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Book Review

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COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK, by **Todd C. Peppers**. Stanford: Stanford University Press, 2006. 328pp. Cloth. \$55.00. ISBN: 0-8047-5381-4. Paper. \$21.95. ISBN: 0-8047-5382-2.

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Todd C. Peppers' primary objective in this book is to provide a systematic framework for answering the long-debated question of whether "law clerks wield an inappropriate amount of influence over their justices?" (p. 2). Peppers explains that while many have written on this topic over the last fifty years, the literature has failed to address crucial questions about the use of law clerks by Supreme Court justices: "[W]hat are the institutional roles and norms surrounding the hiring and utilization of law clerks . . . , how have these rules evolved over time, and do these institutional structures allow law clerks to leave their own fingerprints on constitutional doctrine?" (p.xiv).

COURTIERS OF THE MARBLE PALACE begins by briefly describing the origins of the debate regarding the influence Supreme Court law clerks have on the justices. Peppers explains that this debate began nearly fifty years ago when multiple authors began publishing articles speculating that improper influence by law clerks was possible, if not probable. Most notably, Peppers writes, William Rehnquist published an article in 1957 revealing that when he clerked for Justice Robert Jackson, law clerks prepared memoranda for their justices recommending whether the justice should grant or deny a particular *certiorari* petition. Rehnquist asserted that because a majority of the clerks were liberal, a clerk's unconscious slanting of a memorandum could have the ultimate effect of moving the court "in a more liberal direction" (p.3).

Peppers further explains that since Rehnquist's article, many others have offered opinions and theories agreeing and disagreeing with him. In fact, shortly after Rehnquist's article was published, one U.S. Senator recommended that Supreme Court law clerks undergo confirmation hearings. More recently, in his 1998 book, *CLOSED CHAMBERS*, former Blackmun law clerk Edward Lazarus intimated that it was conservative law clerks, as opposed to liberal law clerks, who have attempted to impose their personal policy preferences on their justices. Given the long-standing debate, Peppers decided to undertake the daunting task of researching the evolution and development of the Supreme Court law clerk institution in hopes of arriving at a supportable conclusion.

Peppers analyzes the question of Supreme Court law clerk influence by applying principal-agent (P-A) theory to the clerkship institution. He first characterizes the relationship between justice and law clerk as one that is similar to the relationship between [*694] principal and agent. He then uses P-A theory to develop hypotheses about the ability of law clerks to influence their justices.

Peppers first assumes, under principles of P-A theory, "that both the justice and the law clerk are self-interested actors with multiple goals regarding the agency relationship" (p.15). For example, a law clerk may view a Supreme Court clerkship as an opportunity to further his policy agenda rather than implementing the policy preferences of the justice for whom he works. Peppers posits that to the extent that law clerks have substantive job duties such as drafting *certiorari* and bench memoranda and opinions, they will have more opportunity to pursue their own goals and influence the outcome of decisions. Peppers further hypothesizes that in order to prevent law clerks from pursuing their own agendas, justices will "create rules and informal norms designed to constrain" the clerks (p.16). As a result of these regulations, Peppers argues, even law clerks who have substantive responsibilities ultimately will have little opportunity to exert undue influence on individual justices or the Court as a whole.

As Peppers explains in Chapter 2, in order to prove his hypotheses he obtained information from many sources, including the U.S. Supreme Court Public Information Office, former justices' personal papers, biographies, journal articles, oral histories, and publicly available interviews. In addition, Peppers surveyed current and

former law clerks and interviewed many of them. He also interviewed two current Supreme Court justices and some individuals “who were familiar with the Supreme Court’s clerkship practice” (p.19).

After describing his sources, Peppers provides an overview of the backgrounds of former Supreme Court law clerks. His stated reason for doing so is that “[i]f law clerks wield influence and affect policy decisions, then the gender, racial and socioeconomic backgrounds, legal training, and ideology of the law clerks become relevant” (p.17). Peppers found that although the Court has done a better job in recent years of ensuring that females are adequately represented in the law clerk corps, historically women comprise only fifteen percent of the total number who have served. Additionally, Peppers’ research reveals that minorities are severely underrepresented. Of the law clerks about which Peppers collected data, ninety- four percent were Caucasian. With regard to academic background, Peppers reports that, while eighty-one different law schools are represented, the justices pick an overwhelming majority of their clerks from the elite law schools, such as Harvard, Yale, and Stanford.

As for political ideology, Peppers finds that a substantially greater percentage of clerks identified themselves as more closely aligned with the Democratic Party than with the Republican Party at the time they clerked. Peppers notes, however, that only 491 of 1524 former clerks answered his survey question about party affiliation. He therefore admits that “any conclusions about law clerk political preferences must be [*695] tentative” (p.34). He concludes Chapter 2 by summarizing the data that he collected on law clerks’ backgrounds, but he draws no conclusions about their influence based on this information.

In Chapters 3 through 5, Peppers provides a detailed explanation of the evolution of the Supreme Court law clerk position. Beginning in 1882 and continuing through 2004, he systematically discusses each justice, providing information, to the extent that it is available, regarding the justices’ hiring processes, the qualifications, academic and otherwise, of their law clerks, the background of each clerk, and the job responsibilities each justice delegated to his respective clerks.

According to Peppers, early law clerks had far different responsibilities than their modern counterparts. Peppers reports that Justice Horace Gray hired the first law clerk in 1882, but it was not until 1886 that Congress allocated funds for each justice to hire one clerk. With few exceptions, the clerks during this period served as stenographers, legal secretaries, and personal assistants. Because the clerks of this era had very few substantive legal duties, Peppers asserts that they had little opportunity to influence the outcome of the cases before the Court. Consequently, he concludes that there was no need for rules to restrain the law clerks, and, from what he could discern, the clerks in fact were not “bound by formal confidentiality rules” (p.207).

