written and more lawsuits were brought, and as the Court became a more powerful player in American politics, more and more litigants sought the Court's attention.<sup>12</sup> The Justices started to receive many more petitions than they could plausibly hear, and deciding which cases to decide became a major part of their job and a substantial use of their time.<sup>13</sup> To assist in this winnowing process, an institution evolved: the law clerk.

An overburdened Court requested that Congress hire clerks, but Congress did not, at first, oblige, so many of the Justices turned to current employees already working at the Supreme Court to assist with clerk-like duties.<sup>14</sup> In 1882, Justice Horace Gray, on his own and using his own money, hired the first law clerk of the Supreme Court to assist him with his work.<sup>15</sup> The success of that first law clerk convinced Congress to hire and pay law clerks to assist all of the Justices.<sup>16</sup> At first, clerks were utilized like secretaries, charged with copying opinions and typing what their Justice requested.<sup>17</sup> Clerks investigated case law,<sup>18</sup> but their role was largely to learn the law and to type exactly what they were told.<sup>19</sup>

By 1919, the clerk moved from a secretarial role to that of a research assistant.<sup>20</sup> Clerks were no longer solely investigating case law and typing opinions for their Justice.<sup>21</sup> Instead, during this regime, the Justices wrote initial drafts of opinions and law clerks served as editors,

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11. REHNQUIST, *supra* note 5, at 9.

12. See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 25 (2006).

13. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 41 (2006).

14. WARD & WEIDEN, *supra* note 12, at 24.

15. *Id.*

16. *Id.*; see Sundry Civil Act of 1886, ch. 902, 24 Stat. 222, 253.

17. WARD & WEIDEN, *supra* note 12, at 34.

18. WITT, *supra* note 4, at 769.

19. See WARD & WEIDEN, *supra* note 12, at 34.

20. *Id.*

21. *Id.* at 35.

ensuring appropriate citations were used and inserting relevant footnotes.<sup>22</sup> Because of this editing role, clerks became more involved in research and frequently contributed to the Justices' written work product.<sup>23</sup> When a Justice needed additional information, he would turn to clerks to conduct research and find sources to support his arguments.<sup>24</sup>

By 1942, according to Ward and Weiden, the role of clerks shifted again, so much so that they consider clerks from this time forward to be "junior justices."<sup>25</sup> The number of clerks doubled, with each Justice now employing two law clerks instead of one.<sup>26</sup> As a junior justice, clerks were active decision makers expected to review and analyze cert petitions, to make recommendations as to whether cert ought to be granted, and to draft opinions for their Justice, switching from the role of editor to that of first drafter.<sup>27</sup> Making this more substantive use of the law clerks, Justices could keep up with their increasing workload and no Justice, even those who were among the slowest of writers, would fall behind.<sup>28</sup>

In 1970, Congress allowed each Justice to hire two additional clerks, giving each Justice a total of four law clerks, and the institution of the law clerk was transformed yet again.<sup>29</sup> Clerks became even more involved in opinion-writing, given that the availability of additional clerks meant less clerk time was spent reviewing cert petitions.<sup>30</sup> Obviously, this delegation provides a venue for clerks to assume influence and possibly shape public policy, given that the Supreme Court's opinions communicate the legal policy they make.<sup>31</sup> On occasion, opinions for cases drafted by law clerks have been released under the Justice's name, with no major revision.<sup>32</sup> This apparent

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22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 200.

26. *Id.* at 36.

27. *See id.* at 36–41.

28. *See id.* at 39.

29. *Id.* at 45.

30. *Id.*

31. *See* 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, 167 (2002).

32. WARD & WEIDEN, *supra* note 12, at 241.

increase in power<sup>33</sup> meant that clerkships became more and more attractive and the Justices could be more and more discriminating in their hiring decisions, making the selection of these ever-more-involved actors more and more important.<sup>34</sup>

Other articles in this symposium address clerk selection,<sup>35</sup> but a few things are particularly important to our consideration of law clerks as advisors, so we consider the aspects of the selection process bearing on the degree to which Justices will rely on their law clerk advisors.

#### IV. SELECTION OF CLERKS

We know that each Justice chooses four law clerks to work in his or her chambers to assist with opinion writing, determine the cert-iness of petitions, or perform other clerical duties and that each Justice has his or her own system for choosing these clerks.<sup>36</sup> However, the attractiveness of the Supreme Court clerkship means that the Justices can be very choosy, focusing only on the “best of the best.”<sup>37</sup> Hence, Supreme Court clerks tend to hail from prestigious law schools with

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33. *Id.* at 241–42. For some time, scholars have been interested in whether law clerks, who work for the Justices, influence the Court’s decision making. EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 271–72 (2005); BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 34, 241 (1979); 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, 164 (2012); Corey Ditslear & Lawrence Baum, Research Note, *Selection of Law Clerks and Polarization in the U.S. Supreme Court*, 63 J. POLITICS 869, 870 (2001); Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 53 (2008); Wahlbeck et al., *supra* note 31, at 167; William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, at 74, 75. The image of clerks influencing the outcome of a Justice’s decision, and ultimately the outcome of a case, is seen by some as inappropriate and unwarranted. LAZARUS, *supra*, at 271–72. Lazarus suggests that at least some Justices willingly ceded power to ideologically motivated clerks, with profound consequences. *See id.* at 274. Of course, this argument is made by a former clerk with potentially exaggerated notions of his own influence, and he does not provide empirical evidence to demonstrate his claims.

34. *See* WARD & WEIDEN, *supra* note 12, at 57.

35. *See, e.g.*, Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 340 (2014); Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289, 291–98 (2014); Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 MARQ. L. REV. 181, 190 (2014); John J. Szmer, Erin B. Kaheny & Robert K. Christensen, *Taking a Dip in the Supreme Court Clerk Pool: Gender-Biased Discrepancies in Clerk Selection*, 98 MARQ. L. REV. 261, 263–66 (2014).

36. WARD & WEIDEN, *supra* note 12, at 45, 108.

37. *See id.* at 70–71.

impressive pedigrees and have experience on law reviews as well as experience clerking with a lower court judge (many of whom feed their clerks up to specific Supreme Court Justices, which we discuss in detail shortly).<sup>38</sup> Many of the first clerks to work for the Justices came from Harvard, and that tradition continues, as most law clerks now hail from Harvard or Yale.<sup>39</sup> If one considers law school pedigree as a proxy for “quality,” then it may be the case that clerks will be differentially influential, depending on the law school they attended. Of course, given that so many attend the most prestigious law schools, there will likely be little variation in quality; all of them will likely be of superior quality.

