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ORAL ADVOCACY BEFORE THE UNITED STATES SUPREME COURT: DOES IT AFFECT THE JUSTICES' DECISIONS?[†]

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I. INTRODUCTION

A rarely challenged assertion among appellate court judges, lawyers who engage in appellate work, and scholars who teach and study appellate practice is the following: oral argument is an important, if not key, element in the process of successfully appealing a case.[1] Textbooks on

1. Advocates, legal scholars, and judges often agree that appellate-level oral arguments are important. *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS (2d ed. 2003); AM. BAR ASS'N, APPELLATE PRACTICE MANUAL (Pricilla Anne Schwab, ed., 1992); ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989); Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986); Joseph W.

appellate practice routinely declare that lawyers must adequately prepare for oral argument and outline assorted tactics for enhancing the likelihood of success on appeal. According to Robert Stern, "It has become axiomatic for writers on appellate advocacy, many of whom are appellate judges, to emphasize the importance of oral argument."[2] Judges also often echo this idea. For instance, Myron Bright declares that "[i]n my opinion, oral argument is an essential component of the decisionmaking process, and plays an important role in assisting the appellate judge in reaching a decision."[3] These types of assertions make an assumption that has not yet been subjected to rigorous empirical analysis—that oral arguments provide information of value to judges and that they can, at times, influence case outcomes.

U.S. Supreme Court Justices generally agree with this conventional view of oral advocacy. They commonly express the belief that when they sit for oral arguments to discuss cases with counsel and among themselves, these proceedings can play a critical role in how they decide. Former Chief Justice Charles Evans Hughes wrote that, in most cases, the impressions a Justice develops during oral arguments "accord[] with the conviction which controls his final vote."[4] Two decades later Justice Robert Jackson echoed the sentiments of the former Chief: "I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. . . . [I]t always is of the highest, and often of controlling, importance."[5]

Current Justices find the arguments are a critical part of their decision making process. As Justice Antonin Scalia quipped, he initially believed oral arguments were "a dog and pony show" before joining the bench, but after sitting for almost two decades he believes that "[t]hings . . . can be put in perspective during oral argument in a way that they can't in a written brief."[6] This sort of thinking led Justice Harlan to advise lawyers that "your oral argument on an appeal is perhaps the most effective

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Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139 (2003); Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25 (1999). *But see* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986) (questioning the value of oral arguments at appellate courts).

2. STERN, *supra* note 1, at 363.
3. Bright, *supra* note 1, at 36.
4. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 61 (1928).
5. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation*, 37 A.B.A. J. 801, 801 (1951).
6. DAVID O'BRIEN, STORM CENTER 282 (4th ed. 1996).

weapon you have got if you will give it the time and attention it deserves."[7] These insights suggest that these proceedings may provide critical information for Supreme Court Justices which, in turn, may affect their decisions on the merits of a case.[8]

This received wisdom among lawyers and judges, however, is generally not shared by political scientists who study appellate courts. They have produced a considerable amount of research explaining the decisions of appellate courts, showing that a host of variables influence the outcomes of cases. Among these explanatory factors are judges' ideological orientations, strategic considerations resulting in intracourt bargaining over opinion drafts, legal norms, contextual factors such as workload, and case characteristics.[9] While there has been little systematic research done on oral arguments, political scientists often assume that, after one controls for the factors generally shown to influence court outcomes, there is little variation left for oral arguments to explain. In addition, they suggest that the institutional setting of the Supreme Court

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7. John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 11 (1956).

8. Many other Justices agree with their colleagues. For instance, Justice Brennan suggests that, while not controlling his votes, this process helps form his substantive assumptions about a case: "Often my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument. . . . Often my idea of how a case shapes up is changed by oral argument . . . ." ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, SUPREME COURT PRACTICE 671 (8th ed. 2002) [hereinafter STERN ET AL.]. Chief Justice Rehnquist agrees with this assertion and states that oral advocacy has affected his thoughts about specific cases: "In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing . . . ." WILLIAM H. REHNQUIST, THE SUPREME COURT 243–44 (2d ed. 2001). More specifically, Chief Justice Rehnquist suggests that a good oral argument "*will* have something to do with how the case comes out." *Id.* at 244. In general, the point is that even though oral arguments may not control the outcome of a case in terms of changing votes, they may provide key information to the Justices, so the importance of these proceedings cannot be overlooked. Note that there has been criticism of the process. For instance, Justice Powell was disappointed at the level of advocacy when he joined the bench. "I certainly had expected that there would be relatively few mediocre performances before the Court. I regret to say that performance has not measured up to my expectations." STERN ET AL., *supra*, at 671.

9. *See, e.g.*, HANSFORD & SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); VIRGINIA HETTINGER, STEFANIE LINDQUIST & WENDY MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE COURT DECISION MAKING (2006) [hereinafter HETTINGER ET AL.]; DAVID KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000) [hereinafter MALTZMAN ET AL.]; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); EPSTEIN & KNIGHT, THE CHOICES JUSTICES MAKE (1998); DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000).

renders the oral argument stage somewhat irrelevant to decisional outcomes. Justices, after all, have reasonably strong preferences, and the agenda-setting process results in a plenary docket comprised of cases having thorny factual and legal issues and containing precedents on both sides of the issue. Segal and Spaeth articulate the textbook political science view, noting that there is no systematic empirical evidence that "oral argument regularly, or even infrequently, determines who wins and who loses."[10]

This divergence between the conventional wisdom in the legal academy and the almost dismissive viewpoint of the political science literature raises the empirical question at the heart of our study: do oral arguments actually matter at the U.S. Supreme Court? That is, what, if any, information do the Justices actually garner from these proceedings, and what consequences, if any, does such information have for the outcomes of cases? While a small literature has developed on this topic, the vast majority of the work is case studies that focus on how one or a few cases were affected by what transpired during these proceedings.[11] Our goal is to move beyond these largely anecdotal accounts to provide systematic quantitative evidence showing that Justices are influenced by the arguments put forward by lawyers.

In this Article, we are interested in testing empirically the extent to which Justices utilize information that can be drawn from the oral arguments, as well as the extent to which such information affects the decisions they make. In order to do so, we draw on a unique set of data: notes taken by former Supreme Court Justice Harry Blackmun as he sat on the bench during oral arguments. In each case, he took notes that include

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10. SEGAL & SPAETH, *supra* note 9, at 280. *See* THOMAS G. WALKER & LEE EPSTEIN, THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION 106 (1993) (suggesting that, while orals are relevant, "[p]robably few [of the Justices'] minds are significantly changed").

11. A small, but rich, cross-disciplinary literature suggests that the Justices garner information about their legal and policy choices, and that this information is ultimately used in majority opinions. *See, e.g.*, TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004) (providing a systematic analysis); William L. Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 ARGUMENTATION & ADVOC. 22 (1989) (providing anecdotal evidence); *see also* Donald S. Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in* Tenn. Valley Auth. v. Hill, 2 U. PUGET SOUND L. REV. 89 (1978); Neil D. McFeeley & Richard J. Ault, *Supreme Court Oral Argument: An Exploratory Analysis*, 20 JURIMETRICS J. 52 (1979); Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q. J. SPEECH 410 (1976) [hereinafter Wasby et al.]. *But cf.* Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 454 (2002).

information perfectly tailored for investigating the role of oral arguments at the Court. Among other things, his oral argument notes record a grade for each attorney's oral presentation before the Court and contain comments raised by his colleagues. His oral argument notes even go so far as to predict the other Justices' final votes on the merits in many cases.

Our empirical investigation focuses on two areas. First, we are interested in the quality of the oral advocacy presented to the Court, especially in terms of its etiology, as well as its effectiveness. We investigate these questions empirically by utilizing notes taken by Blackmun during oral arguments while he sat on the Court. Specifically, we here utilize the grades that Justice Blackmun assigned to each attorney's oral arguments. This information allows us to answer two related questions: (1) why do some attorneys make better arguments before the Court; and (2) does the quality of oral advocacy influence who wins and loses?

Second, we turn our attention to the information the Justices elicit about themselves during oral arguments. We analyze data on how often Justice Blackmun paid attention to the views expressed by his brethren during oral arguments (by examining when and why he recorded the comments of a particular colleague during orals) and the factors that led him to pay attention to some, but not all, of his colleagues. Additionally, we utilize Blackmun's notes to demonstrate that what transpired during oral arguments provided him with an indication of whether his colleagues would vote to affirm or reverse the lower court decision at issue. We do so through an examination of when Justice Blackmun attempted to predict the votes of his colleagues in his oral argument notes.

