

# Roundtable

## **The United States Supreme Court: An Introduction**

BERT I. HUANG \*

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## INTRODUCTION

The Supreme Court of the United States has always occupied a center place in the comparative study of judicial institutional design and the role of courts. In this roundtable discussion, National Taiwan University College of Law is honored to have Professor Bert I. Huang from Columbia Law School, United States, who had served as the law clerk of Supreme Court Justice David H. Souter, to unveil the ways that the U.S. Supreme Court functions by introducing the *certiorari* process and the system of law clerks. Based on his own experience, Professor Huang provides his insight on the institution of law clerks and their functions. In resonance with these insightful comments, Professor Wen-Chen Chang presents a brief analysis on four models of law clerks to supreme or constitutional courts in a comparative perspective. To response comments and questions raised by Professor Chao-Chun Lin and other participants, Professor Huang explains the role of the U.S. Solicitor General and illustrates additional channels for judicial deliberation between Justices. This roundtable has evidently shed a new light on the comparative discussion of judicial institutions.

## I. OPENING REMARKS

**PROFESSOR JAU-YUAN HWANG**

Good morning, everyone. We are really pleased to have Professor Bert I. Huang as our guest speaker. Professor Huang served as President of the Harvard Law Review while he studied at Harvard Law School. You can imagine how important this position is as it was also served by President Obama of the United States. Professor Huang clerked for Justice David H. Souter of the Supreme Court of the United States in 2007-2008. Today's lecture on the introduction of the United States Supreme Court will be focused on the procedural and the institutional aspects of the Court, an area where Professor Huang might have some personal observations. Let us give a big applause to welcome Professor Huang.

## II. SPEECH

## THE UNITED STATES SUPREME COURT: AN INTRODUCTION

**PROFESSOR BERT I. HUANG**

Thank you, Professor Hwang. It is my great pleasure and honor to be here. As you know, I have very warm feelings toward National Taiwan

University. Both of my parents are now full professors here: Professor Shwu-Yong Liou Huang [劉淑蓉], my mother, and Professor Wu-Liang Huang [黃武良], my father. So, in a way, this is a homecoming for me—even if I grew up in Texas and don't speak as much Mandarin as I should.

Today I'd like to speak with you, along with Professor Lin and Professor Chang, about the work of the United States Supreme Court. I know the students here have been discussing judicial review and may already know some of this, but I hope to describe some interesting characteristics about the Supreme Court and its workings that you may not be as familiar with, especially if you've been studying other legal systems or other constitutional courts.

I'd like to discuss first the role of the Supreme Court as a common law court, a court in the tradition shared by Britain, the United States, Canada, and Australia, among other countries. Then I'd like to discuss a very useful tool that our Supreme Court has available, called *certiorari*. *Certiorari* means that the Supreme Court can choose which cases it hears. I'll describe how this process works. This will lead us to the role of the law clerks: who are they and what assistance do they provide the Justices? I'll address some of the criticisms you may have heard about having such young and inexperienced lawyers involved in the Court's decisions; my personal view is more favorable and optimistic about the function of the law clerks. Please note that I'll be speaking very generally, today, and will need to oversimplify a few things.

### 1. *Common Law Courts*

First, as many of you already know, many American courts follow the common law tradition. They deal with two things at the same time. One is deciding cases and the other is interpreting the law. You might be thinking: every court that decides cases has to interpret law. The special thing about common law courts is that when they interpret the law, that interpretation in a way becomes part of the law. The interpretation binds future courts. I assume you're familiar with this idea of precedent or *stare decisis*. That's a part of the common law tradition; it is very important for the U.S. Supreme Court.

The United States has a federal government and fifty states, and each has its own judiciary. In the federal judiciary, the courts that make

precedential rulings are the federal appeals courts and the Supreme Court. After a case is decided at a federal district court, which is the trial court, a party can appeal the decision to one of the federal appeals courts. After this, a party might try to bring its case to the Supreme Court.

If you look at the numbers, there are around sixty thousand cases each year in the federal appeals courts. These courts have mandatory review, which means they must hear every appeal that is brought to them. Thus, if you're a party in a case in federal court, and you don't like the results at the trial level, automatically you have the right to appeal. Out of the sixty thousand or so cases, these courts may write precedential opinions in about five or six thousand.