Becoming perhaps even more important than pedigree, though, is experience clerking for a lower court judge, and that experience has ideological as well as qualifications implications for the clerk-as-advisor. Today, it is almost always the case that a Supreme Court clerk has first clerked for a lower court judge; indeed, “securing a clerkship on the courts of appeals with one of the top ‘feeder’ judges has become a virtual requirement” for any candidate to clerk at the Supreme Court.<sup>40</sup> “Feeder judges” are those lower court judges who consistently place clerks on the Court due to the relationship they have forged with specific Justices.<sup>41</sup> Given the increase in applications, the Justices need help choosing good clerks, and one major requirement that appears to be quite important to most of the Justices is ideological congruence.<sup>42</sup> Indeed, Ward and Weiden find “a remarkable ideological congruence between justices and clerks” such that liberal clerks generally work for liberal Justices and vice versa.<sup>43</sup> Given that we know that, in general, people are more receptive to advice with which they agree,<sup>44</sup> this suggests that the Justices will be most attentive to their own clerks and the clerks for the Justices with whom they most frequently agree. And given that these feeder judges are consistently providing the Justices with quality, ideologically congruent clerks, the opinions of these feeder

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38. *Id.* at 68–69, 239.

39. *Id.* at 70–75.

40. *Id.* at 107.

41. *Id.* at 68–69, 75, 80–83.

42. *Id.* at 83.

43. *Id.* at 55; *see also* Christopher D. Kromphardt, *supra* note 35, at 295, 297.

44. *See, e.g.*, Michael H. Birnbaum & Steven E. Stegner, *Source Credibility in Social Judgment: Bias, Expertise, and the Judge’s Point of View*, 37 J. PERSONALITY & SOC. PSYCHOL. 48, 48–49 (1979).

judges may also affect the way in which the Justices view the decision made below, which will be explored further below.

Given this information on selection, we might consider clerk advice to be quite influential, given that clerks are quality sources who tend to agree with the Justices for whom they work. In addition, we might expect some pieces of information about cases petitioned to the Court to be particularly useful to the Justices in amassing their docket. Indeed, the cert decision, becoming more and more difficult as petitions become more and more numerous,<sup>45</sup> is just the place to consider the role of clerks as advisors. The clerks themselves single out the cert stage as the stage at which their input is most influential.<sup>46</sup> In the next section, we detail the certiorari process and the role clerks play in it. We then examine the political science literature on certiorari to date and attempt to ascertain whether, in addition to the known determinants of cert, the recommendations of the clerks (the Justices' advisors) also matter and whether the information they provide to the Justices, via the cert pool memos, contributes to Supreme Court decision making on cert.

#### V. THE CERT POOL

One of the most influential institutional design changes in considering the role of the law clerk at the U.S. Supreme Court was the creation of the "cert pool."<sup>47</sup> The cert pool, like the institution of law clerks itself, was designed to reduce the workload of the Justices by combining efforts while also improving decision making and by providing edited, reliable information about the cases requesting Supreme Court review.<sup>48</sup> Justice Lewis F. Powell Jr., who suggested the cert pool in 1972, thought the institution would reduce duplication of effort.<sup>49</sup> "Rather than have nine clerk-written memos on each case, the pool of clerks would divide up all the petitions and produce only one memo on each case for all the justices who chose to participate."<sup>50</sup> This also, however, provided an opportunity for the clerks to influence the decision making of the Justices. As more petitions were filed, the clerks' recommendations arguably became even more important. Via the cert

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45. WARD & WEIDEN, *supra* note 12, at 109, 125.

46. *Id.* at 146-47.

47. *Id.* at 147.

48. *See id.* at 45.

49. *Id.*

50. *Id.*



pool memos, clerks provide the Justices with vast amounts of edited information necessary for decision making.<sup>51</sup> The clerks, then, have the opportunity to act as advisors to the Justices, and the advice they provide—the carefully edited case information in the cert pool memos—can guide judicial decision making. Indeed, the primary source of information used by the Justices to make cert decisions, and the customary way law clerks communicate advice and information to the Justices, is via the cert pool memorandum.<sup>52</sup> Drafting pool memos at the cert stage means law clerks are “the initial gatekeepers and primary decision makers in the agenda-setting process.”<sup>53</sup> The creation of the dead list under Chief Justice Hughes signaled that not all cases were worthy of discussion, and pool memos became an even more important means of learning about the cases being petitioned.<sup>54</sup>

The cert pool and greater reliance on pool memos also meant clerks would have more time to devote to each cert pool memo, allowing for a more thorough and in-depth analysis of the case and greater interpretation of the law or issue at stake.<sup>55</sup> Although the creation of the cert pool may have diluted individual clerk influence by giving each clerk fewer cases to analyze, the influence of the clerks as a whole potentially expanded at the very important agenda-setting stage.<sup>56</sup>

The cert pool memoranda, produced by the law clerks for all of the Justices in the cert pool, are typed assessments that include information and summary as well as analysis by the clerk, and only recently were they made systematically available to scholars.<sup>57</sup> The cert pool

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51. *Id.* at 125–126.

52. *See id.* at 126.

53. *Id.* at 238.

54. *Id.* at 113, 126.

55. *See id.* at 120–123, 142.

56. *Id.* at 147, 238.

57. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 42 (1991). Justices have included some cert pool memos in their papers. For example, one can obtain copies of memos for *granted* cases from Justice Powell’s archives at Washington and Lee University Law School. Justice Powell had the memos in cases denied cert destroyed, according to John N. Jacob, the Archivist of his papers. E-mail from John N. Jacob, Archivist and Special Collections Law Librarian, Wash. & Lee Sch. of Law, to Sara C. Benesh, Assoc. Professor of Political Sci., Univ. of Wisconsin–Milwaukee (Apr. 23, 2014, 09:10 CST) (on file with author). However, Justice Harry Blackmun included nearly all of the memos, both in cases granted and in cases denied cert, during the 1986–1993 Terms. LEE EPSTEIN, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE DIGITAL ARCHIVE OF THE PAPERS OF JUSTICE HARRY A. BLACKMUN (2007), <http://epstein.wustl.edu/blackmu>

memoranda are stylistically uniform, regardless of author, beginning on the first page with the names of the parties, the lower court that made the most recent decision on the case, and a categorization of the case as Federal/Civil, State/Civil, Federal/Criminal, State/Criminal, Federal/Habeas, State/Habeas, or Military/Criminal. Next, the law clerk author provides the following sections: (1) a summary of the case; (2) the facts and proceedings below; (3) the contentions made by the petitioner and the respondent; (4) the clerk's evaluation of the case; and (5) the recommendation by the clerk of what action should be taken (usually deny, grant, or Call for Record (CFR) with a possibility to grant). The Appendix provides screen shots of these memoranda, illustrating these sections and the language used, as well as the markup done by Justice Blackmun's clerks.<sup>58</sup>

#### VI. CLERKS AS ADVISORS—INFLUENCE VIA ADVICE

The cert pool memos, all of which end with an explicit recommendation by the memo clerk author,<sup>59</sup> should carry a significant amount of influence. As noted above, the clerks themselves suggest that the decision to grant or deny cert is where law clerks have the most influence on judicial decision making,<sup>60</sup> and given the large numbers of cases that request the Court's attention, it seems nearly impossible for the Justices to conduct independent reviews of all petitions. According to our data, when the pool memo clerk recommends that the Justices grant cert to a petition on certiorari, the Court grants cert approximately

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n.php, archived at <http://perma.cc/S5MQ-TPA9>. These memos also include the penciled "mark up" he had the clerks in his chambers provide. See, e.g., *infra* Appendix.