The Article proceeds as follows. In the next two Parts, we take up our first set of questions, which focuses on whether experienced and resourceful attorneys provide better arguments and whether arguments presented by counsel can affect decisions Justices make. Part IV focuses on whether Justices attempt to learn about their colleagues during oral arguments and whether such information affects the coalition-formation process that follows the arguments. Finally, we analyze whether what transpires during oral arguments can help a Justice make predictions about how a case will ultimately be decided.

II. INFORMATION AND ORAL ARGUMENT

Our most general claim is that oral arguments provide information that can reduce the Justices' uncertainty regarding aspects of a case. While the

Justices generally come to these proceedings after reading the written briefs and the lower court record, they often still face some degree of uncertainty regarding what are generally complex legal and factual issues. The Justices, for example, need an understanding of the legal status quo, the policy choices available to them, the likely effect that different legal rulings will have on the litigants and other similarly situated parties, and the like.

It is in this context that lawyers appear before the Court and attempt to provide the Justices with information that will help their clients' cause. Counsel appearing before the bench can do so by providing "a clear presentation of the issues, of the relationship of those issues to existing law, and of the implications of a decision for public policy."[12] As Justice Blackmun suggests, "A good oralist can add a lot to a case and help [us] in our later analysis of what the case is all about. . . . Many times confusion [in the brief] is clarified by what the lawyers have to say."[13] Johnson, for example, provides evidence that Justices often "seek new information during these proceedings," especially when they are more uncertain about how to act and when a case is more complex.[14] These proceedings thus have the potential to crystallize Justices' views or to move them toward a particular outcome.[15]

Justices themselves, in their writings and speeches, provide hints as to why oral arguments provide information relevant for deciding cases.[16] For them, there are two main pieces of information they can gather from these proceedings: information they draw out of counsel about the Court's legal and policy options and information about how their colleagues view the case. They further suggest that these sources of information are helpful as they deliberate over the answers to legal questions before them. We consider these two types of information in turn.

First, and most basically, Justices posit that during oral arguments, counsel provide information that helps them decide on the merits of cases they hear. Former Chief Justice William Rehnquist pointed out that discussing a case directly with the advocates allows Justices to evaluate

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12. Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32 LAW & SOC'Y REV. 613, 623 (1998) (citing Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995)).

13. Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry A. Blackmun*, 34 U. RICH. L. REV. 285, 298 (2000).

14. JOHNSON, *supra* note 11, at 5.

15. *See, e.g.*, Wasby et al., *supra* note 11; JOHNSON, *supra* note 11.

16. This part draws on JOHNSON, *supra* note 11.

counsel's "strong points and your weak points, and to ask . . . some questions [about the case]."[17] Further, Justice Byron White argued that during these proceedings, the Court treats lawyers as resources to provide new or clarifying information so that the Justices can gain a clearer picture of the case at hand.[18] This suggests that there may be points about which the Justices are still unclear after reading the briefs, and a face-to-face exchange can help them clarify their thinking. As Justice Rehnquist added: "One can do his level best to digest from the briefs . . . what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings."[19]

This function should not be overlooked. As Justice John Harlan argued, "[T]here is no substitute . . . for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies."[20] Thus, one specific function of the arguments is to allow counsel to convey information that may help the Court deal with specific issues of a case.

That the Justices gather information from counsel during oral argument is intuitive. While the briefs may address almost every legal intricacy, counsel cannot always know what information the Justices want. It is only during oral arguments, then, that Justices can discuss with counsel those points that pique their interests. As Justice Rehnquist suggested, "[O]ral argument offers . . . a direct interchange of ideas between court and counsel. . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs."[21] This, Rehnquist argued, is important because it allows the Justices to begin to form their thoughts about how they may ultimately rule: "Probably the most important catalyst for generating further thought was the oral argument of that case."[22] Thus, these proceedings provide a time for Justices to raise issues that they believe will help decide a case.[23]

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17. William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015 (1984).

18. Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B. J. 346, 383 (1982).

19. REHNQUIST, *supra* note 8, at 245.

20. Harlan, *supra* note 7, at 7.

21. Rehnquist, *supra* note 17, at 1021.

22. REHNQUIST, *supra* note 8, at 241.

23. *See* JOHNSON, *supra* note 11; Timothy R. Johnson, *Information, Oral Arguments, and*

Second, beyond gathering information from the advocates, Justices posit that oral arguments can clarify their own thinking and "perhaps that of their colleagues."[24] In other words, during these proceedings, they contemplate how the arguments relate to their own, as well as to their colleagues', vote to reverse or affirm the lower court decision. They do so by speaking with one another as much as they speak with counsel.[25] As Justice Scalia stated almost two decades ago, "It isn't just an interchange between counsel and each of the individual Justices; what is going on is to some extent an exchange of information among Justices themselves."[26] Other Justices and the lawyers involved in the process have echoed similar sentiments.[27] In short, questions Justices ask during oral arguments have as much to do with eliciting information from counsel as they do with telling their colleagues how they view a case.[28]

Supreme Court Decision Making, 29 AM. POL. RES. 331 (2001).

24. *See* White, *supra* note 18, at 383. Additionally, it is interesting to note that at least one former Justice attempted to test this argument. Chief Justice Hughes provided anecdotal evidence that a Justice's impressions of a case after oral argument often conform to his or her final votes. He suggested that one of his colleagues from the New York Court of Appeals kept track of his immediate, post-oral-argument impressions of a case, and that 90% of the time these thoughts accorded with his final vote. HUGHES, *supra* note 4, at 62. This conclusion is supported by Justice Harlan's experience with oral arguments several years later.

When he kept a similar diary, Harlan found that "more times than not—the views which I had at the end of the day's session jibed with the final views that I formed after the more careful study of the briefs . . . ." Harlan, *supra* note 7, at 7. Judges Richard Arnold and Myron Bright kept records at the Eighth Circuit for cases decided between September 1982 and June 1983, comparing their views of the cases pre– and post–oral argument. Judge Bright's view changed after oral arguments in 31% of cases, and Judge Arnold's view differed after oral arguments in 17% of cases. Bright, *supra* note 1, at 40.

25. For instance, E. Barrett Prettyman's analysis of hypothetical questions indicates that Justices are communicating with one another through these types of questions. *See* E. Barrett Prettyman, Jr., *The Supreme Court's Use of Hypothetical Questions at Oral Argument*, 33 CATH. U. L. REV. 555, 556 (1984).

26. Interview by Paul Duke with Antonin Scalia, Associate Justice, U.S. Supreme Court, THIS HONORABLE COURT (PBS Video 1988).

27. Justice Stevens (as quoted by Justice Kennedy) said: "[During oral arguments] the Court is having a conversation with itself through the intermediary of the attorney." Interview by A.E. Dick Howard with Anthony M. Kennedy, Associate Justice, U.S. Supreme Court, SUPREME COURT VISITORS FILM (1997). Lawyers who appear before the Court confirm this point. As former Solicitor General Ted Olson put it, "It's like a highly stylized Japanese theater. . . . The Justices use questions to make points to their colleagues." Joan Biskupic, *Justices Make Points by Questioning Lawyers: High Court May Hint at Views in Oral Arguments*, USA TODAY, Oct. 6, 2006, at 7A, *available at* 2006 WLNR 17320019. *See also* Hatchett & Telfer, *supra* note 1, at 144.

28. Johnson provides initial anecdotal evidence of this phenomenon. JOHNSON, *supra* note 11. Specifically, his analysis of 75 civil liberties cases decided between 1972 and 1986 demonstrates that Justices listen to their colleagues, sometimes quite closely, during these proceedings. *Id*.

III. Does the Quality of Oral Advocacy Affect Supreme Court Decisions?

To plumb the extent to which arguments put forth by counsel during oral arguments can affect the Justices' decisions, we analyze an interesting source of data: Justice Harry Blackmun's contemporaneous evaluations of the arguments presented by attorneys who participated in these proceedings. Appointed by President Richard M. Nixon in 1970, Justice Blackmun served on the Court until his retirement in 1994. During this time, Justice Blackmun took extensive notes while he sat on the bench for oral arguments. In fact, notes exist in his files at the Library of Congress for almost every case in which he sat. He also kept similar notes for a shorter time period while he sat on the Eighth Circuit Court of Appeals from 1959 to 1970. His Eighth Circuit notes, taken from 1961 to 1970, are also available at the Library of Congress.