Turning to the Supreme Court, things look very different. The Supreme Court does not hear thousands of cases, not even hundreds of cases, every year. These days, it chooses around eighty or ninety cases a year. Virtually every case that the Court hears is one in which it will write an opinion, in order to clarify some aspect of the federal law or the U.S. Constitution. Because of *certiorari* review, the Court chooses its own cases. That's why it only has only around eighty cases a year, not thousands. So the next question is, how does the Court decide to take certain cases?

## 2. *Certiorari*

In American culture, there's an expression that goes like this: "I will take my case all the way to the Supreme Court." And the idea behind it is that if I lose my case somewhere in the federal or state courts, I'll be able to make one final appeal to the Supreme Court. But how do you do that? How is it even possible, when the Court hears only about eighty cases a year?

An understanding of the *certiorari* process might help answer these questions. First, the litigant asks the Court to take the case, by filing a petition. Then the Court will examine the petition and decide whether to grant or to deny it. If it grants the petition, the case is accepted and the Court will make a decision in the case itself.

This process is formally simple, but of course the reality is more complex. The simple part is that the Supreme Court decides almost everything by vote. The nine Justices all participate in every vote unless they have a possible conflict of interest and decide to recuse. So it is necessary to have a five-vote majority for most decisions. But not for the decision to grant a petition—only four votes are needed to take a case.

There are many reasons why the Court might decide *not* to take a case.

An important and common reason is that the legal question in the case concerns purely state law, and not federal law or the U.S. Constitution. Another common reason for rejecting a given case is that it isn't an ideal case for deciding this specific legal question. If the facts of a case are unclear, or if the original judge had multiple reasons for deciding the way he or she did, or if the legal question of interest isn't central to the case or isn't clearly posed, then the Justices might decide this isn't the best case to use in interpreting the law. The Justices might then wait for the next time a case brings up this legal issue.

What cases do attract the Court's attention, then? A case may present an important legal question that the Court has not yet dealt with; for instance, if the constitutionality of a newly enacted law is being challenged (such as the new health care law in the United States). Another reason it might accept a case is if another court makes a decision that conflicts with the Supreme Court's instructions. Neither of these, however, is the most common reason for taking a case.

The main reason today's Supreme Court will take a case is to maintain uniformity in federal law, across the numerous courts and jurisdictions in the United States. Remember that many American courts are common law courts. What if the federal appeals court sitting in Texas interprets the law differently than the one sitting in New York? Both of their interpretations are precedential and bind future courts in their region. This inconsistency is what we call a "split."

Splits happen quite often. The United States has fifty states and twelve federal judicial regions, plus a few special jurisdictions. Each of the twelve regions has one federal appeals court deciding what federal law means. The states' supreme courts also interpret federal law, including the Constitution. There can thus be many opportunities for conflicting interpretations. The Supreme Court sees one of its main responsibilities as monitoring these interpretations and ensuring that they don't conflict with each other.

This strong emphasis on correcting splits surprises even many lawyers in the United States. The expression goes, "I'll fight my case all the way to the Supreme Court!" It is not: "I'll fight my case all the way to the Supreme Court—*by identifying a split!*" People don't usually think splits are the main factor. Some think the Supreme Court should take every case, just like other appeals courts, in order to correct errors. But that has not been true for a long time. Even back in the 1950s, Justice Harlan said, "A great many petitions for certiorari reflect a fundamental misconception as to the role of the

Supreme Court.”<sup>1</sup>

*Certiorari* offers several advantages; but the way it is used has also been criticized. One advantage is that, by controlling the quantity of cases, the Court can set its own pace. When it takes fewer cases, the Court is able to give its reasoning in more depth in those cases. But some commentators have criticized the Court for taking too few cases. They compare it to twenty or thirty years ago, when there were a hundred twenty, even a hundred fifty cases a year. There is also a qualitative criticism. One key criterion today for taking a case, as I’ve mentioned, is that there’s a split. But another is the importance of a case. There may be a split among the courts about a law that is of relatively little consequence. Critics might say it’s more useful for the Court to deal with controversies influencing large numbers of people, even if there’s not a real split.