58. See *infra* Appendix. Of course, not every Justice was a member of the cert pool. See WARD & WEIDEN, *supra* note 12, at 119. During the 1986–1993 Terms, considered here, Justices Marshall, Brennan, and Stevens declined to join the pool. See PERRY, *supra* note 57, at 42. There is some dispute over whether non-cert pool chambers also receive the cert pool memo, but it appears to be the case that they do not. Zachary Wallander, SCOTUS on Cert: A Look at the Blackmun Papers 63–64 (2014) (unpublished Ph.D. dissertation, University of Wisconsin–Milwaukee) (on file with author). This complicates our analysis, given that we focus on cert decisions of the Court as a whole, but given that it is a small minority of Justices who likely did not see the memos and given that they do not, themselves, comprise enough votes to grant, some Justice in the group voting to grant cert in any given case would have relied upon the cert pool memo. It is interesting to note, however, that in an individual-analysis of the Justice votes, Wallander finds that Justice Blackmun was influenced by the cert pool memo's recommendation while Justice Stevens (not in the pool) was not. Wallander, *supra*, at 68–69.

59. PERRY, *supra* note 57, at 42.

60. WARD & WEIDEN, *supra* note 12, at 146–47.

92% of the time, and when the clerk recommends a denial, the Court heeds that advice 76% of the time.<sup>61</sup>

It may well be that the memo itself, even independent from the final recommendation by the clerk, is slanted in such a way as to convince the Chief Justices to view the petition as either worthy or not worthy. Lazarus and Justice Rehnquist argue that such slanting may well occur.<sup>62</sup> However, many of the pool Justices had their own clerks reread the memos to make sure the argument and reasoning were not biased and that the assessment of the case was fair.<sup>63</sup> The mark-up of the pool memo by a Justice's own clerk ensures that the brief offers a fair presentation of the arguments for and against hearing the case.<sup>64</sup>

Note well, though, that while Lazarus and Chief Justice Rehnquist view any influence of clerk recommendation on cert decision to be somehow problematic,<sup>65</sup> we see this as a normal relationship between a decision maker and his or her advisor. Decision making in complex situations often involves the seeking out of and consideration of advice, whether it is a patient attempting to make a decision regarding medical treatment, a potential litigant considering filing a lawsuit, a taxpayer seeking to comply with the U.S. Tax Code, or a student determining which courses to take in the fall. All of these individuals consult

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61. Interestingly, when the cert pool was created, pool clerks were instructed to draft pool memos with no explicit recommendation about whether the petition should be granted or denied cert. *Id.* at 124. However, in practice, even early on in the institution's history, the clerks made mention of their take on the cert petition. *Id.* Justice Powell clearly wanted clerks to provide an explicit recommendation, and eventually, it became part of the rubric for the memos. *Id.* It certainly appears to be the case, then, that the Justices were seeking clerks' advice from the start.

62. LAZARUS, *supra* note 33, at 262–63; Rehnquist, *supra* note 33, at 75.

63. See PEPPERS, *supra* note 13, at 164–65; WARD & WEIDEN, *supra* note 12, at 125; Adam Liptak, *A Second Justice Opt's Out of a Longtime Custom: The 'Cert. Pool,'* N.Y. TIMES, Sept. 26, 2008, at A21.

64. See PERRY, *supra* note 57, at 42. The Blackmun Papers allow us to see the mark-up Justice Blackmun required of his own clerks in screening the memo author's assessment of the petition. See EPSTEIN ET AL., *supra* note 57. Routinely, his clerks highlighted the names of lower court judges, the lower court for which the judge worked, whether the Solicitor General or amicus provided an argument in the petition, whether they deemed the alleged conflict as real, and any corrections to the memo author's interpretation of the case. *Id.* At the end of each pool memo, Justice Blackmun's clerks provided the memo author's first name (the last name is always typed on the memo), the Justice for whom she clerked, the lower court judge for whom she clerked, and the law school she attended, as well as Justice Blackmun's clerk's own recommendation on cert and a reason for any disagreement with the pool clerk's recommendation written in paragraph form. *Id.* A sample is shown in the Appendix. The two clerks agreed 86% of the time, according to our data.

65. Rehnquist, *supra* note 33, at 75; LAZARUS, *supra* note 33, at 267, 272–274.

experts, and their eventual decisions reflect some combination of their own preferences and information and the advice they receive. The degree to which they rely on that advice is likely to hinge on the degree to which they trust the advisor, which in turn depends on whether the decision maker ascribes to the advisor an adequate level of expertise and like-mindedness. Indeed, people tend to weigh their own opinion much more heavily than they weigh others', and the further the advice is from their own perception of the issue, the less likely they are to follow it, especially when they are, themselves, knowledgeable.<sup>66</sup> The advice is also evaluated, at least in part, with references to the advisor,<sup>67</sup> and even the most knowledgeable use heuristics to make complex decisions, some of which include their perceptions of the source of advice<sup>68</sup> and the source's credibility.<sup>69</sup> Overall, decisions made taking advice into account are qualitatively better than those made without such advice.<sup>70</sup> Those better decisions are also much more efficiently made, and efficiency, to the Justices at cert, is surely a much sought-after goal.

It is reasonable to assume, given the experimental psychology literature cited above and the quality of law clerks and their ideological congruence with the Justices, that Supreme Court Justices will also be influenced by the advice available to them (most important to us, advice given to them by their law clerks via the cert pool memos) and that reliance is, rather than a negative influence to be avoided, a positive improvement to the Court's certiorari decisions.

In order to test our theory of advice, we focus, as noted, on the stage at which we view the potential to influence decision making to be at its apex: the certiorari decision. We first consider what we know about the

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66. Birnbaum & Stegner, *supra* note 44, at 48; Robert Huckfeldt, *The Social Communication of Political Expertise*, 45 AM. J. POL. SCI. 425, 426 (2001); Ilan Yaniv, *Receiving Other People's Advice: Influence and Benefit*, 93 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 2 (2004) [hereinafter Yaniv, *Receiving Other People's Advice*]; Ilan Yaniv, *The Benefit of Additional Opinions*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 75, 76 (2004).

67. See, e.g., Birnbaum & Stegner, *supra* note 44, at 48–49; Huckfeldt, *supra* note 66, at 437.

68. Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752, 763 (1980).

69. Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 POL. BEHAV. 363, 365 (1990); Jeffery J. Mondak, *Source Cues and Policy Approval: The Cognitive Dynamics of Public Support for the Reagan Agenda*, 37 AM. J. POL. SCI. 186, 188, 190 (1993).

70. Yaniv, *Receiving Other People's Advice*, *supra* note 66, at 3. See generally, Chaiken, *supra* note 68.

cert decision, control for all of those things, and then ascertain whether and to what degree the clerk's recommendation and the information provided by the clerk to the Justices in the cert pool memo further influences the decision making of the Court.