Specifically, Justice Blackmun's Supreme Court oral argument notes include substantive comments about each attorney's positions and a grade for oral argument, as well as notes and comments regarding what other Justices said at orals. For example, in *Florida Department of State v. Treasure Salvors*,[29] Blackmun wrote ten substantive comments about the argument made by the respondent's attorney, Paul Horan, and then noted that "[h]e makes t[he] most o[f] a thin, tough case."[30] The attorney then earned a 6 on Blackmun's 8-point grading scale. In *First National Maintenance Corporation v. N.L.R.B.*,[31] Blackmun wrote of the petitioner's attorney, "The argument has persuaded me to reverse," when assigning him a score of 5 on his 8-point scale.[32] Blackmun also offered harsher evaluations at times. He commented on the Nebraska Assistant Attorney General's argument in *Murphy v. Hunt*[33] by noting, "very confusing talk about Nebraska's bail statutes;" the attorney received a grade of 4.[34] Similarly, in *Kugler v. Helfant*,[35] the respondent's attorney

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29. 458 U.S. 670 (1982).

30. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Jan. 20, 1982) (on file with *Washington University Law Review*). Justice Blackmun used a set of cryptic abbreviations in his notes. Specifically, here, he wrote, "He makes t most o a thin, tough case." Of the other attorney in the case, Susan Smathers, Blackmun noted "She hangs in there." *Id.*

31. 452 U.S. 666 (1981).

32. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Apr. 21, 1981) (on file in the Personal Papers of Justice Blackmun, Library of Congress, Washington, D.C.).
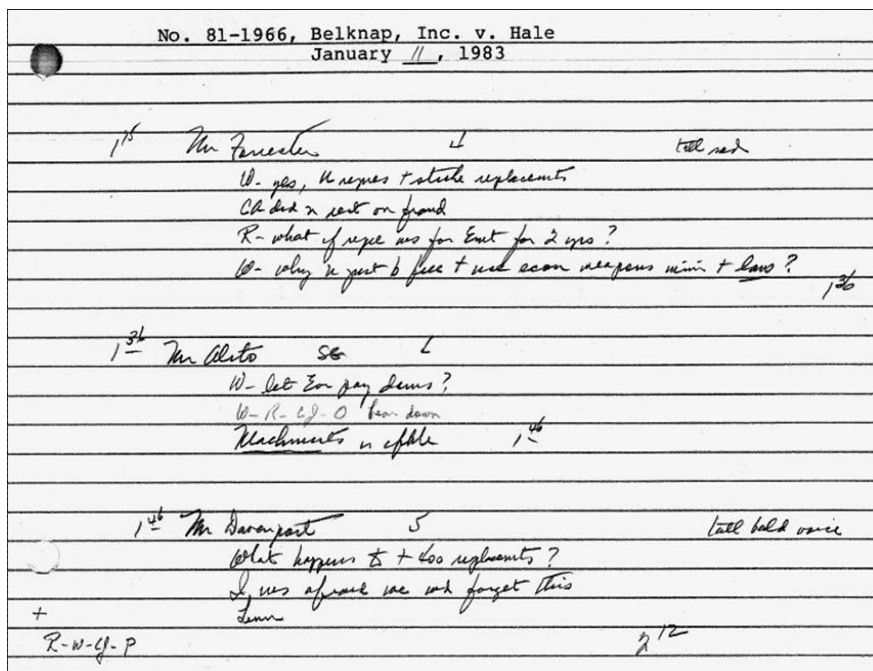
33. 455 U.S. 478 (1982).

34. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Jan. 18, 1982) (on file with the Library of Congress).

earned a "C" (on Blackmun's A–F scale) along with the notation, "He goes too far."[36]

To provide an even clearer picture of how Justice Blackmun recorded his grades, Figure 1 shows his notes from *Belknap, Inc. v. Hale*.[37] Here, Larry E. Forrester, arguing for Belknap, and Samuel A. Alito, Jr., representing the National Labor Relations Board, earned a 4 (noted right after their names) on Blackmun's 8-point scale, while Cecil Davenport earned a 5 (again, noted after his name). Davenport's client won the case.

FIGURE 1: BLACKMUN'S ORAL ARGUMENT NOTES IN *BELKNAP, INC. V. HALE* (1983)

Other Justices have made notations after sitting for oral arguments; this further indicates the role of oral arguments in the decisional process.

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36. *Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Mar. 25, 1975) (on file with the Library of Congress).*

35. 421 U.S. 117 (1975).
36. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Mar. 25, 1975) (on file with the Library of Congress).
37. 463 U.S. 491 (1983).

Justice Powell's oral argument notes are replete with examples of how information from these proceedings helped him decide cases. For instance, in *United States v. 12 200-Foot Reels of Super 8mm Film*,[38] Justice Powell wrote, "[A]rgument was helpful, especially as a summary of previous law-read transcript."[39] Again, in *EPA v. Mink*,[40] Powell notes that Assistant Attorney General Roger C. Cramton provided an "excellent argument (use transcript if we write)."[41] Similarly, after the respondent's argument in *Jensen v. Quaring*,[42] Blackmun indicated that "[t]his simplifies things for me."[43]

In the next part, we turn to a direct empirical examination of the following two factors: (1) the determinants of the quality of an attorney's oral argument (based on Justice Blackmun's grading of each attorney's performance at orals); and (2) the influence that oral arguments exert on Justices' voting behavior, as determined by the extent to which the quality of an attorney's oral arguments correlates with the Justices' votes for her client.

A. Probing the Quality of Oral Arguments

The first step in our analysis is an examination of the factors, suggested by our theory, associated with Justice Blackmun's evaluations of an attorney's oral arguments. We do so for two reasons. First, it is substantively interesting to know whether these grades are related to the factors that scholars generally associate with a well-spoken attorney—namely, the educational and career experience of attorneys coupled with their reputational resources. Second, this analysis will help to establish the underlying validity of these data as a measure of the quality of oral argumentation. We are especially interested in showing that these grades are not a function of Justice Blackmun's ideological proclivity to prefer one attorney's position over the other's arguments. We contend, and show

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    38.   413 U.S. 123 (1973).
    39.   Oral Argument Notes from Lewis Powell, Justice, U.S. Supreme Court (Jan. 19, 1972) (on file with Washington and Lee University Law School).
    40.   410 U.S. 73 (1973).
    41.   Oral Argument Notes from Lewis Powell, Justice, U.S. Supreme Court (Nov. 9, 1972) (on file with Washington and Lee University Law School).
    42.   Jensen v. Quaring, 472 U.S. 478 (1985).
    43.   Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Jan. 7, 1985) (on file with the Library of Congress).

empirically, that Blackmun's evaluations of attorneys' arguments can plausibly be seen as a measure of their quality.

Based on the public statements and private writing of Supreme Court Justices, as well as the empirical data from legal scholars and political scientists, we seek to test a series of hypotheses about how the arguments presented to the Court may affect the choices Justices make. Our hypotheses in this part are grounded in two literatures. First, we draw upon the social choice literature that focuses on how information generally affects human interactions. We then combine this broad theoretical foundation with ideas from existing literature on how information and cues may affect decisions made by the Supreme Court.

Among analysts who study human interaction, and particularly interaction between political actors, it is widely recognized that for information to be effective, decision makers must perceive the source of the information to be credible or reliable.[44] The credibility of an information source hinges in part on whether the recipient believes the sender to be well informed and candid on the subject of the communication. The reasoning is intuitive: if the receiver considers the sender to be ill informed, then any information conveyed is likely to be discounted as being possibly inaccurate or misleading.[45]

A long-standing idea in the literature on law and courts is that repeat players, by virtue of factors including experience and resources, are more likely to enjoy litigation success.[46] In the context of the Supreme Court, a key indicator of credibility is a lawyer's litigating experience, especially the extent to which an attorney appeared before the Court in the past. For instance, McGuire finds that attorneys who litigate before the Court more

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44. *See, e.g.*, ARTHUR LUPIA & MATHEW MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY REALLY NEED TO KNOW? (1998); David Austen-Smith, *Information and Influence: Lobbying for Agendas and Votes*, 37 AM. J. POL. SCI. 799 (1993); Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431 (1982); Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103 (1996). While gathering information, decision makers must assess its credibility because the efficacy of information provided to an actor depends on the credibility of the source in the eyes of the recipient. As Austen-Smith puts it in his examination of Congress: "[T]he extent to which any information offered . . . is effective depends on the credibility of the lobbyist to the legislator in question. Such credibility . . . depends partly upon how closely the lobbyist's preferences over consequences reflect those of the legislator being lobbied, and on how confident is the legislator that the lobbyist is in fact informed." Austen-Smith, *supra*, at 800.

45. *See* Austen-Smith, *supra* note 44.

46. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–104 (1974) (describing the advantages enjoyed by repeat players); *See also* CLEMENT VOSE, CAUCASIANS ONLY (1959).

frequently than their competitors are more likely to prevail in their case.[47] As such, we hypothesize:

> *Litigating Experience Hypothesis:* Attorneys with more experience arguing before the Court at oral arguments will earn higher evaluations from Justice Blackmun.