To understand more about *certiorari* and these criticisms, let’s talk about how the process works in practice. Most of the law clerks form a “pool” for analyzing the petitions, as a group: First, one of these law clerks reads the petition and writes a memo, summarizing the legal issues involved and recommending that the Court grant or deny a case. (This pool of clerks goes through every petition—which means that they read thousands of them, writing memos for each one, every year.) After that, the Justices read the clerks’ memos, read selected petitions, form their views, choose cases for a short list, and finally discuss this list of cases at a conference. There they also vote on whether to grant or to deny.

What happens in this meeting? Only the Justices know. It’s private and secret. It takes place in this beautiful room, and the Justices are there alone. No clerks. No secretaries. Nobody to open the door, take notes, or get coffee for everyone. The junior Justice has to do that. You may have heard a story about this arrangement: Until recently, the Supreme Court had not changed its membership for over ten years, which meant that Justice Breyer was the junior Justice for all that time. He had to open the door, take notes, and get the coffee. (I’m joking about the coffee.) Then, Justice Alito was confirmed and became the junior Justice. As the story goes, whenever someone knocked on the door, Justice Breyer would still stand up, out of habit, and Justice Alito would have to tell him, “No, no, I’ll get the door.”

The law clerks are absent from this conference. But they have already

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1. JOHN M. HARLAN, MANNING THE DIKES: SOME COMMENTS ON THE STATUTORY CERTIORARI JURISDICTION AND JURISDICTIONAL STATEMENT PRACTICE OF THE SUPREME COURT OF THE UNITED STATES 549 (1958).

influenced which petitions attract the Justices' attention; after all, it's the law clerks who first recommend that the Court take or reject a case. So who are these people?

Typically, the clerks are young, between twenty-five and thirty-five years old, recent graduates from top law schools. Some have practiced law, but what almost all of them has done is serve as a clerk for a judge in the federal appeals courts. I clerked for Judge Boudin in the First Circuit before working for Justice Souter at the Supreme Court. For me, this training was invaluable, even if it was just for one year.

Each Justice hires four law clerks, so there are thirty-six altogether. (Actually, the number is slightly higher, because retired Justices are able to hire clerks as well.) As I mentioned, law clerks read the petitions, write memos, and make a recommendation. They also assist the Justices with the cases that are accepted. Before they work with the Justices on opinions, there is a great deal of preparation that needs to be done; part of it is doing a lot of research, and part of it is talking with other Justices' clerks. When the time comes, the law clerks help with the opinions. How that is done differs with the different Justices.

You can imagine the common criticisms about the law clerks and their role. First, critics say, they are inexperienced. Most of them don't have much legal experience beyond clerking for one or two judges. I've heard critics suggest that law clerks may be part of the reason why so much emphasis is put on splits. Law clerks were extremely successful law students; they are well-trained in discerning what judges really mean and at distinguishing among what different judges have said. For the most part, law clerks are confident in identifying cases in which a court in Texas is interpreting the law differently than a court in New York. The criticism is that they overemphasize splits as a criterion because they are especially good at this, while they don't have as much perspective or insight about which cases are the more important ones.

Another criticism is that the use of law clerks may contribute to the low numbers of cases taken on *certiorari*. Because they are inexperienced and insecure, critics say, law clerks try not to recommend that the Court accept cases. Supposedly, the biggest nightmare for a law clerk is if the Court takes a case suggested by the clerk—but then rejects the case later, as if admitting a mistake.

But I am not as worried as these critics are about law clerks putting emphasis on splits or being conservative in their recommendations. Why



not? First of all, law clerks are just one part of the system. Many signals reach the Court, indicating the importance of certain cases. These signals come from experts including other judges, the federal or state governments, and interest groups. Third parties called *amicus curiae*, who are not involved in a specific case, can put in recommendations to the Court, arguing that a certain case affects thousands of people like them or that having the law settled matters enormously. Or they can make efforts to keep the Court away from certain cases, to persuade it not to interfere.

The Court can also invite outsiders to offer their views. One of the most prominent is the federal government. You've all heard of Justice Kagan, the newest Justice (who now has to open the door, take notes, and so forth). Before being appointed as the ninth Justice, she served as the Solicitor General, a job sometimes called the "tenth Justice." This person is the top lawyer for the United States in arguing cases at the Supreme Court and is in charge of an important branch of the Justice Department. The Office of the Solicitor General is an absolutely professional office, a non-political one, and its views are taken seriously by the Justices. The Court has a practice known as "calling for the views of the Solicitor General," to get the federal government's official opinion on the importance of certain cases. Expert signals like these are thus available for the Justices.