## VII. A MODEL OF CERTIORARI DECISIONS

There is a tremendous amount of literature in political science on the determinants of cert, and while some of the analyses suffer from selection bias (e.g., they study only those cases actually granted cert) the best of them consider both cert grants and cert denials. To date, Caldeira, Wright, and Zorn test one of the most thorough models of cert, including nearly all of the variables that prior research deemed important to the Court's cert decisions.<sup>71</sup> These variables include dissensus in the lower courts (e.g., dissents or concurrences issued by the lower court), issue areas involving civil liberties, and the support of the federal government, all of which serve as indicators, or "cues," about the certworthiness of a case.<sup>72</sup> Strategy has also been proffered as a reason why the Justices make decisions on cert as they attempt to obtain their most favored outcome on the merits, achieved sometimes by voting to deny a case to avoid a loss on the merits.<sup>73</sup>

Additionally, constitutional claims made by the parties have been found to increase the likelihood of cert, while disagreement among lower courts (e.g., reversals of trial court decisions by an appellate court) also enhances the prospects for cert.<sup>74</sup> The Supreme Court also more frequently reverses than affirms,<sup>75</sup> so it is likely that the Court

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71. See Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 563 (1999).

72. Joseph Tanenhaus, Marvin Schick, Matthew Muraskin & Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 116-17 (Glendon Schubert ed., 1963); S. Sidney Ulmer, William Hintze & Louise Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC'Y REV. 637, 638 (1972).

73. LAWRENCE BAUM, *THE SUPREME COURT* 100 (3d ed. 1989); Sara C. Benesh, Saul Brenner & Harold J. Spaeth, *Aggressive Grants by Affirm-Minded Justices*, 30 AM. POL. RES. 219, 220 (2002); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POLITICS 828, 828 (1989); Caldeira et al., *supra* note 71, at 554. See generally John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990).

74. Tanenhaus et al., *supra* note 72, at 118.

75. Matthew Hall, *Experimental Justice: Random Judicial Assignment and the Partisan Process of Supreme Court Review*, 37 AM. POL. RES. 195, 204 (2009); see also Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An*

takes cases that it deems to have been decided incorrectly below. The presence of amicus briefs also increases the likelihood of cert,<sup>76</sup> as does conflict among courts, both alleged and actual.<sup>77</sup> Amici indicate a case has importance beyond the parties presenting arguments and that some party outside the case will be affected by the Court's decision.<sup>78</sup> And cases involving a conflict among courts, especially the circuits, are singled out for attention by the Supreme Court in its Rule 10.<sup>79</sup> Because of the importance of this characteristic, parties often find ways to "allege" conflict in order to get the Court's attention.<sup>80</sup>

Caldeira, Wright, and Zorn's model considers all of the known determinants of cert.<sup>81</sup> They find that the presence of cues, such as the United States as a petitioner or dissent in the lower court, does indeed increase the likelihood of cert.<sup>82</sup> In addition, a conservative Supreme Court is less likely to hear a conservatively decided lower court decision.<sup>83</sup> When a lower court has been reversed by the intermediate

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*Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000).

76. Caldeira et al., *supra* note 71, at 563; Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807, 808, 824 (2004); Kevin T. McGuire & Gregory A. Caldeira, Research Note, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 724 (1993); see also Karen O'Connor & Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 LAW & SOC'Y REV. 311, 316-17 (1981-1982).

77. DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 38-39 (1980); Caldeira et al., *supra* note 71, at 563.

78. Collins, *supra* note 76, at 810.

79. PROVINE, *supra* note 77, at 37-38; see SUP. CT. R. 10.

80. Cameron et al., *supra* note 75, at 102.

81. See Caldeira et al., *supra* note 71, at 563.

82. *Id.* Caldeira, Wright and Zorn also find that the Justices employ strategy in their voting: When the Court becomes more conservative, liberal Justices are less likely to vote to grant, and vice versa, as they predict a loss on the merits. *Id.* at 563-64 & n.14. Their analysis considers the individual Justices' votes as their unit of analysis, however, and we consider the decision to grant a case by the Court as a whole. *Id.* at 563. Hence, we are unable to control for strategic voting of that sort. We do control for the direction of the lower court's decision, however, and so consider one piece of the ideological considerations present in the cert decision.

83. In 1982, under Chief Justice Rehnquist, the Supreme Court was primarily conservative. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 151 (2002). Using the Martin-Quinn scores as a measure for ideology, for example, a majority of the Justices scored conservatively (positive numbers indicate conservative decision making and negative numbers vice versa, and most Justices at this time had MQ

appellate court, the Justices are more likely to place the case on their agenda, and the presence of amici, whether in favor of or against cert, increases the likelihood that a petition will be heard by the Court.<sup>84</sup> Finally, conflict, alleged and actual, is a large influence on the Court's decision to grant cert.<sup>85</sup>

We consider all of the variables included in the Caldeira, Wright, and Zorn article but also add to their work in several ways. First, we use a better measure of conflict. Using the Blackmun Papers,<sup>86</sup> we code whether the Justices' most trusted advisors, law clerks, deem there to be a real conflict or not. Clerks systematically (as mentioned above) discussed whether they thought the case presented a real conflict (i.e., a split in the circuits) or not in the discussion section.<sup>87</sup> If the clerk thought a real conflict existed, he or she discussed the split; however, if no conflict existed and the petitioner alleged conflict, the clerk discredited the split and explained why in his or her discussion section. The parties often alleged conflict (they did so in 57% of our cases), but those conflicts were not always deemed to be real by the clerk. This advice, then, which is being provided directly by the clerk to the Justices themselves, is a superior measure of conflict.<sup>88</sup>

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scores that were positive). *See id.* at 145–46, 148. Thus, we expect this conservative Court to be more likely to hear cases in which the most recent lower court decision was liberal.

84. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988); McGuire & Caldeira, *supra* note 76, at 724. In an updated manuscript, Caldeira, Wright, and Zorn find that briefs in opposition might not increase the likelihood of cert. *See* Gregory A. Caldeira, John R. Wright & Christopher Zorn, *Organized Interests and Agenda Setting in the U.S. Supreme Court Revisited 2–3* (July 15, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2109497>, archived at <http://perma.cc/MC33-K5LN> [hereinafter Caldeira et al., *Organized Interests Revisited*]. The authors find that during October Term 2007 the grant rate for opposition briefs actually decreased. *Id.* at 8–9. It is unclear, then, whether briefs in opposition to cert actually hurt the position of those filing in the way that Caldeira, Wright and Zorn found them to in their earlier article.

85. PROVINE, *supra* note 77, at 38–39.

86. EPSTEIN ET AL., *supra* note 57.

87. *See infra* Appendix.

88. Caldeira, Wright, and Zorn utilized the New York University Supreme Court Project to code whether the petitioner alleged conflict, either among lower courts or between a lower court and the Supreme Court, or both, and whether an actual, or square, conflict existed. Caldeira et al., *supra* note 71, at 561; *see Introduction to the Appendices*, 59 N.Y.U. L. REV. 1403, 1403–04 (1984). A square conflict existed if the law professors on the project determined that two or more courts reached different outcomes on similar cases. *Id.* at 1404. This measure, while surely solid, is removed from the actual information the Justices have at their disposal. Hence, our measure, focused as it is on the clerks' actual determination over conflict that is communicated to the pool Justices, seems superior.