The quintessential repeat player—the Solicitor General—is a consistently successful advocate before the Court;[48] in fact, the Solicitor General's office wins about 70% of the cases in which the U.S. government participates.[49] While scholars have offered various explanations for the Solicitor General's success, it is generally agreed that the nation's best appellate advocates often work for this office and become among the most experienced attorneys to appear before the Court.[50] This means the Justices may be particularly interested in the Solicitor General's view of a case. As Justice Powell put it to Chief Justice Burger in one case: "[T]he importance of this case—and the interest of the government—justify giving the Solicitor General 15 minutes [for oral argument]. . . . He may be more helpful than the more partisan counsel."[51] Thus, we hypothesize:

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47. *See* KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY (1993); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998) [hereinafter McGuire, *Explaining Executive Success*]; Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995) [hereinafter McGuire, *Repeat Players*].

48. *See* Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 138 (1988) (presenting data on success rates of Solicitors General representing the government from the Eisenhower administration to the Reagan administration); Jeffrey A. Segal, *Supreme Court Support for the Solicitor General: The Effect of Presidential Appointments*, 43 W. POL. Q. 137, 140 (1990) (reviewing the literature on the Solicitors General's success rates).

49. LINCOLN CAPLAN, THE TENTH JUSTICE 4 (1987) (documenting that the Solicitor General in 1983 had 79% of his certiorari petitions granted and prevailed in 83% of cases in which he participated); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 29 (1992) (reporting that the government won 67.6% of the cases in which it participated during the 1959 to 1989 Terms); Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision-Making*, 49 AM. J. POL. SCI. 72, 79 (2005) [hereinafter Bailey et al.] (finding that the Supreme Court "embraced the position advocated by the S.G. 68% of the time").

50. McGuire, *Explaining Executive Success*, *supra* note 47, at 505 (stating that the Solicitor General is the "prototypical repeat player" by virtue of being a frequent litigant).

51. Lewis F. Powell, Chambers Actions on Miscellaneous Motions, Sept. 23, 1982 (on file in the Personal Papers of Harry Blackmun, Library of Congress, Washington D.C.).

Solicitor General Hypothesis: Attorneys from the Solicitor General's office are more likely to earn higher marks from Justice Blackmun.

While the Solicitor General's office argues on behalf of the federal government, there are cases when attorneys from a particular agency argue or when the Attorney General personally argues. These attorneys, like Solicitors General, have experience and resources that are likely to make them stronger litigators than nongovernmental attorneys. Thus, we predict:

Federal Government Attorney Hypothesis: Federal government attorneys, other than attorneys from the Solicitor General's office, should receive higher grades from Justice Blackmun than other attorneys.

The credibility of attorneys is also tied to the education they receive. We expect that attorneys who received their education at prestigious law schools are more likely to be accorded respect by the Justices because they are deemed credible sources of information.[52] Empirically, Justice Blackmun's oral argument notes provide evidence that he was cognizant of where those appearing at oral arguments attended law school. For instance, in *Southland Corporation v. Keating*,[53] he noted of John F. Wells (counsel for appellees): "This guy was #2 at Stanford when [Rehnquist] was #1 and [O'Connor was] #3."[54] Similarly, in *Monroe v. Standard Oil Company*,[55] he indicated that appellee attorney Paul S. McAuliffe had a degree from Yale.[56] McGuire's findings and Blackmun's attention to this detail lead us to predict:

Elite Law School Hypothesis: Attorneys educated at more prestigious law schools are likely to earn higher grades from Blackmun.

Beyond the contribution of education, attorneys bring unique professional experiences that add to their professional training. For some Supreme Court litigators, a crucial component of their training was a

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52. *See* MCGUIRE, *supra* note 47, at 39–41 (explaining that "prestigious legal training leads to a fruitful practice").
53. 465 U.S. 1 (1984).
54. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Oct. 4, 1983) (on file with the Library of Congress).
55. 452 U.S. 549 (1981).
56. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Mar. 4, 1981) (on file with the Library of Congress).

clerkship on the Court. After working at the Court for a year or two, clerks become adept at understanding which arguments are likely to garner five votes, and which arguments will be less likely to have any effect on the outcome of a case. As a result, McGuire suggests that "former clerks are highly valued as Supreme Court litigators" and may therefore have an enhanced ability to offer arguments that will sway the Justices.[57] As with law school prestige, Justice Blackmun took notice of this factor at oral arguments; in *Daniels v. Williams*,[58] he describes attorney Stephen Allan Saltzburg as a "[Marshall] clerk."[59] Further, in *United States v. American Bar Endowment*[60] he notes that Francis M. Gregory was a "[Brennan] clerk"[61]; and in *United States v. Halper*,[62] he recorded that John Roberts was a "[Rehnquist] clerk."[63] Thus, we predict:

> *Former Clerk Hypothesis:* Former Supreme Court clerks are more likely to earn higher marks than attorneys who did not clerk.

McGuire finds evidence that members of what he terms the "Washington Elite" (i.e., private attorneys working in Washington, D.C.) are more successful than other private attorneys because they are seen as providing more credible and better arguments to the Justices.[64] This may be due to their relationship with, and proximity to, the Court.[65] This leads us to predict:

> *Washington Elite Hypothesis:* Private attorneys from Washington, D.C., are more likely to earn higher evaluations than are attorneys from outside Washington, D.C.

Academic lawyers and lawyers for interest groups are also often viewed as "notable practitioners," and they often have more experience

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57.   MCGUIRE, *supra* note 47, at 163.

58.   474 U.S. 327 (1986).

59.   Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Nov. 6, 1985) (on file with the Library of Congress).

60.   477 U.S. 105 (1986).

61.   Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Apr. 28, 1986) (on file with the Library of Congress).

62.   490 U.S. 435 (1989).

63.   Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Jan. 17, 1989) (on file with the Library of Congress).

64.   MCGUIRE, *supra* note 47, at 183–84 (showing that Washington attorneys who are Supreme Court practitioners with a reputation "for performing sound and solid work in the Court" are more likely to influence the Supreme Court's case selection).

65.   *Id.* at 183 (stating that "experts who work in close proximity to the Court appear to have a strong impact on its proceedings").

than other attorneys.[66] We expect, then, that academic counsel such as Laurence Tribe and Eugene Gressman would be held in higher regard by the Justices than would non-academic counsel and that attorneys who argue for interest groups would enjoy a similar status. Thus, we predict:

> *Law Professor Hypothesis:* Law school professors who appear before the Court will garner higher grades than non–law school faculty.

> *Amicus Attorney Hypothesis:* Attorneys who participate at oral arguments on behalf of interest groups will garner higher grades at oral arguments.

Finally, we assess whether Justice Blackmun's evaluations are influenced by ideological considerations—namely, whether he gave better grades to lawyers advocating positions he preferred. Given the vast literature on Supreme Court decision making that argues ideology influences how Justices vote,[67] we must ensure that his grading of attorneys was not tainted by ideological colors. This leads us to test the following:

> *Ideological Compatibility Hypothesis:* Attorneys who present arguments ideologically closer to Justice Blackmun are more likely to earn higher marks for their oral arguments.

1. Data and Variables

To test the above hypotheses, we analyze the grades Justice Blackmun assigned to attorneys during oral arguments in a random sample of 539 cases decided between 1970 and 1994.[68] These grades are located in

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66.   *Id.* at 156 (reporting that "[o]utside of Washington, the lawyers most likely to be held in high esteem are law professors and attorneys for organized interests").

67.   *See, e.g.*, SEGAL & SPAETH, *supra* note 9.

68.   We used the docket number as our unit of analysis, and over this time period, the Court decided 3,755 cases with oral argument (full opinion, per curiam, judgment of the Court, or equally divided vote). Our data therefore represent about a 14% sample of the population of cases. Some of the evidence in this and the following part derive from Timothy R. Johnson, Paul J. Wahlbeck, & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006) [hereinafter Johnson et al.].

Note that our data include nine cases where Justice Blackmun's case file contained more than one set of oral argument notes due to a reargument. In our first model, we include the grades from both arguments, but in the outcome model, we obviously only include one observation for each Justice in

Blackmun's oral argument notes in his personal papers at the Library of Congress. We examine the determinants of the grades Blackmun gave to each attorney in a case by regressing these grades on factors that act as proxies for the likely credibility of an attorney and the quality of the information presented.