Still another criticism is that the law clerks have little institutional memory because they usually work for only one year. But the Justices themselves will remember past cases and issues from past petitions. What the law clerks add is a fresh point of view. I had always wondered why judges would hire inexperienced recent law school graduates. But after working in the courts and meeting other law clerks, I started to see one reason: Judges themselves are already experts with plenty of institutional memory. Many want law clerks to bring a freshness of perspective. This seems true at the Supreme Court as well.

Finally, I'd like to point out the strong culture of mutual support among the law clerks. Double-checks happen much more than you might think. It's often not just the one assigned clerk who works on a certain petition, but several who get involved in discussing it. Clerks turn to each other, seeking and providing substantial help. They do this out of humility and sometimes insecurity, all of which makes them more careful and improves their work.

On a personal note, I left my time at the Court with a greater respect for it. My respect grew in part from getting to know my fellow law clerks. Many of my former colleagues are now close friends, and they are people I completely trust and would count on to accomplish the toughest legal work.

One other thing that gave me extra respect for the Court was the privilege of working for Justice Souter. He is a humane, modest, and truly brilliant man. Because of him, this grand and imposing institution felt to me a much more human place.

### III. COMMENTARY

#### PROFESSOR JAU-YUAN HWANG

Thank you, Professor Huang, for your wonderful presentation. You provide the brief and quite personnel observation of the U.S. Supreme Court procedure for us. Now I will turn to our two discussants. First, we welcome Professor Wen-Chen Chang to give her comments, opinion or suggestions. Then we will have Professor Chao-Chun Lin.

#### A. PROFESSOR WEN-CHEN CHANG

Thank you. I am really pleased to be here today. As Prof. Bert Huang just mentioned how the law clerks work with Justices in the U.S. Supreme Court, I would like to provide a comparative view on the relationships between law clerks and Justices of supreme or constitutional courts by discussing the following four models.

The first model is a supreme or constitutional court largely dominated by career judges who are assisted also by career judges as their law clerks. Japan comes to our mind as a typical example of this model. In Japan's Supreme Court, law clerks are chosen from junior judges from the lower courts. Professor David Law of Washington University Law School in St. Louis, who is currently a visiting professor with us, has published a wonderful piece explaining how these career-judges clerks have significantly constrained Justices of Japan's Supreme Court, particularly those not chosen from career judges, on their understandings of laws or legal interpretations by the ways that research assistances are provided.<sup>2</sup>

The second model is a supreme or constitutional court again dominated by career judges whose law clerks are recruited not only from career judges but also from scholars and professors who may complement the career judges' specialties as a result of their mixed professional backgrounds. One example in this model is the South Korean Constitutional Court that has constitutional research officers to assist its Justices.<sup>3</sup> These research officers

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2. See David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009).

3. THE CONSTITUTIONAL COURT OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT 38-39 (2001).

are recruited from lower-court judges as well as from scholarly communities. Some of them may be on loan from prestigious law schools to the Court. These research officers help Justices to prepare cases and provide research assistance especially in the area of comparative laws and practices.<sup>4</sup>

The third model is a supreme or constitutional court mixed with career judges and non-career judges, whose law clerks come from recent law school graduates. This is like the scenario of the U.S. Supreme Court. While in recent years there is an increasing number of the Supreme Court Justices who have served as judges prior to their appointments to the Court, before the 1930s there was only a small fraction of Justices who had have such judicial practices. Seen in this way, the U.S. Supreme Court is sort of a mix between career judges and non-career judges (or law professors), and they are assisted by a group of young graduates from top law schools. I think this model is most typical from a comparative constitutional point of view.

The fourth model is also a mixed court composed of career judges and law professors assisted by recent graduates with bachelor or master degrees in law as law clerks. These law clerks have been trained only in law. The majority of law clerks may hold a master degree, but their degrees are still about law of some advanced or particular areas. Unlike law clerks in the U.S. Supreme Court, who have a non-law bachelor degree aside from their JD, these young LL.B or LL.M clerks are not acquainted with arguments outside the realm of law. This model is adopted by our Constitutional Court in Taiwan, which is also common to other courts of civil law tradition.