The Court grants cert when its clerks deem the conflict to be real. This information, provided to the Justices by their trusted advisors, obviously matters. According to our data, nearly 98% of cases are granted cert by the Court when clerks report an actual conflict. Allegations of conflict, on the other hand, are not nearly so influential. (Only 68% of cases in which only an allegation of conflict is made are granted.) But we want to know more. It appears to be the case that the analysis by the clerks of the extent to which an allegation of conflict is real matters. We also measure some of the other influences on the vote to grant cert through the lens of the cert pool memo, interpreted by the clerks and passed along to the Justices, and so tap more specifically into the information available to and used by the Justices at the time of their cert vote.

For example, Caldeira, Wright, and Zorn find the presence of the Solicitor General to matter to the cert decision,<sup>89</sup> and many have considered why that presence matters.<sup>90</sup> Is it a direct influence of the Executive Branch on the judiciary? Or is it instead a trusted attorney whose argument carries more weight with the Justices than the arguments of other attorneys? Is it perhaps merely a cue that the case is consequential? Black and Owens suggest that the Solicitor General is differentially influential due to the professionalism the office projects.<sup>91</sup> We measure the presence and position of the Solicitor General from the memorandum, again allowing us to focus on the extent to which information provided by the clerks in the memo matters to the Justices. It may well be that the case is supported by the United States, but unless the clerk discusses the position of the Solicitor General, we do not treat that variable as being present. So too with briefs *amicus curiae*. The literature tells us these briefs matter, serving as an indicator to the Justices of the pervasive importance of the case under consideration.<sup>92</sup> We code amici from the memos, again providing some measure of the content of the memos and their influence. Only those briefs discussed by the clerks are counted. We can then consider whether the clerk's choice to discuss a certain number of briefs in support of or in

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89. See Caldeira et al., *supra* note 71, at 563; see also Caldeira et al., *Organized Interests Revisited*, *supra* note 84, at 5, 12 app.

90. See, e.g., RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (2012); PROVINE, *supra* note 77, at 86–87.

91. BLACK & OWENS, *supra* note 90, at 136.

92. See Collins, *supra* note 76, at 808.



opposition to cert leads the Court to be more or less likely to grant cert.<sup>93</sup>

One important piece of information provided by the clerks to the Justices that we consider is entirely new to the literature: We include measures of the identity of the lower court judges involved in adjudicating the case in the courts below. By examining the number of “mentions,” by name, of lower court judges in the cert pool memo, we, in effect, empirically test Perry’s percolation theory.<sup>94</sup> Perry suggests that the Supreme Court seeks out “good” and “well-percolated” cases so as to have a more informed starting point.<sup>95</sup> The Justices seek cases that have been reviewed by several other courts because, according to one clerk interviewed by Perry, they want to “review how other courts have looked at this issue.”<sup>96</sup> We consider whether the number of lower court judge mentions in a pool memo increases the likelihood the Justices vote to grant cert on the theory that the Court wants cases that have percolated through the court system. We expect that, as the number of judges mentioned in the pool memos increases, the extent to which the case has percolated will be higher and, therefore, that the Justices will be more likely to vote to grant cert.

Taking the judge mention analysis one step further, we also consider *which* judges are being mentioned, testing whether the discussion of *particularly important* lower court judges further enhances the likelihood of cert. Perry suggests not only that the Justices prefer to take cases that are well-percolated, but also that they seek well-reasoned lower court decisions to review.<sup>97</sup> And all lower court judges are not equally likely to produce high-quality, well-reasoned opinions; judges known to and relied upon by the Justices, on average, ought to do a better job. We consider in particular those judges from whom the Justices most often receive clerks: the feeder judges.

We expect that judges with whom the Justices have ongoing relationships will be treated differently when it comes to cert. We consider, therefore, mentions by name of judges who frequently have

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93. It is likely the case that there is a systematic process under way here as well, as the clerks focus the Court’s attention on *specific* amici to the exclusion of others. We are, in other research, attempting to get a handle on that process as well, seeking to ascertain what drives the clerks to focus on one brief over another.

94. PERRY, *supra* note 57, at 230.

95. *Id.* at 230–31.

96. *Id.* at 231.

97. *See id.* at 230–34.

their clerks promoted to the Supreme Court to ascertain whether the Justices are particularly interested in reviewing their work. Lower court judges who can routinely attract quality clerks to work in their chambers and then channel those clerks to the Supreme Court will command a certain degree of influence with the Justices. These judges will build a reputation for consistently producing “top-notch clerks,”<sup>98</sup> and the Justices will assume, then, that their opinions are of higher quality. Hence, clerk mentions, by name, of particularly successful lower court judges (i.e., feeder judges) might increase the likelihood of cert.<sup>99</sup> This suggests an influence beyond mere percolation, measured as multiple treatments of a given issue by multiple judges. Instead, the Justices consider the qualities of the judge being mentioned in a more specific way, granting cert to cases considered by judges with whom they have more familiarity, likely because they expect those cases to be particularly well-reasoned. Reviewing a well-reasoned case, after all, means less work for the Justice charged with writing the opinion.<sup>100</sup>

Hence, given the political science research on certiorari, and using especially Caldeira, Wright, and Zorn as a baseline, we seek to ascertain

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98. WARD & WEIDEN, *supra* note 12, at 83.

99. We measure success via Ward and Weiden, who calculate the success of lower court judges by the average number of law clerks a judge places on the Supreme Court per term (i.e., the number of clerks a judge has placed on the Court divided by a judge’s years of service). *Id.* at 82. Only the 26 most successful lower court judges (two district court judges and 24 judges from the federal courts of appeals from 1962 to 2002) placing clerks on the Supreme Court were coded as “feeder judges.” *Id.* The average number of clerks placed on the Court by all 26 lower federal court judges is 1.19 clerks per term, ranging from a maximum of 2.73 clerks per term (J. Michael Luttig, 4th Circuit) to a minimum of 0.52 clerks per term (Ralph K. Winter, 2nd Circuit). *Id.* For more information regarding the placement success rate of law clerks by lower court judges, see *id.* at 76–85.

100. See PERRY, *supra* note 57, at 230–34. It is certainly possible that the reverse is true: e.g., that the Justices are more likely to “trust” that the lower court judge got it “right” when considering a case on which one of these feeder judges has written and hence to be less likely to hear the case. We are more convinced by Perry’s view, especially given what we know about the Court’s workload and its shortcuts. Corley, for example, demonstrates well the high degree to which the Justices borrow language from (or plagiarize) the parties’ briefs, the lower courts’ decisions, and the amicus briefs filed in the cases. See Pamela C. Corley, Paul M. Collins Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POLITICS 31, 42 (2011) (on lower court’s decisions); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties’ Briefs*, 61 POL. RES. Q. 468, 473 (2008) (on parties’ briefs); Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content* 1, 22 (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300505](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300505), archived at <http://perma.cc/4AKS-86DG> (on amicus briefs). Given that propensity and the time savings it implies, it seems far more likely than not that the Justices will prefer to review well-reasoned decisions written by judges for whom they have respect.

whether, on top of the known determinants of cert (some of which are measured directly from the memoranda and so consist of information provided by clerk advisors to the cert pool Justices),<sup>101</sup> the additional advice and information provided by law clerks in the cert pool memorandum influences the decisions made by the Justices. Focusing on the Court as a whole as our unit of analysis,<sup>102</sup> and using data we collected via the cert pool memoranda available at the Digital Archives of the Blackmun Papers,<sup>103</sup> we show that both the advice and the information matter.