Using Justice Blackmun's grades as a dependent variable requires us to consider two key issues. First, it is possible that the grades in Blackmun's notes do not reflect his evaluation of the quality of the substantive arguments presented by the attorneys during oral arguments, and are simply based on the attorney's rhetorical performance. Content analysis of Blackmun's oral argument notes for 70 cases (13% of the sample) demonstrates that it is the former and not the latter. Specifically, we coded each sentence in his notes for these 70 cases to determine whether it discussed the substance of an attorney's argument or the presentation style of that attorney. We found in these 70 cases that 95% (1,064) of the sentences in Blackmun's notes discuss the attorneys' substantive arguments, while only 5% (49) focus on stylistic comments about the presentation or on more general comments such as "bad argument." These data overwhelmingly indicate that Blackmun was concerned about the substance of arguments.[69]

The second issue we must confront is that Justice Blackmun's grading system changed over the course of his tenure on the Court. He employed three different grading scales: A–F from 1970 to 1974; 1–100 from 1975 to 1977; and 1–8 from 1978 to 1993 (see Figures 2a–2c for the frequency distribution of grades assigned to attorneys under each grading scheme).[70]

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each case, and we use the data on the reargument to measure the quality of the oral argumentation. The results for the outcome model do not change if we instead drop reargued cases from the analysis.

69. We cannot rule out the possibility that our measure of oral advocacy captures the influence of the written briefs. One would expect that lawyers making a good showing at oral arguments also penned high-quality written briefs. It is important to recognize, however, that even if the effect of written briefs is bleeding into our measure, we are still demonstrating the effect of attorneys on the legal process.

70. The three different scales have similar distributions, as seen in measures of skewness, which assesses the degree of asymmetry, and kurtosis, which assesses peakedness. A high kurtosis score indicates that a distribution has a steeper peak and fatter tails (i.e., there is relatively sparse data for larger values of the variable). A kurtosis of 3 represents a normal distribution; the A–F scale, 1–100 scale, and 1–8 scale, respectively, have kurtosis scores of 3.4, 3.7, and 3.2. A skewness statistic tells us whether the distribution is symmetrical or whether it is skewed to the left (low values of the variable) or right (high values of the variable). The respective skewness statistics for these three scales are –0.39, 0.10, and 0.36. The negative value for the A–F scale indicates that a few more observations are at the low end of that scale, as compared to the other two. For a discussion of skewness and kurtosis, see generally CHARLES T. CLARK & LAWRENCE L. SCHKADE, STATISTICAL ANALYSIS FOR ADMINISTRATIVE DECISIONS (1979).

For the A–F scale, the average grade (after converting it to a numeric scale) is 82.05 with a standard deviation of 5.88. The mean (and standard deviation) for the other two scales are respectively 77.36 (4.42) and 4.88 (0.85).

To compare Blackmun's evaluations of attorneys across these three scales, we standardized the different grading schemes onto a common scale by determining how far away each grade was from the mean grade in that particular scale.[71] More technically, we calculated a z-score for each grade, which tells us how many standard deviations a specific grade is from the mean grade in that scale.[72] A score of 0 indicates that an attorney's grade in a case equaled the mean grade for all of the attorneys in our sample for that scale. Larger positive scores indicate attorneys who scored higher than average on Blackmun's scorecard, while negative values indicate they had lower than average scores.

Because the z-scores are on a continuous scale, we estimated an OLS regression.[73] Additionally, because an attorney may appear multiple times before the Court, we employed robust standard errors clustered on each attorney.[74] We did so because while our data contain 1,118 observations, only 863 different attorneys argued before the Court. Thus, clustering in this manner allows for errors to be correlated within a particular attorney across different cases.[75] Figures 2a–2c provide data on the nature of each grade scale.

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71. To transform the alphanumeric scale into a numeric one, we converted an A to 95, an A- to 90, a B+ to 87, a B to 85, a B- to 80, etc. Occasionally, Justice Blackmun assigned partial grades, specifically A-/B+, B-/C+, and C-/D; we transformed these to 89, 79, and 69, respectively.

72. We measured the z-score in the following way: (X – Mean) / Standard Deviation. *See generally* WILLIAM L. HAYS, STATISTICS (3d ed. 1981). By calculating the z-score for each grade based on the mean and standard deviation of the particular grading scheme from which it was drawn, we control for any changes in Justice Blackmun's baseline grading propensity across the three scales. In other words, our approach does not require us to assume that an 85 under the first scale is equivalent to an 85 in the second or third scales. In addition, our results are not sensitive to how we precisely measure these grades. Indeed, the results are largely comparable if we linearly transform the 1–8 scale into a 0–100 scale.

73. Ordinary Least Squares (OLS) is a statistical technique that determines the degree of linear association between a dependent variable and a set of independent variables. For a discussion of OLS, see WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 220 (3d ed. 1997).

74. One of the principal advantages of robust standard errors, also known as heteroskedastic consistent standard errors or the Huber-White sandwich estimator, is that it can relax the assumption of independence across the observations in a data set. It can produce "correct" standard errors even if observations are correlated. *See generally* Halbert White, *A Heteroskedasticity-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity*, 48 ECONOMETRICA 817 (1980).

75. An alternative way to cluster would be on each case, which would allow the errors to be correlated across the different attorneys in the same case. This procedure is carried out in Stata 9.0

FIGURE 2A: FREQUENCY DISTRIBUTION OF JUSTICE BLACKMUN'S
EVALUATIONS OF ATTORNEYS' ORAL ARGUMENTS, 1970–74
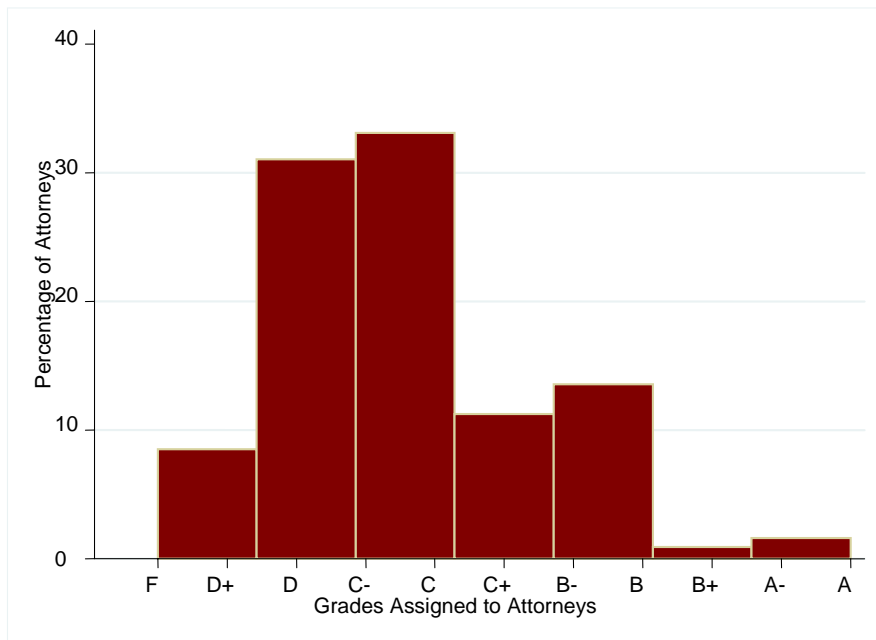
using the following command at the end of the regression command: robust cl(lawyer_number). The results were largely the same when we clustered across cases rather than across attorneys.