The advantages and disadvantages of the first and second model are clear. The first model is likely to present a conservative court as exemplified by Japan's Supreme Court, where Justice of career judges are assisted by law clerks of career judges. However, in the second model, where Justices of career judge are assisted by scholars or even professors as the Constitutional Court of South Korea has demonstrated, it tends to generate more liberal decisions. The interesting comparison is between the third and fourth models. In both models, the composition of the courts have taken advantages of both career judges with their practical experiences and law professors with their theoretical perspectives. One further question to ask is how much can law clerks help on this mixed picture of the court. How much more specialties or fresh views these law clerks can provide?

Thus I would like to put forward a question for Professor Bert Huang: Based upon your personal experiences or observations, to what extent and in

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4. In fact, the Constitutional Court of Korea is currently in the midst of creating a research institute that will be staffed by full-time researchers who have been very much acquainted with comparative legal research and even speak English, German, Japanese, or Spanish fluently. See David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. (forthcoming Aug. 2011).

what ways would the graduates of the current American law schools, trained to be interdisciplinary and critical of many things, make them a better law clerk than graduates of LL.B or LL.Ms in most of the civil law jurisdictions? Following that, I would like to ask another question in reflection upon the recent debate on the use of foreign law or comparative legal analysis in domestic constitutional adjudication.<sup>5</sup> I know these debates are mainly between Justices in U.S. Supreme Court.<sup>6</sup> However, I would like to ask you, according to your personal experiences, how much law clerks would be able to bring these comparative discussions into their memos to the Justices? What impacts would these memos have, if any? And how much would interdisciplinary approaches or perspectives such as your specialty in law and economics be written into memos of these law clerks? Would these be ever conveyed to the Justices? To what extent do you think the impact has been, if any?

From my point of view, in the third and fourth models, the roles of law clerks are limited. Law clerks do not provide much assistance to the Justices who have had long years of experiences either in legal practice or academia. In Taiwan, for example, though law clerks provide some foreign law materials to the Justices, due to their limited capacity in foreign languages, they mainly provide comparative materials written in Chinese or at times in English.

The last question for Professor Bert Huang is the relationship between Justices and their law clerks in the U.S. Supreme Court. I know some justices of scholarly backgrounds may interact with his/her clerks just as a professor acts with his/her research assistants. What is your observation on this based upon your experiences at the U.S. Supreme Court? Are there different styles between Justices of different backgrounds? Also, how about the relationship between or among Justices themselves? I was once told that Justices are not always befriended with other Justices. Some may go for coffee with some but not necessarily with others. Would these varied friendships between Justices affect the relationships between their law clerks?

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5. See Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109-27 (2005).

6. See, e.g., Stephen Breyer, *Keynote address proceedings of the ninety-seventh annual meeting of the American Society of International Law*, 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002); William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 411 (Paul Kirchhof & Donald P. Kommers eds., 1993); Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

**B. PROFESSOR CHAO-CHUN LIN**

Thank you very much for the illuminating speech. I would like to discuss three related questions. The first question is about the issue of seniority in the US court system. Let's take the case of Justice Breyer as an example. As we know, Justice Breyer was the second-longest-serving junior Justice in the history of the U.S. Supreme Court. He has been in that position for twelve years. In the past, it seems to me that the seniority did not matter in the U.S. legal system. However, because the case of Justice Breyer and other information, I started to wonder, "Does the seniority make some difference in the U.S. Supreme Court?" How do you think of this?

The second question is about the expert signals. How much impact do the various key players make on the decisions? The typical example is the influential nongovernmental organization (NGO), the National Association for the Advancement of Colored People (NAACP).<sup>7</sup> Moreover, I would like to know more about the role of Solicitor General. Some say that the Solicitor General is the 10<sup>th</sup> Justice of the Court. Others however say that he/she performs like a servant of the President. Sometimes the Solicitor General pays loyalty to the interests of the whole society, but in other times he/she does the job for his or her own interest. Additionally, I know that the Solicitor General sometimes would confess errors of lower court decisions, even when local decisions are pro-governmental or the government has won the case. Have you witnessed any case that the Solicitor General confesses errors made by lower courts?