### VIII. FINDINGS: INFORMATION AND ADVICE

Table 1 presents the results of our comprehensive models of the Court's certiorari decision.<sup>104</sup> Two models are tested there. Model 1 considers Perry's percolation hypothesis, ascertaining whether the number of judges mentioned in the cert pool memo enhances the

101. Eleven control variables used in previous studies on case selection are measured here, innovatively, via the pool memo and hence comprise information provided by the clerks to the Justices (these include alleged conflict, true conflict, amicus brief(s) discussed, the Solicitor General's position, whether the case involved a constitutional claim, whether the lower court was reversed, whether there was dissent in the lower court, and whether the U.S. was the petitioner). *See, e.g.,* Caldeira et al., *supra* note 71; Collins, *supra* note 76; O'Connor & Epstein, *supra* note 76. We also control for the ideological direction of the lower court's decision, as coded by the Spaeth Database (when it is liberal, we expect the conservative Rehnquist Court to be more likely to vote to grant cert). HAROLD SPAETH, LEE EPSTEIN, TED RUGER, SARA C. BENESH, JEFFREY SEGAL & ANDREW D. MARTIN, *THE SUPREME COURT DATABASE CODEBOOK* (2014), [http://supremecourtdatabase.org/\\_brickFiles/2014\\_01/SCDB\\_2014\\_01\\_codebook.pdf](http://supremecourtdatabase.org/_brickFiles/2014_01/SCDB_2014_01_codebook.pdf), archived at <http://perma.cc/9RWR-DLYU>.

102. The literature on certiorari has vacillated between a focus on individual Justice votes and the Court's cert decisions as a whole. Analyzing the cert decision at both levels is useful.

103. Epstein, Segal, and Spaeth, with support from the National Science Foundation, created and host "The Digital Archive of the Papers of Justice Harry A. Blackmun," freely available online. EPSTEIN ET AL., *supra* note 57. We randomly sampled 666 grants and 666 denials from October Terms 1986–1993 from the archive and coded all information noted as coming from the cert pool memos. (We included, then, deadlisted cases, on which the Justices do not explicitly vote to deny cert but no Justice votes to hear.) In addition, the Spaeth Database provided coding for the direction of the lower court for the cases granted review, and we applied the same rules to our coding of the lower court's direction in cases denied review. SPAETH ET AL., *supra* note 101. Because the Court obviously hears a tiny percentage of the cases appealed to it, we weighted our analysis and used an appropriate statistical technique (rare events logistic regression) to control for the rarity of review. *See* Gary King & Langche Zeng, *Logistic Regression in Rare Events Data*, 9 POL. ANALYSIS 137 (2001). A copy of a cert pool memo as well as a docket sheet (from which we coded the cert vote) are in the Appendix. *See infra* Appendix.

104. *See infra* Table 1.

likelihood of certiorari in a particular case, under the intuition that such mentions constitute evidence that several different courts and judges have considered the legal issue presented. Model 2 considers the influence of the feeder judges, testing our claim that mentioning judges who are particularly well known to the Justices and expected to produce higher-quality opinions enhances the likelihood that the Court will desire to review their cases. In both models, we also consider the influence of all of those variables discussed above as having an influence on the cert decision, all but one of which are coded from the memos and so comprise pieces of information provided by the clerk advisors to the Justices.

As shown in Table 1, many of the known determinants of cert matter in the predicted directions, even when measured via their communication from the clerks to the Justices in the cert pool memos.<sup>105</sup> Extremely important is the law clerk's determination that a conflict alleged by the parties is real or true. Given that the memo is almost certainly the place the Justices look in order to ascertain the extent to which a true conflict exists, this constitutes an important advisor influence.<sup>106</sup> In addition, the decision by a clerk to discuss in the memo specific amici and their arguments influences the Court greatly; one brief mentioned increases cert, and two or three briefs mentioned increases its likelihood even more.<sup>107</sup> Interestingly, discussion by the clerk in the memo of briefs in opposition neither increases nor decreases the likelihood that the Court will grant cert in the case. The position taken by the Solicitor General—coded as 1 when the memo writer mentions that he favors cert, 0 when the clerk does not mention his position, and -1 when the clerk discusses his opposition to cert—matters strongly, as does what went on in the lower courts. Discussions of disagreement, either among courts or within one court, both contribute to the Court's decision to hear a case, and when the United

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105. *See infra* Table 1.

106. Of course, it could well be that the conflict drives the clerks' recommendation and the Justices' decision simultaneously. We explore that possibility in a forthcoming work. Zachary Wallander, Sara C. Benesh & David A. Armstrong, *Advisors to Elites: Untangling the Causal Mechanism* (2014) (unpublished manuscript) (on file with authors). As shown there, conflict matters both to the clerks and, through the clerks, to the Justices, but not directly to the Justices (there, Justice Blackmun). *Id.* This provides support for the finding, here, that the advice of the clerk is what is driving the Court's decision. *See infra* Table 1.

107. *See infra* Table 1.

States, as a party, is asking the Court to hear the case directly, the Court is extremely receptive.

Clearly, then, the law clerks matter as advisors to the Court. That is shown via our consideration of the known determinants of cert as measured via the cert pool memos. Importantly, and in addition, however, even after controlling for all of those known influences, the recommendation of the law clerk to grant, which ends the cert pool memo, also increases the likelihood that the Court will grant cert. This means that—even holding conflict, the view of the Solicitor General, and all of the other things we know to influence the Supreme Court’s docket construction constant—the Court considers the advice in the cert pool memo, reacting positively to it.

In addition to the actual advice of the cert pool memo author, the Justices also respond to information about the lower court judges involved in the case (and in cases like it, as discussed in the memo). Indeed, Table 1 shows that both percolation (multiple judges considering the legal issue at stake) and the involvement of the feeder judges matter. As the number of judge mentions increases, the likelihood the Court will hear the case also increases, suggesting that the Justices respond to clerk discussions of lower court judges and the cases in which those judges were involved (including the case at bar). And, beyond percolation, we find the identity of the judges to matter. As the number of feeder judges mentioned in the memo increases, the likelihood of the Court hearing the cases also increases. Judge mentions (percolation) and feeder judge mentions have a substantively large impact on the Court’s decision, though mentions of feeder judges are more influential than mentions of other judges. Over the range of its values (from no judges mentioned to fifteen judges mentioned), the probability of a grant increases about 0.039; the Court is 4% more likely to grant a case in which many judges were mentioned than one in which none were. Mentioning feeder judges, on the other hand, makes a larger difference. Over the range of that variable (from no feeder judges mentioned to ten feeder judge mentions), the likelihood of a grant increases by 0.36. It is clear that the use by the cert pool memo author of the names of those judges closest to the Supreme Court leads the Court to more carefully consider the cert petition, making it more likely that the petition will be heard. Considering that this analysis includes deadlisted cases, it is likely this effect is even stronger than what we find here.