FIGURE 2B: FREQUENCY DISTRIBUTION OF JUSTICE BLACKMUN'S
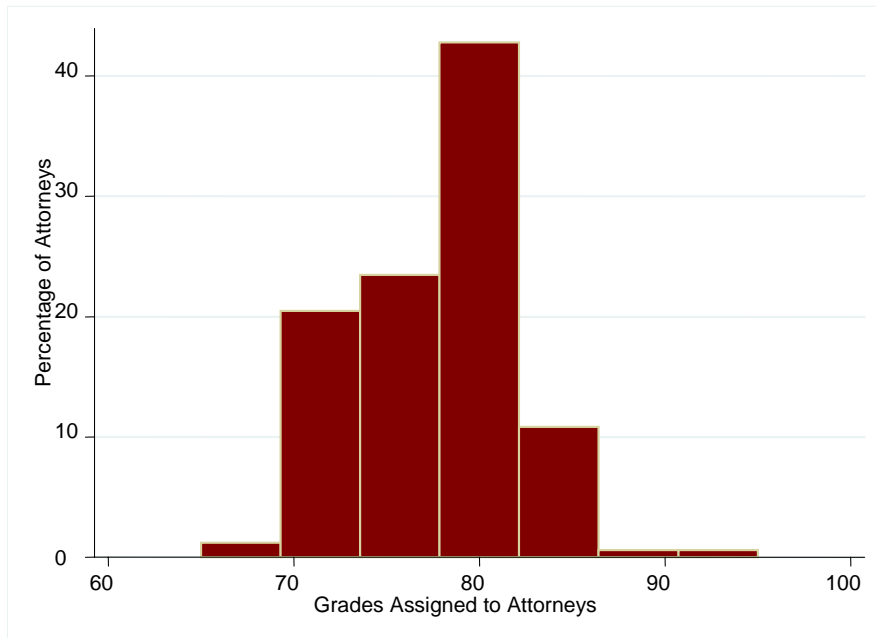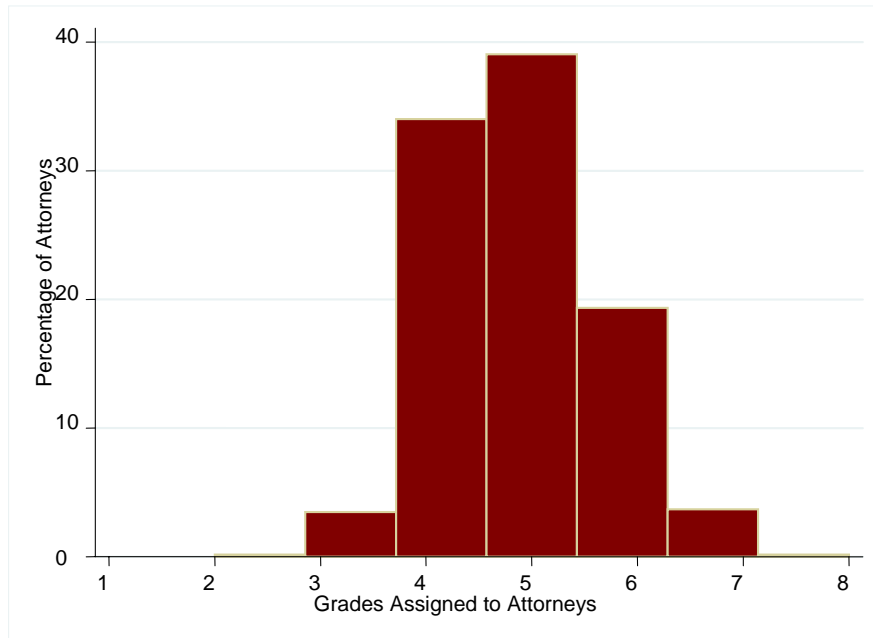EVALUATIONS OF ATTORNEYS' ORAL ARGUMENTS, 1975–77

FIGURE 2C: FREQUENCY DISTRIBUTION OF JUSTICE BLACKMUN'S
EVALUATIONS OF ATTORNEYS' ORAL ARGUMENTS, 1978–94

We included variables in our model to test each of the hypotheses discussed above. First, we included a measure of litigating experience based on McGuire's definition of experience.[76] Specifically, we coded the number of times an attorney previously appeared before the U.S. Supreme Court at oral arguments. We gathered these data through searches on Lexis/Nexis for each attorney's name to determine past cases in which they appeared in this capacity. A case was only counted if the attorney in the present case was listed previously as having been the one to orally argue (being named on a brief does not count for this purpose). The number of prior appearances ranges 0–85 with a mean of 4 and a median of 0. To account for the skewed nature of these data (and to account for the fact that a difference between appearing in 0 cases or 1 case is a bigger shift than the difference between appearing in 84 or 85 cases), we used the

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76. This measure of experience is well established in the literature. *See, e.g.*, McGuire, *Repeat Players*, *supra* note 47; James F. Spriggs II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365 (1997); Wahlbeck, *supra* note 12.

natural log of this count of appearances before the Court.[77] This variable, labeled as *Litigating Experience*, has a mean of 0.702, a standard deviation of 1.08, and ranges between 0 and 4.45.

Second, to determine whether the Solicitor General argued, we coded Justice Blackmun's oral argument notes as well as the Court opinions in either Lexis/Nexis or FindLaw to determine whether an attorney had a title. Specifically, we looked for "Assistant Solicitor General" or "Solicitor General." To account for the possibility that the Solicitor General is more successful before the Court than Assistant Solicitors General, we created two separate variables. First, if the attorney was the Solicitor General, we created a variable that is coded 1 (labeled *Solicitor General* in the table). For all other attorneys, this is coded 0. We created a similar variable for Assistant Solicitors General; if they argued then we coded *Assistant Solicitor General* as 1, while all other attorneys take on a value of 0. Solicitors General constitute 2.4% of the attorneys in our sample and Assistant Solicitors General account for 13.0% of the attorneys.[78]

Next, we coded for whether the arguing attorney is from the federal government. It is coded 1 anytime the United States government is a party to the case and an attorney from the Solicitor General's office is not the attorney of record. Specifically, we searched Lexis/Nexis for any instances where the United States is a party to the case and the Solicitor General or Assistant Solicitor General does not argue. For this variable, *Federal Government Attorney*, government attorneys are coded 1 and all other attorneys are coded 0. Approximately 12% of the attorneys in our sample represent the federal government but are not from the Solicitor General's office.

Beyond the experience and government status of attorneys, we obtained data on measures to test our other credibility hypotheses. We obtained data on whether an attorney attended an elite law school from Lexis/Nexis, Westlaw, or the Martindale Hubbell directory (the issue published during the year the case was argued). Attorneys who attended one of the elite law schools (Harvard, Yale, Columbia, Stanford, Chicago, Berkeley, Michigan, and Northwestern) are coded 1, while all other

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77. The transformation of skewed variables is commonly used to help facilitate data analysis. Taking the natural log of a variable makes the variable more symmetrical in nature. Since the log of 0 is undefined, we first added one to the number of prior appearances before the Court and then took its natural log. *See* JOHN FOX, APPLIED REGRESSION ANALYSIS, LINEAR MODELS, AND RELATED METHODS 60 fig.4.1 (1997).

78. This includes 46 cases where the Solicitor General argued as an amicus; this amounts to about 27% of the Solicitor General's arguments.

attorneys are coded 0.[79] The mean value of *Attorney Attended Elite Law School* is 0.39 and the standard deviation is 0.49.

We determined whether an attorney was a member of the Washington, D.C., Bar by coding the address for the arguing attorney as it appeared on the briefs submitted to the Court. If an address was found in Washington, D.C., excluding federal government attorneys, we coded *Washington Elite* as 1. All other attorneys are coded 0. About 11% of the attorneys in our sample were private attorneys from Washington D.C.

We used the Martindale Hubbell directory for the year the case was argued, as well as the address listed on the briefs, to determine whether the arguing attorney was a law professor. If an attorney was listed as a professor at a law school, we coded *Law Professor* as 1, while all others are coded 0. Nearly 2% of attorneys arguing before the Court were law professors at the time.

Sometimes the Court allows attorneys, beyond those representing the litigants, to appear at oral arguments on behalf of an interest group (as amicus curiae). If the attorney appeared in this capacity, we coded *Interest Group* as 1. All other attorneys are coded 0. Just over 1% of attorneys represented an interest group at oral arguments.

Additionally, we obtained data from the clerk's office at the U.S. Supreme Court to determine whether the arguing attorney served a Justice as a law clerk. The list includes all clerks who worked at the Court from 1932 to 1991.[80] We coded *Former Law Clerk* as 1 if an attorney had served in this capacity, and all others are coded 0. Nearly 7% of the attorneys in our sample previously worked as a clerk for one of the Justices.

Finally, we measured the ideological compatibility of the attorney's position against Justice Blackmun's. Using the ideological direction of the

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79. Although there are annual rankings of law schools (see, e.g., *U.S. News & World Report* rankings at http://grad-schools.usnews.rankingsandreviews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php), there are no rankings of elite law schools that span the long period of time during which Supreme Court advocates in our sample were trained. While some may disagree with our identification of elite programs, the findings are not dependent on the exact specification of this variable. For example, we obtain the same result when we omit schools not routinely included in the recent top ten (e.g., University of California, Berkeley) or when we add schools that are ranked highly today (e.g., University of Virginia, New York University, Duke, and the University of Pennsylvania).

80. For a discussion of the quality of clerks, and the degree to which they are hot commodities once they leave the Court, see generally TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006); ARTEMUS WARD & DAVID L. WEIDEN: SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006).

lower court decision (coded as either liberal or conservative),[81] we determined whether an attorney represented the liberal or conservative position. For instance, if the lower court decision was liberal, then we coded the petitioner as advocating the conservative position at the Court and the respondent as putting forward the liberal position. Second, we employed Martin-Quinn scores to determine Blackmun's year-to-year ideology over his entire Court career. Using a dynamic item response model with Bayesian inference, Martin and Quinn fit multivariate dynamic linear models to create measures of Justices' ideologies for each year they sat on the bench.[82] Larger values indicate that a Justice is more conservative.