My third question is about the time limit of oral arguments. In Taiwan, our oral argument has no time limit. However, as far as I know, in the Supreme Court or other appellate courts, Justices only allow the party to have sixty minutes or thirty minutes to make statements. I would like to know your opinions on this. Thank you.

*Professor Bert Huang:*

Thank you for these challenging and interesting questions. I hope the students here have been listening closely, because these questions help to deepen our understanding of how the Court works.

First of all, the four models provided by Professor Chang are

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7. Founded in 1909, the NAACP is the oldest and largest civil rights organization in the United States, and has utilized civil suits as the pattern in modern civil rights litigation, such as *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Murray v. Pearson*, 169 Md. 478, 182 A. 590 (1936); *Brown v. Board of Education*, 347 U.S. 483 (1954). *NAACP Legal History*, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/pages/naacp-legal-history> (last visited Aug. 18, 2011).

fascinating. I look forward to learning more about the Japanese constitutional court from reading Professor Law's article. I'd like to add just one general observation about how the different actors, including the outside actors I mentioned, complement each other. It worries some people when the Justices are all former appeals judges because their backgrounds may thus seem very similar. But remember, the Court is able to access valuable expertise from outside, such as from *amicus curiae*. As for academics: The Korean model is interesting in how it actually hires law professors as research staff. In the United States, law professors might have some influence as *amicus curiae*, but also through the students they've taught who become law clerks. Judicial history also suggests that the ideas of law professors have affected the legal reasoning of judges and Justices over time. And of course, some judges used to be professors themselves. There are thus some informal channels, too.

The question about law school culture also raises an important topic. I think the fact that American law schooling starts after college makes a big difference for the pool of law clerks. It can help to have a law clerk who was a poetry major sitting next to one who was an economics major, and so forth. Clerks may also have specialized in different areas of law during law school. This relates to the question about how interdisciplinary thinking is brought in. In the United States, law students are expected to be critical readers. They are also immersed in such approaches as law and economics, law and literature, and law and history, among others. It's built into the legal education. As a result, law clerks are used to seeing a given problem from different perspectives.

On the question of comparative law: this is generally less emphasized in U.S. law schools, though now there is growing interest. Of course, there will be some law clerks who are familiar with comparative legal systems or international law. It's also possible to have a clerk who was a Japanese studies major, or African studies, in college before coming to law school. But so far it's not a big part of legal training. Compensating for this, however, is the fact that law clerks are resourceful and will make great efforts when they need to deal with international questions or foreign law; they will go and figure out what the laws are, in various places, on particular issues.

If you look at U.S. Supreme Court opinions, you can find citations to cases from Europe, Africa, or Asia. But there's a much narrower range of actual use than some of the recent controversy may suggest. There seems to be little chance that American judges or lawyers will transplant foreign decisions into the domestic law as precedent, rather than citing them as possibly persuasive illustrations.

You asked about the effect of friendships among the Justices. As you may know, Justices Ginsburg and Scalia, even though they have conflicting views on some issues, are famously good friends with each other. The story is, they spend New Year's Eve together and go to the opera together. (Sometimes, when they are lucky, they get to perform in an opera together.) But I'm sure that even if the Justices were not friends, their law clerks would still be capable of working well together, as they need to do. That's just part of the job.

Now let's turn to Professor Lin's questions, which are also fascinating, though in more of a political scientist's style. First, seniority does matter. Seniority comes with time on the bench, but the Chief Justice automatically has highest seniority. The power to assign who writes an opinion is based on seniority. As I mentioned, it takes five votes to win a case. When the votes are known, on each side, the most senior Justice can assign who writes the opinion for that side. Why does this matter, if the decision has already been made through voting? One reason is that the author of the opinion largely determines the style and substance of the legal thinking in the opinion. When Justice Stevens retired, many news articles recognized that he was often the senior Justice on the other side from the Chief Justice, in controversial cases, and noted how influential he was in his ability to use this assignment power.

The next question was about communication among the Justices. The secret conference is one place it happens. But, as historical records have shown, there are also phone calls, conversations in the halls (or maybe at the opera), and many exchanged memos in which the Justices explain their views and try to persuade each other. And of course, the clerks talk to each other. Just as legislative staffs work out the details of laws before the legislators focus on it or go to vote, a lot of communication happens at the level of the law clerks.

