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When Court Clerks Rule

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The recent release of Justice Harry A. Blackmun's private Supreme Court case files has starkly illuminated an embarrassing problem that previously was discussed only in whispers among court insiders and aficionados: the degree to which young law clerks, most of them just two years out of law school, make extensive, highly substantive and arguably inappropriate contributions to the decisions issued in their bosses' names.

Even Roe vs. Wade, Blackmun's most famous decision, which legalized abortion nationwide in 1973, owed lots of its language and much of its breadth to his clerks and the clerks of other justices. A decade later, when Blackmun's defense of abortion rights shifted from an emphasis upon doctors' medical prerogatives to women's equality, it was his young clerks who were responsible for his increasingly feminist tone.

Blackmun's files, which span his tenure on the court from 1970 to 1994, also show that in some cases over the years, clerks introduced explicitly partisan political considerations into the court's work (once urging that an abortion ruling be issued before a presidential election, so that women could "vote their outrage" if Roe vs. Wade was reversed). Sometimes clerks' unrestrained ideological biases were starkly evident (as when one referred to Justice Antonin Scalia as "evil Nino" in a memo).

According to "Becoming Justice Blackmun," a new book by New York Times Supreme Court correspondent Linda Greenhouse, even Blackmun's most well-known line -- "From this day forward, I no longer shall tinker with the machinery of death" -- was not his own. That 1994 dissent denouncing capital punishment was proposed by one clerk and written by a second. Blackmun accepted virtually every word of the clerk's draft.

Blackmun's papers are particularly illuminating because we know so little about what goes on behind the closed doors of the Supreme Court. Law clerks often refuse to discuss their work and some even dissemble in the face of explicit evidence. But it is undeniable that they have taken on a dramatically expanded role at the court in recent decades. Indeed, the increased influence of clerks on both the substance of legal rulings and on the court's private collegial dynamics is the greatest change the Supreme Court has experienced in the last 35 years.

The clerks have become so important in large part because there are now so many of them. Chief Justice William H. Rehnquist employs three clerks annually, but his eight colleagues have four apiece. That's a far cry from 1945, when each justice had just one clerk, or even 1970, when each had only two.

The increase is unnecessary. This year the court is scheduled to decide 74 cases by means of written opinions. Each justice will write eight or nine majority opinions, plus a dozen or more dissents and concurrences.

Sixty years ago, in 1945, when each justice had just one clerk, the court decided more than 160 cases. The number of clerks increased to two in 1946, to three in 1970 and finally to four in 1976, when the court decided more than 175 cases.

For well over a decade now, the court annually has been deciding fewer than half the cases it did in 1976 or 1946. No current justice, and no insider apologists for the court, can claim with a straight face that today's justices require the assistance of four or even three law clerks. No one can contend that a multiplicity of clerks makes for better rulings; indeed, as Blackmun's files reveal, an excess of clerks encourages justices to give away essential parts of their jobs to inexperienced people in their 20s whose political biases sometimes go unchecked.

One last example: the important 1985 federalism case of Garcia vs. San Antonio Metropolitan Transit Authority. According to Greenhouse, after the justices had privately voted, 5 to 4, and after Blackmun had already been assigned to write the majority opinion, one of his clerks informed him that he -- the clerk -- disagreed, and would rather draft an opinion switching Blackmun to the side of the four dissenters. Blackmun acquiesced, the minority became a majority, and constitutional law made a major, unexpected turn.

Is this really how cases should be decided? Allowing each justice no more than two law clerks or, better yet, just one, would force justices to do more of their own work and would significantly reduce the dangers that Harry Blackmun's files powerfully document. Congress should put aside partisan warfare over the federal judiciary long enough to enact a reform -- a limit of one law clerk per justice -- that liberals and conservatives alike should agree would strengthen and protect the court.