We matched our Justice-specific ideology measure with the ideological direction of the attorney's argument, as described above. If an attorney argued for the liberal side in a case, we coded *Ideological Compatibility* as a transformed version of Justice Blackmun's Martin-Quinn score; specifically, for these observations, we multiplied Justice Blackmun's Martin-Quinn score by –1. Alternatively, if the attorney argued for the conservative side, we used Justice Blackmun's Martin-Quinn score for this variable. Higher values therefore indicate that Blackmun is ideologically closer to the attorney's position. This variable ranges between –1.9 and 1.9, with a mean of 0.009 and a standard deviation of 1.06.

In addition to our variables of interest, we included *Appellant Attorney* as a control. Because the Court is predisposed to reverse lower court decisions, we might expect Justice Blackmun to find petitioners' arguments more favorable.[83] Thus, we included a dummy variable that

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81. We draw these data from HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE, 1953–2005 TERMS, *available at* http://www.as.uky.edu/polisci/ ulmerproject/allcourt_codebook.pdf (last visited Nov. 1, 2007). For a full discussion of how we define these outcomes, see *id.* at 52–55.

82. *See generally* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) [hereinafter Martin & Quinn, *Dynamic Ideal Point Estimation*]. One advantage of these scores is that they can, to some degree, capture change in a given Justice's ideological position over time. Justice Blackmun's move to the left is often discussed by academics and in the popular press. His ideological position moved from 1.86 in his first full year on the Court, which was the second most conservative score assigned to a Justice, to –1.81 in his last, which was the second most liberal score in 1993. *See* Andrew D. Martin & Kevin M. Quinn, Martin-Quinn Scores, http://mqscores.wustl.edu/measures.php last visited Nov. 29, 2007. For a discussion of preference change on the Court, see Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U.L. REV. 127 (2007); Andrew D. Martin & Kevin M. Quinn, *Assessing Preference Change on the US Supreme Court*, 23 J.L. ECON. & ORG. 365 (2007).

83. DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980);

equals 1 when the attorney represents the petitioner, and 0 otherwise. In our sample of cases, the appellant won about 47.9% of the time. Finally, as a robustness check, we also included fixed effects for each Term of the Court (i.e., a dummy variable for each Term, with the 1970 Term excluded to serve as a baseline); the results reported in Table 1 are not appreciably different from the results with these additional control variables.

2. The Correlates of Argumentation Quality

We posit that attorneys with more litigating experience, better legal education and training, and greater reputational resources will receive higher evaluations because such attorneys will offer the Court more credible and compelling arguments than will less experienced or less resourceful attorneys.[84] The results in Table 1, which were estimated in Stata 9.0, provide support for this expectation. Specifically, they show that any single measure of attorney credibility has a modest effect on their oral argument grades, but when one examines a set of these attorney characteristics, we observe considerable variation across the model's predictions of the attorneys' grades.

TABLE 1: OLS REGRESSION ESTIMATES OF JUSTICE BLACKMUN'S ASSESSMENT OF THE QUALITY OF ORAL ARGUMENTATION BEFORE THE COURT (1970–94)

Variable	Coefficient	Robust Standard Error	Significance (one-tailed test)
Litigating Experience	0.262	0.051	0.000
Solicitor General	0.370	0.218	0.050
Assistant Solicitor General	0.102	0.118	0.190
Federal Government Attorney	0.165	0.097	0.050
Attorney Attended	0.209	0.066	0.001

Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387 (1982).

84. *See* McGuire, *Repeat Players*, *supra* note 47, at 189 (explaining that Justices have informational needs and that attorneys "have considerable incentive to provide candor in both their briefs and oral arguments").

Variable	Coefficient	Robust Standard Error	Significance (one-tailed test)
Elite Law School			
Washington Elite	0.401	0.106	0.000
Law Professor	0.217	0.183	0.120
Attorney Argues for Interest Group	–0.163	0.253	0.520
Former Law Clerk	0.276	0.119	0.010
Ideological Compatibility with Attorney	0.051	0.025	0.020
Appellant Attorney	–0.121	0.060	0.050
Constant	–0.317	0.058	0.000
Number of Observations	1118		
R^2	0.19		
S.E.E.	0.90		

As predicted, attorneys with more prior experience litigating before the Court present better oral arguments. To determine how the coefficient of 0.262 for *Litigating Experience* translates into points on the grade scale, we multiplied the coefficient by the standard deviation of the unstandardized grade variable on the 100-point scale, which is 6.28.[85] Doing so indicates that a one-unit change in this variable increases a lawyer's grade by 1.6 points on the 100-point scale, and a lawyer who has the maximum level of experience in our data earns an average of 7 points more than those with the minimum experience. Additionally, attorneys from the U.S. government, especially those from the Solicitor General's office, provided more compelling oral advocacy to Blackmun. When the Solicitor General personally argues, his grade is 2.3 points higher on the 100-point scale that our reference category of attorneys located outside of Washington, D.C.[86] Federal government attorneys not in the Solicitor

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85. Recall that the dependent variable in this regression analysis is a z-score, measuring the number of standard deviations an attorney's grade is from the average grade among all attorneys. The coefficient of 0.262 for *Litigating Experience* thus indicates that a one-unit increase in this variable leads to a 0.262 standard deviation change to a lawyer's grade. To make the regression coefficients more interpretable, we converted them back into the 100-point scale.

86. Our findings with respect to the two Solicitor General variables are somewhat confounded by collinearity with past litigating experience. The main statistical impact of collinearity between our

General's office do better, too, as they earn grades 1.0 point higher than those same non-Washington attorneys.

Other factors of credibility also affect the quality of oral advocacy. For instance, attorneys who attended elite law schools earn grades 1.3 points higher than other attorneys.[87] Additionally, because Washington insiders are seen as more credible by the Justices, they earn grades that are about 2.5 points higher than attorneys outside Washington, D.C.[88] Former Supreme Court clerks earn 1.7 points higher score than non-clerks. The two remaining variables that capture attorney characteristics—*Law Professor* and *Attorney Argues for Interest Group*—appear to be unrelated to their ability to offer better oral arguments. In addition, it is interesting that while the Court tends to take cases to reverse the lower court, attorneys arguing for appellants do not get higher grades. This provides some evidence that Justice Blackmun was not simply awarding higher grades to attorneys who were on the likely winning side of the case.

Finally, we turn to our test of whether messages from attorneys who put forward arguments more compatible with Justice Blackmun's ideological preferences will receive higher grades.[89] The coefficient for

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variables is that our standard error estimates will be larger than they should be. This makes our variables less likely to be statistically significant. *See* FOX, *supra* note 77, at 337–52. The Solicitor General himself argued, on average, 34.1 previous cases, and the Assistant Solicitor General averaged 14.9 prior arguments. In contrast, the average civilian attorney had appeared before the Court in only 1.3 cases. If we omit the experience variable, *Assistant Solicitor General* as well as *Solicitor General* become statistically significant. The remaining variables are not overly contaminated by multicollinearity.

87. Some have argued that affiliations with law schools may communicate ideological information to the Court. *See, e.g.*, J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315 (1993). While some law schools have liberal or conservative reputations, alumni do not select cases strictly on ideological grounds. Our data on attorneys arguing before the Supreme Court reveal that graduates of Harvard and Yale, for instance, systematically represent parties on both sides of the ideological divide.

88. *See* MCGUIRE, *supra* note 47, at 183 (commenting that one benefit of representation by the elite Washington attorneys is "the reliability that the Court can assign to their judgment").

89. If there is measurement error in our ideological distance variable, then Justice Blackmun's evaluations of an attorney may be more heavily affected by ideological considerations than we report. We recognize that this measure is somewhat blunt, but current measurement technology does not offer a feasible alternative. Our proxy has been used in prior research. *See* Brian R. Sala & James F. Spriggs, II, *Designing Tests of the Supreme Court and the Separation of Powers*, 57 POL. RES. Q. 197 (2004). It is also analogous to a variable for the direction of the lower court decision because such a variable is a proxy for whether the petitioner sought a liberal or conservative Court outcome. *See, e.g.*, McGuire, *Repeat Players*, *supra* note 47. While there is some amount of error in our measure, we take comfort in how well it performs in our model that explains each Justice's final vote on the merits. In that model, our measure of ideological distance correlates highly with the Justices' vote on the merits. Since we do not expect the effect of measurement error to be significantly larger for the model

Ideological Compatibility with Attorney is appropriately signed and statistically distinguishable from no effect. Substantively, a one-unit increase in ideological compatibility resulted in a 0.32-point change in Blackmun's evaluation of the attorney's information when comparing attorneys transmitting information close to Blackmun with those who were more distant. When Blackmun was as ideologically distant from a litigant as possible, as compared to when he was ideologically aligned with a litigant, a lawyer's score only increased by about 1.2 points. Thus, Blackmun's evaluations of attorneys are not greatly influenced by his own ideological leanings.[90] Importantly, this result indicates that our measure of oral argument quality is not overly tainted by Blackmun's ideology, and thus it may appropriately be used to explain the other Justices' final votes on the merits.[91]

Combined, these findings suggest that the credibility of the attorney plays a role in Justice Blackmun's grading scheme. Taking each variable in isolation, as we have done above, artificially diminishes the effect of credibility since attorney profiles usually comprise combinations of these attributes. Take, for instance, three hypothetical attorneys: a very credible Solicitor General; a private, but credible, Washington, D.C. attorney; and a less credible non-Washington attorney.[92] The Solicitor General receives an

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explaining Blackmun's grades as compared to the one explaining votes, and since the measure of ideology works quite well in the model of votes, we infer that it is working reasonably well in the model explaining grades. In short, we do not think measurement error is masking any significant ideological bias in Blackmun's grading.