I'll also say a word about oral arguments. It may seem absurd that when the Court takes only eighty-some cases a year, and these include some of the more interesting conflicts in the law that year, it then only gives each side half an hour to speak. But remember, this is only one part of the argumentation, and not necessarily the biggest part. Some people think that oral arguments are as important for what the Justices are saying to each other, as for what the lawyers are saying. After all, most of the lawyers' argumentation has already been written down and carefully read. What's more, the Supreme Court is usually dealing with issues about which multiple judges in other courts have already offered detailed opinions. When there's a

split, intelligent judges will have disagreed, yielding plenty of material on each side.

The final question was about the Solicitor General. This is an office which has the high respect it gets because of the people who have held that job. And it is taken seriously by everyone thanks to its tradition of neutrality. The Solicitor General has the obligation to take the most legally sound position, even if the outcome is not what the President would prefer. Professor Lin pointed out a nice example, in which the government has won a case but the Solicitor General will say, "That's a mistake." For this office, neutrality and respect go together.

#### IV. GENERAL DISCUSSIONS AND RESPONSE

*Question:* To what extent do you substantially involved in the decision making process, if it is possible for the Justices to change their opinions during the discussion? If your opinion conflicts with your Justice, would you try to persuade him/her?

*Professor Huang:*

It varies from judge to judge. Each judge hires clerks for different qualities, and there is some range in how clerks are used. But yes, there are judges who look for clerks who will argue with them and take the other side. Although judges are confident and experienced, they all want to avoid making a mistake because something was overlooked. So they welcome intellectual challenge. One familiar story is that Justice Scalia, who is very confident in his views, has sometimes hired clerks who have opposite views in order to have someone who can argue with him and with the other clerks.

*Question:* To what extent, can the Justices maintain their writing style with the help of law clerks?

*Professor Huang:*

It varies enormously, how much judges involve their law clerks in the writing process. For example, it's well-known that the first judge I clerked for, Judge Boudin, has a strong and distinctive writing style. He doesn't waste words or use many footnotes. He tries not to use technical language but rather words that make sense to non-lawyers, which can be challenging for law clerks to do. None of us had his kind of writing genius. If you read



his opinions, you can be very sure those words are his own. Another such example is Judge Posner. There are times, though, when you can tell that a judge's written opinion was drafted mostly by a law clerk.

*Question:* What is the relationship between you and other legislator staffs especially when you face the case of political importance? How does the relationship affect your work?

*Professor Huang:*

Washington is a small town, in a way. The Supreme Court is across the street from Congress; and beyond that the White House is less than a couple miles away. As a young person working there, you might have roommates; one might work for the Congress and another for an interest group. (In fact, it's common even for members of Congress to share houses together.) People's kids go to school together. And so on. There can be a lot of social interaction with other people involved in government.

But I know of no work interaction between the staff of Congress and the law clerks of the Supreme Court. Among other things, law clerks know that they must keep their work confidential. And the independence of the judicial branch is extremely important. Did you know that the Supreme Court used to be located *inside* the same building as Congress? It was in a dark but beautiful room that had been the old Senate chamber. But the Court eventually moved across the street—in part because people wanted at least one street separating the two branches of government. The branches are supposed to check each other. Being in another branch's building (and maybe having your electricity turned on or off by them) doesn't seem so independent. But today, the Supreme Court has its own beautiful home.

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# 美國聯邦最高法院運作初探

Bert I. Huang

## 摘 要

美國聯邦最高法院在於司法體系設計及比較的研究中，向來處於核心之地位。臺灣大學法律學院很榮幸邀請到於美國哥倫比亞大學法學院任教的Bert I. Huang教授，為我們演講美國聯邦最高法院運作中諸如移審令（*certiorari*）及法官助理等制度，讓我們得以瞭解其具體運作。Bert I. Huang教授曾任美國聯邦最高法院David H. Souter大法官的助理，本於此經驗，他對法官助理制度的實際運作及功能，能提供我們完整與精闢的瞭解。張文貞教授則從比較法觀點，針對各國最高法院或憲法院所採取的四種主要法官助理模式，提出簡要分析。針對林超駿教授和其他與會人士所提出的評論與提問，Bert I. Huang教授也進一步提及其他協助美國聯邦最高法院運作的相關制度，開啓對於美國聯邦最高法院及其他司法體系比較上的全新視野。