In 1919, Congress authorized funding for each justice to hire a second clerk. Chapter 4 details how this additional funding paved the way for the position to evolve from stenographer or secretary to legal assistant. Thus, from 1920 through the 1940s, Supreme Court law clerks had duties such as “editing legal opinions, performing cite checks, Sheperdizing cases, conducting legal research, and summarizing cert[iorari] petitions” (p.84). Peppers points out that with few exceptions, the law clerks were not required to provide legal analysis, write bench memoranda, or draft opinions. He concludes that, although the clerks of this period had more substantive legal duties, they were not “decision makers” (p.208). Furthermore, Peppers asserts that “conference discussion and opinion circulation were sufficient institutional checks” on any law clerk influence (p.208). Accordingly, neither formal nor informal rules were necessary to restrain the clerks, and none existed.

In Chapter 5, Peppers explains the evolution of the position in the 1950s and 1960s from legal assistant to law firm associate. He contends that comparing modern Supreme Court clerks to law firm associates is appropriate because clerks “assume[] the same responsibilities that an associate would in a small but very prestigious law firm” (p.144). Peppers begins with the Warren Court in 1953 and concludes with speculation about the Roberts Court. He thoroughly describes the duties and responsibilities that each justice delegated (or delegates) to his or her law clerks, including preparing bench and *certiorari* memoranda and drafting and editing opinions. Peppers demonstrates that their duties gradually increased over time, culminating in the [*696] clerks of the Rehnquist Court being given more substantive responsibilities than any others in the history of the Court.

In addition to discussing the substantive transformation of clerks' duties since the 1950s in Chapter 5, Peppers also describes the development of ethical rules. Justices Warren and Burger "imposed general confidentiality rules upon all clerks, and in 1987 the Supreme Court promulgated an ethical code of conduct for its clerks" (p.210). Furthermore, some justices developed "intrachamber rules" (p. 210). Peppers asserts that the creation of these rules and other practices (such as screening candidates based on political ideology) was necessary in order for the justices to monitor the law clerks and prevent them from using or having the opportunity to use their increased responsibilities to exert improper influence.

In the final chapter, Peppers contends that the original hypotheses he "generated from P-A theory are supported by the historical evolution of the clerkship institution" (p.207). Thus, he argues that when Supreme Court clerks had limited duties they also had little opportunity to sway the justices and there was no need for rules to govern their conduct. As the position evolved and the justices delegated more substantive responsibilities to the clerks, however, Peppers contends that the justices also created formal and informal rules and procedures to constrain the clerks. These constraints, Peppers asserts, in turn prevented (and continue to prevent) the clerks from inappropriately influencing the justices. Based on his research, Peppers ultimately concludes that "[t]he necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court" (p.207).

COURTIERS OF THE MARBLE PALACE is a compelling, informative book. As much as anything, it is a tremendous informational source for anyone interested in the Supreme Court. It is evident that the author has thoroughly researched the topic and provided the reader with a factual view of the past and present responsibilities of a Supreme Court law clerk. Because Peppers relies on principal-agent theory to develop his hypotheses and used exhaustive research to prove them, the book also appears to be objective.

The problem with Peppers' conclusion, however, is that the question he addresses – whether law clerks wield an inappropriate degree of influence over their justices – is nearly impossible for a Supreme Court outsider to answer. Although I learned a great deal of historical information from reading COURTIERS OF THE MARBLE PALACE, I am not convinced that the data Peppers collected actually proves that modern law clerks do not exert undue influence over their justices. At most, Peppers' research suggests that it is unlikely that the early clerks who served as stenographers and secretaries had the opportunity to influence the Court.

Although Peppers collected a wealth of data about former justices and their law clerks, reliance on these data to draw [*697] conclusions about how justices hire and utilize their clerks today is questionable. Peppers concedes that six of the sitting justices declined to be interviewed or answer written questions, one justice did not respond to his requests at all, and there were no former justices alive to interview. In addition, while he mailed approximately 1000 one-page surveys to former clerks, only about 400 responded. Moreover, Peppers admits that the survey merely asked for "basic information," such as academic background (p.18). Peppers states that he sent a second round of surveys to nonrespondents, but he does not give his response rate for the second survey.

Peppers did interview more than fifty former clerks, but requested interviews with 100. Because of his "high rejection rate for interviews," Peppers mailed his interview questions to those who refused to be interviewed in person (p.19). He reports that this approach was "moderately successful" (p.19). Perhaps most importantly, however, Peppers acknowledges that, although he was able to rely on interviews with former clerks from the 1950s through the 1970s, those from the 1980s and 1990s evidenced "a general unwillingness to be interviewed" (p.20). Thus, most of his "written interview requests were answered and declined, with the ongoing duty of law clerk confidentiality cited as the reason" (p.20).

In short, the only people who truly know whether law clerks from the late twentieth and early twenty-first centuries exert or exerted inappropriate influence are the individual clerks and the justices themselves. These are the precise individuals who, for the most part, refused to shed light on the issue. Peppers concedes as much when he indicates that past and present law clerks and justices possess the best source of data for him to test his theory, but "[t]ime and confidentiality rules . . . limited [his] reliance on these primary sources" (p.18). Ironically, the very rules that Peppers employs to prove his hypotheses are the ones that hindered his ability to

complete his research. While it is perhaps impossible for Supreme Court outsiders to ascertain the influence wielded by recent or current law clerks, if history is any guide it is feasible that in time this information may become available. Until then, the power of today's Supreme Court clerks to "leave their fingerprints on constitutional doctrine" will remain shrouded in mystery.

REFERENCE:

Lazarus, Edward P. 1998. [CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT](#). New York: Times Books.

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