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Courtiers of the Marble Palace

The Rise and Influence of the Supreme Court Clerk

Todd C. Peppers

Since the hiring of the first Supreme Court law clerk by Associate Justice Horace Gray in 1882, court observers and the general public have demonstrated a growing fascination with law clerks. Who are the young men and women that serve in the shadows of the marble palace? How are Supreme Court clerks hired and what do their jobs entail? Do they exert any undue influence or pursue their own ideological agendas? And is there a difference in how conservative versus liberal clerks influence their justices?

Combining first-hand interviews with such former clerks as John Paul Stevens and Richard Posner with information found in the personal papers of former justices, judicial biographies, and oral histories, *Courtiers of the Marble Palace* (forthcoming from Stanford University Press in May 2006), systematically takes up these questions for the first time, providing a complete picture of the evolving rules and norms that have surrounded the hiring and utilization of law clerks, and the changing relationship between law clerks and the justices.

Todd Peppers provides a comprehensive, richly detailed account of law clerks over a span of 120 years. The story of the law clerk begins in the 1880s, when clerks were primarily stenographers and secretaries, who performed a range of administrative functions. The institution underwent a transformation in the early 20th century when the position evolved to that of legal assistants involved in fact checking, legal research and opinion editing, balanced against the role of a *confidante* and social companion. The portrait of the modern law clerk is very different. Today's clerks are involved in drafting opinions and reviewing appeals, and serving as sounding boards to the justices. The book presents a never-before-seen picture of the work lives and day-to-day relationships between Supreme Court justices and their clerks; relationships that in some cases have extended to daily breakfasts, games of competitive basketball and tennis, faux firings, and tearful deathbed vigils.

Courtiers of the Marble Palace confirms popular beliefs about the strong gender and ethnic bias in the hiring of court clerks, and reveals sharp differences in the hiring practices of individual justices. (For example, as of 2005, at least 40 percent of the clerks

hired by Justices O'Connor, Ginsburg, and Breyer were women, in contrast to Justices Scalia and Kennedy, who hired women less than 15% of the time.)

Peppers' findings run counter to conventional notions about the role of the Supreme Court clerk. The book argues that, in general, law clerks do not appear to have undue influence over decision-making. As caseload pressures have risen, the justices have hired more clerks (now up to four clerks per justice) and given them more substantive responsibilities, such as, drafting opinions, reviewing petitions for certiorari, and preparing the justices for oral argument. However, Peppers maintains that the clerks are not, as many in the popular press claim, junior justices or puppet masters. The justices and the "clerkship institution" itself (the web of formal and informal norms and rules) has deliberately adopted rules to make sure that the power given to their law clerks is limited and controlled.

Lastly, *Courtier of the Marble Palace* suggests that a unique aspect of the clerkship institution has been lost over time. With the increased number of cases and increased responsibilities of law clerks, perhaps ironically, the mentoring relationship between justices and clerks has withered away. No longer are law clerks "the surrogate sons and confidential companions" of the justices, as were the clerks of Oliver Wendell Holmes, Jr., Hugo Black, and Felix Frankfurter. Today law clerks are much like law firm associates, working in "nine little law firms" for demanding senior partners.

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