Confronting Online Advocacy

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Jeffrey L. Fisher & Alli Orr Larsen, *Virtual Briefing at the Supreme Court*, 109 **Cornell L. Rev.** __ (forthcoming 2019), available at SSRN.

How do the Justices (and their law clerks) know what they know? More specifically, how do they acquire the information that they rely on when deciding cases? Alli Orr Larsen has done more than anyone in recent years to answer this set of questions. From exploring the role of amicus brief "facts" in Supreme Court opinions to tracing "in house" fact-finding by the Justices themselves, Larsen has shown how information comes to, and is sought by, members of the Court in surprising and perhaps unsettling ways. It is thereforeunsurprising that Larsen, with renowned Supreme Court advocate Jeff Fisher, have new and important information about how facts and arguments reach chambers today.

The starting point of *Virtual Briefing* is that the digital age has opened new avenues for reaching the Justices. As readers of this site will no doubt acknowledge, many in the legal profession gather crucial information about cases online. Whereas yesterday's lawyer might have consulted bar journals and op-ed pages to glean legal insights, today's lawyer has her pick of podcasts, blogs, and twitter feeds devoted to the Court. As one example, according to ABA estimates, there were a mere 100 legal blogs in 2002 and more than 4000 by 2016. These sources provide what the authors dub "virtual briefing"— written or oral online advocacy, outside the normal briefing process, aimed at influencing the outcome of a case at the Supreme Court.

A lesser team would simply say it stands to reason that the Justices and their clerks are paying attention to this new type of briefing. Larsen and Fisher, however, have the online equivalent of receipts. They identified Twitter accounts for 25 law clerks from the 2017–18 and 2018–19 Terms—37% of the clerks from this period. They then found that a substantial number of clerks "followed" accounts focused on Court commentary, including those of SCOTUSblog, Orin Kerr, and the now-defunct *First Mondays* podcast. Larsen and Fisher even show in a few instances that clerks began following subject-specific accounts around the time certain cases were pending—for example, a labor law blog when the public-unions case, Janus v. AFSCME, was argued.

Having shown that a sizeable number of law clerks tune in to Court commentators, *Virtual Briefing* then has the difficult task of showing that this made a difference. The authors are careful to acknowledge that they cannot prove so definitively. But they can provide examples where the evidence suggests that a particular blog post or podcast mattered—and they do so persuasively. As one example, Fisher and Larsen trace the infamous "broccoli horrible" argument from NFIB v. Sebelius, as it moved from the *Volokh Conspiracy* blog to Justice Scalia's questions at oral argument to all three main opinions on the Commerce Clause. With this and a few other powerful examples, they make a strong case that virtual briefing has mattered, even if one cannot say so with certainty or in quantifiable terms.

The article then turns from the descriptive to the normative: We have reason to believe that virtual briefing matters, now should we be concerned? To answer this question, the authors have another difficult task: trying to draw a line between making arguments with an intent to affect case outcomes in a blog post or podcast and making arguments with an intent to affect case outcomes in a bar journal or the op-ed page of *The New York Times*. Online commentators can respond to claims made at argument in real time (not days or weeks later) and online fora tend to lack the gatekeepers and fact-checkers associated with famed print publications. Taken together, these points mean that the Justices can "crowdsource" their arguments, often from potentially dubious sources, making virtual briefing different in kind from what has come before.

The ways in which virtual briefing is different can create clear problems. Virtual briefing can circumvent the adversarial process, as commentators can posit new arguments not made by the advocates at argument, and quickly enough to impact decision-making. And it can skirt the spirit of Supreme Court Rules on amicus briefs, which forbid non-amici from providing financial support for filing and require disclosure of non-amici authors. Needless to say, there are no transparency/accountability requirements when uploading a blog post or recording a podcast.

Virtual Briefing concludes by exploring several prescriptive measures. The authors acknowledge, however, that the most obvious solutions come with their own problems. For example, if the Court were to promulgate a rule restricting the posting of material online that appeared to function as a brief—and such a rule could pass constitutional muster—it is not clear to whom the rule would apply, how the rule would be enforced, and how the Court could separate virtual briefing from unobjectionable commentary. The authors ultimately call for enhanced transparency as the most sensible and realistic option. If a Justice encounters a new argument of interest from an online source, the Court could call for supplemental briefing—thereby bringing it "into the fold" of traditional briefing.

In the end, *Virtual Briefing* makes a valuable contribution by identifying and wrestling with an important and complex problem. As the authors conclude, whatever happens with virtual briefing in the future, we should not proceed without discussion and critical thought. Thanks to Fisher and Larsen, we have it.

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