## IX. CONCLUSIONS: THE LAW CLERK AS ADVISOR

In this Article, we attempted to ascertain the extent to which information provided by law clerks in their cert pool memos influences the Supreme Court's decision making on cert. Justices, faced with the task of sorting the meritorious petitions from the many that are not, need advice. In this Article, we considered exactly which types of advice had the potential to influence the Court's decision making. Given that the institution of the law clerk was explicitly created to ease the Justices' burden, and given that the certiorari stage is the point at which the Justices most need assistance, we focus on the law clerk as advisor at that stage.

We find that it is, in fact, the case that the Justices use the advice provided to them by the law clerks in the cert pool memos. Indeed, even after controlling for all other known determinants of cert (as measured, for the most part, via the cert pool memo), the recommendation to grant cert by the memo clerk influences the Court to grant a petition. Clerks are hand-picked by the Justices and are able advisors. It would be odd if the Justices did not consider their clerks' input in their decision making. And our measurement strategy of focusing on the cert pool memo to code the known determinants of cert means that what the clerks write matters as well. When the clerks deem a conflict to be real, the Justices are more likely to grant cert. When they discuss the amici and their arguments in the memo, the Court takes more notice of the petition. The clerks learn the types of information desired by the Court, and when they provide it in the memos, it matters. Indeed, it would be odd if the content of the memos did not matter to the Court as well.

But in an addition to the literature, we find that, just as Perry asserted years ago after conducting interviews with Justices and clerks, the Justices are, at least in part, driven by the readiness of a case to be heard by the Court as well.<sup>108</sup> We find, for the first time of which we are aware, some empirical evidence that percolation matters to the Court in that the Court is more likely to grant cert to a petition for which the cert pool memo discusses many lower court judges and the reasoning they used in their cases. In addition, Perry spoke of a desire by the Court to consider a case reasoned well below, and our analysis lends empirical credence to that supposition as well.<sup>109</sup> The more the clerks mention

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108. PERRY, *supra* note 57, at 230–34.

109. *See id.*

feeder judges who reasoned the case or decided similar cases below, the more attractive the petition is to the Court, keen as it is on borrowing the reasoning of those lower court judges.

Of course, we need to know more. It might be the case that the Justices obtain information outside the pool memos that we do not consider here. Indeed, it would be unreasonable to think the pool memos are the Justices' only source of information when making a decision on cert. Lawyers and amici provide briefs making arguments about whether a case should be granted or denied cert, and we expect that the Justices read at least some of them. However, much of this information is summarized in pool memos written by law clerks, and we would not expect the Justices to request them unless they were useful.

In addition, we consider the Court as a whole as the decision maker when cert decisions are, in actuality, comprised of individual votes. A focus on those individual votes and a tailoring of the relevant variables to the individual Justices (using the recommendation of *their* clerks, considering the lower court judges from whom *they* take clerks, and adding the ideological measures many have found to be important) would be a useful extension.

The Justices of the Supreme Court cannot make decisions alone, nor would it be wise for them to do so. The important and consequential decisions they make to grant cert to the tiny percentage of all cases that are appealed to them is necessarily limited by time and resource constraints. Thus, they need information and advice to help them decide which cases are certworthy. Law clerks do this directly by giving recommendations and information, and the institution of the law clerk was designed explicitly with this role in mind. While some may be uncomfortable to find that what the clerks tell the Justices influences the Justices' decision making, we argue that discomfort should only arise when the carefully and thoughtfully constructed recommendations made by the able law clerk advisor is no longer considered, for that may mean that the Justices use some other, less substantively based shortcut like, perhaps, an ideological reaction to the lower court's decision. Is not law clerk influence preferable to that?

**Table 1**  
**Supreme Court Decision to Grant Cert, 1986–1993 Terms**  
 (Grant=1, Deny =0)

	Model 1 ( <i>Percolation</i> )			Model 2 ( <i>Feeder Judges</i> )		
	Coef.	Std. Err.	Sig. Level	Coef.	Std. Err.	Sig. Level
<b>Memo Recommendation to Grant</b>	<b>2.21</b>	<b>(0.26)</b>	<b>0.000</b>	<b>2.23</b>	<b>(0.26)</b>	<b>0.000</b>
<b>Number of Judge Mentions</b>	<b>0.15</b>	<b>(0.08)</b>	<b>0.027</b>	----	----	----
<b>Number Successful Judge Mentions</b>	----	----	----	<b>0.46</b>	<b>(0.26)</b>	<b>0.039</b>
<i>Information from the Brief</i>						
Alleged Conflict	0.28	(0.24)	0.124	0.34	(0.24)	0.078
<b>Actual Conflict</b>	<b>3.48</b>	<b>(0.38)</b>	<b>0.000</b>	<b>3.49</b>	<b>(0.40)</b>	<b>0.000</b>
<b>One Amicus Brief Discussed</b>	<b>3.85</b>	<b>(0.83)</b>	<b>0.000</b>	<b>3.40</b>	<b>(0.83)</b>	<b>0.000</b>
<b>Two or Three Amicus Briefs Discussed</b>	<b>2.37</b>	<b>(1.00)</b>	<b>0.009</b>	<b>2.39</b>	<b>(0.98)</b>	<b>0.008</b>
Number of Amicus Briefs Filed Against	-0.02	(0.03)	0.460	-0.02	(0.03)	0.628
<b>Solicitor General Position</b>	<b>1.52</b>	<b>(0.43)</b>	<b>0.000</b>	<b>1.39</b>	<b>(0.40)</b>	<b>0.000</b>
Constitutional Claim	-0.16	(0.44)	0.719	-0.20	(0.45)	0.653
<b>Lower Court Dissent</b>	<b>0.96</b>	<b>(0.30)</b>	<b>0.001</b>	<b>1.15</b>	<b>(0.29)</b>	<b>0.000</b>
<b>Lower Court</b>	<b>1.33</b>	<b>(0.27)</b>	<b>0.000</b>	<b>1.43</b>	<b>(0.26)</b>	<b>0.000</b>



<b>Reversal</b>						
<b>U.S. as Petitioner</b>	<b>3.06</b>	<b>(0.77)</b>	<b>0.000</b>	<b>3.05</b>	<b>(0.77)</b>	<b>0.000</b>
<i>Other Determinants of Cert</i>						
<b>Lower Court Direction</b>	<b>1.21</b>	<b>(0.23)</b>	<b>0.000</b>	<b>1.14</b>	<b>(0.23)</b>	<b>0.000</b>
Constant	-5.99	(0.21)	0.000	-5.92	(0.21)	0.000
N	1290			1293		

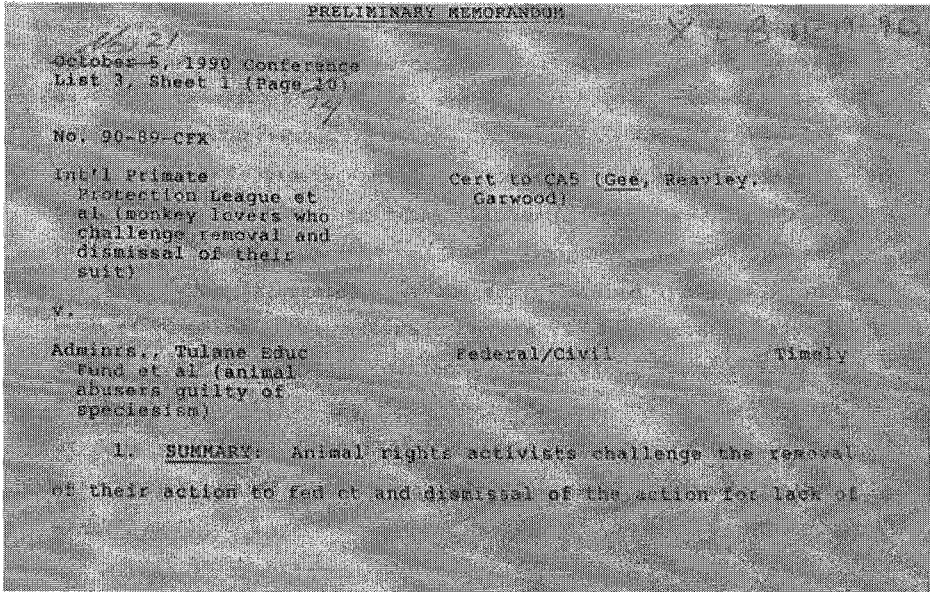
All sig. tests are one-tailed.

Model 1    McFadden Pseudo R<sup>2</sup> (0.56)  
               Expected Proportion Reduction in Error (0.50)

Model 2    McFadden Pseudo R<sup>2</sup> (0.56)  
               Expected Proportion Reduction in Error (0.50)

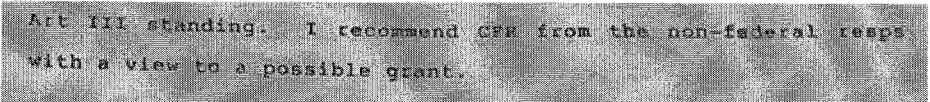
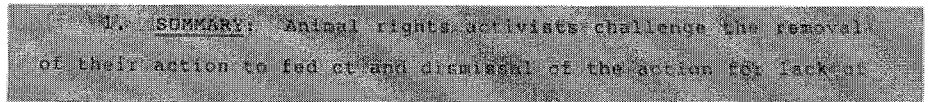
APPENDIX: EXAMPLE CERT POOL MEMO

First Page of the Memo



Sections of the Memo

Section One— Detailed Summary of the Case



**Section Two—Facts and Proceedings Below**

2. FACTS AND PROCEEDINGS BELOW: Dr. Edward Taub of the Inst for Behav Res (IBR) was convicted in Md of cruelty to 17 macaque monkeys being used in experiments in which nerves to the monkeys' limbs were severed. A state ct order awarded custody of the monkeys to the National Institutes of Health (NIH) until 1983. The disposition of the monkeys apparently became a cause celebre, and over 300 members of Congress asked (and NIH agreed?) that they be turned over to an animal sanctuary. Nevertheless, NIH has continued to keep the monkeys since expiration of the state ct custody order, transferring them to Tulane's Delta-Regional Primate Center. A Jack Anderson column exposed an alleged NIH plot to have the monkeys secretly killed. Five of the monkeys were then transferred to a zoo. In 1988, NIH announced its intent to euthanize three of the remaining monkeys, hoping to obtain useful information from the procedure and subsequent autopsy. Petrs, several animal rights groups and their members, filed suit agst Tulane, IBR and NIH, raising claims under La law and seeking an injunction agst the killings, and transfer of the monkeys to petrs or to members of Congress. The state ct issued a TRO. NIH removed the action to federal ct pursuant to 28 U.S.C. § 1442(a)(1). The federal ct extended the TRO beyond the 20 days permitted by FRCP 65(b), and resps NIH and Tulane (but not IBR?) appealed the TRO as, in effect, a preliminary injunction.

### Section Three—Contentions Made by Petitioner and Respondent

1. CONTENTIONS: Petrs: (1) Section 1442(a)(1) clearly permits removal only by federal officers, not by federal agencies. CA5's position is supported by only a few cts.<sup>1</sup> CA5's decision directly conflicts with Levell Mfg. v. Export-Import Bank, 843 F.2d 725 (CA3 1988), and with the vast majority of cts.<sup>2</sup> It is not surprising that the majority rule is found primarily in dot cases, since remand orders are generally unappealable. Theratron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976). When petrs sued reeps in Md, the case was removed on the basis of federal question jurisdiction. IPPL v. IBR, supra. CA4 found petrs had no standing to raise the federal question they presented, and remanded the case to state ct. CA4

Resp (SG): (1) CA5 correctly determined that petrs lack Art III standing. Petrs claim that they sought broader relief than in the CA4 case is not only factually incorrect, but also fails to establish standing. Petrs' alleged injury (lack of a future relationship w/ monkeys) is not "fairly traceable" to the assertedly illegal conduct, but rather is attributable to the fact that the monkeys are privately owned. See Allen v. Wright, 468 U.S. 737, 753 & n.19 (1984). Petrs' alleged injury is also not "redressable" by any relief to which they might be entitled under state law. None of their state law causes of action entitled them to continue their relationships with the monkeys or to be granted custody. Further, even if Art. III standing had been found, CA5 would have had to dismiss the case (even agst. the private reeps) on Supremacy Clause grounds, because petrs cannot

**Section Four — Memo Clerk's Evaluation of the Case**

4. DISCUSSION: Petrs' first issue -- whether a federal agency may remove an action under § 1442(a)(1) -- is potentially certworthy. That statute permits removal by various "persons" including "[a]ny officer of the United States or any agency thereof, or person acting under him..." (emphasis added). The issue is whether an "agency [of the United States]" is a "person" entitled to remove, or whether only an "officer of ... [an] agency" may do so. The latter is a more natural reading of the statutory language, but the former may be more consistent with the statute's purpose to protect the exercise of federal authority from state ct interference. As demonstrated by petrs, there is a longstanding split of authority on this question. See 14A Wright, Miller & Cooper, Federal Practice and Procedure § 3727 (2d ed. 1985). While apparently only two CAs have addressed the issue, they reached opposite conclusions. Most of the relevant cases were decided by dcts, probably, as petrs suggest, because dct remand orders are generally unreviewable. 28 U.S.C. § 1447(d).

The SG's argument that the issue would benefit from further study in the lower cts is strained, given that a split of authority has existed for over 20 years. While only two CAs have ruled on the issue (CA5 in three cases), there are at least 15 dct opinions. The existence of nearly 20 published opinions also

**Section Five— Recommendation by the Memo Clerk**

5. RECOMMENDATION: CFR from the non-federal resps with a view to a possible grant.  
There is a response.  
September 22, 1990      Pa. Lj. Beck      Opn in petn

**Blackmun's Clerk's Markup of the Memo**

September 22, 1990      Pa. Lj. Beck      Opn in petn  
H.H.      [unclear]  
[unclear]

Docket Sheets

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION	
	RELIST	CVRS	D	D	C&S	N	FOUR	ONE	APP	APP	APP	D	D
Rehnquist, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Stevens, J.													
O'Connor, J.													
Scalia, J.													
Kennedy, J.													
Souter, J.													

\* \* \*