90. We also measured ideology using Segal-Cover scores. *See generally* Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of Supreme Court Justices Revisited*, 57 J. POL. 812 (1995). The results are similar to those in Table 1. The advantage of the Martin-Quinn scores is that they vary over time, and conventional wisdom and the data indicate that Justice Blackmun became more liberal the longer he sat on the Court. *See* Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 82, at 147–49.

91. There is a possibility that lawyers might pitch their arguments to the median Justice on the Court, which might lead Justice Blackmun to award attorneys higher grades when he occupied the median position. To investigate the possibility of strategic attorneys, we included a dummy variable in our analysis for whether Justice Blackmun assigned higher grades to attorneys when he was the median Justice on the Court (1978 and 1979) than in other years. These data do not indicate that he gave lawyers higher grades when he was the median Justice; and the other results in the model do not change when we include these variables. This result reinforces our finding for ideological distance by demonstrating that Blackmun did not give attorneys grades that were higher when they were likely pitching their arguments to him. Assessment of who was the median Justice is taken from Martin & Quinn, Martin-Quinn Scores, *supra* note 82, and is available in LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 260–61 (CQ Press 2007) [hereinafter EPSTEIN ET AL.].

92. We gave the Solicitor General the following attributes: the maximum value of experience for Solicitors General, past law clerk experience, and graduation from an elite law school. The private

average grade of 88.8, while the less credible, private, Washington attorney receives a score of 80.6. The less credible non-Washington attorney obtains a mark of 76.8. So, a credible attorney, like the Solicitor General, will receive a grade that is considerably higher than a less credible non-Washington counterpart.

Importantly, this analysis indicates that Justice Blackmun's evaluations are a reasonable measure of the quality of attorneys' oral presentations. First, ideology has a small substantive effect on his grades, which is a necessary (but not sufficient) condition for the grades' being a valid measure of argumentation quality. Second, these grades also evidence validity because they correlate with variables for attorney credibility and experience. Third, we did not see Blackmun manifest a tendency to give higher grades to appellants. This latter result further suggests that he was not simply awarding higher grades to the lawyer he thought was on the winning side. The next part offers a qualitative look at who earned the highest grades from Justice Blackmun. Following that, we demonstrate statistically that the quality of oral argumentation has a pronounced influence on the Justices' final votes on the merits.

3. Who Earned the Best Grades?

The previous part demonstrates that various characteristics relating to attorneys' professional training and work experience correlate with their performance at oral arguments. In this part, we take a qualitative look at who some of the premier advocates before the Court were.

We begin with the early period—when Justice Blackmun assigned letter grades. Recall that the average attorney during this period received a B- (the numerical mean was 82.1% with a standard deviation of 5.9). However, 18 attorneys averaged an A- or better before the Court, and four others averaged a high B+.[93] Many of the names on this list will be familiar to Court watchers, from Deputy Solicitor General Daniel

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Washington attorney was given the following characteristics: average experience of a Washington-based attorney, attendance at an elite law school, but not a Supreme Court clerk. The less credible non-Washington attorney had no prior Supreme Court experience, did not attend an elite law school, and was not a Supreme Court clerk. We held ideology constant at its mean of 0 for each attorney type. To calculate the expected grade level, we multiplied the product of each coefficient and the standard deviation on the 100-point grade scale (6.28) by the designated value. We then added the mean of the unstandardized grade (78.8) and the regression constant to this product to arrive at the expected grade.

93. Note that we calculated the average grade for each attorney by averaging all the grades they received within a particular grading regime.

Friedman and Solicitor General Erwin Griswold, to future Judge E. Barrett Prettyman, Jr. and notable lawyer and legal scholar, Charles Alan Wright. One of the consistently best advocates to appear before the Court during this period was Deputy Solicitor General Friedman. In his 9 appearances as Deputy Solicitor General in our sample, he averaged a grade of A/A- (92.9 on the numeric scale). Indeed, he received a grade lower than an A (a B+) on only one occasion. His expertise is also evidenced by the fact that, in his two post–Solicitor General appearances before the Court, he earned an A and a B+ from Blackmun.

Other experienced attorneys also fared well before the Court during this period. Archibald Cox (some years after he left his position as Solicitor General) earned an A-/B+ as well as a B (both well above average grades from Blackmun). Similarly, Joseph Califano (who had previously served as an advisor to President Johnson and later served as Secretary of Health and Human Services under President Jimmy Carter) earned an A- on 3 occasions and a B+ in 1 appearance.

We see a similar pattern when Justice Blackmun began to use his 100-point scale (1975 to 1977, when the mean score was 77.4 with a standard deviation of 4.4). Solicitors General still seemed to fare the best, though there was more variance in their grades. For instance, Deputy Solicitor General Randolph earned grades of 85 and 83 but also earned an 80 and a 76. Further, Deputy Solicitor General Friedman earned an 83, while Deputy Lawrence Wallace earned an 81 and an 80. Other government attorneys did not perform as well. Deputy Solicitor General Andrew L. Frey only earned a 75, and Assistant Attorney General Peter R. Taft earned the lowest grade during this time period—a 39.

Among non-government attorneys, former Solicitor General Griswold was still among the cream of the crop. In two cases argued during the 1977 Term, he earned a 95 and an 87. Other "big-name" attorneys appear to have given average arguments according to Justice Blackmun. E. Barrett Prettyman earned an 80 for an argument during the 1976 Term, while Frank Easterbrook earned an 80 in 1975.

Remember that during the final time period (1978–94), Justice Blackmun turned to his 8-point scale (the mean score was 4.9 with a standard deviation of 0.9). Again, Solicitors General performed quite well. Indeed, Solicitor General Wade H. McCree earned two 7s (note that only one attorney received the highest grade of 8, so a 7 is quite good), Solicitor General Rex Lee earned a 6 and two 5s, and Solicitor General Kenneth Starr earned two 6s. Deputy Solicitor General Wallace earned a

series of 7s and 6s in addition to an average 5, and Deputy Solicitor General Stephen Shapiro earned a 7.

There was also a wide range for private attorneys. While the median grade for private attorneys was 0.37 standard deviations below the mean grade for all attorneys, their grades varied from a low of 3.39 standard deviations below the mean to a high of 3.98 standard deviations above the mean. At the high end are private lawyers such as Laurence Tribe (who was also a law professor at the time), who earned a 7 and 7/6; Moses Lasky, who earned an A; and S. Hazard Gillespie, who was awarded a 7. The lowest score of this time period was a 2 earned in 1981 by Robert M. Beno, who was a private attorney working outside Washington, D.C., and without any prior experience arguing before the Court.

The point for us is that the grades of those who did well in their appearances match our expectations quite well. Indeed, Solicitors General, former clerks, other attorneys working for the federal government, private attorneys working in Washington, D.C., and those having previously argued before the Court (all proxies for experience and credibility) seem to earn the best grades when arguing before the Court. These anecdotes help illustrate the general tendencies that we reported in the previous part.

4. Supreme Court Justices Before the Bench

Four of the current Supreme Court Justices appeared during Justice Blackmun's tenure on the Court, and one former Justice appeared. As is the case with other attorneys who argued, these Justices' grades varied. Two Justices argued once each. After he left the bench, Justice Arthur Goldberg was tapped to argue on behalf of Curt Flood in *Flood v. Kuhn*.[94] He earned an above-average grade of 81 on Blackmun's 100-point scale, but lost the case. Justice Antonin Scalia argued one case, *Alfred Dunhill of London, Inc. v. Cuba*,[95] prior to his elevation to the Court, and he earned an 85, placing him in the top 2.4% of attorneys who argued during this time period. While he was arguing as amicus curiae, his side won a reversal.

Three Justices argued multiple cases prior to their service on the bench: Justice Alito, Justice Ginsburg, and Chief Justice Roberts. According to Justice Blackmun, both Roberts and Alito were average advocates during this time. Prior to becoming Chief Justice, Roberts argued 20 cases, and

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94.   407 U.S. 258 (1972).
95.   425 U.S. 682 (1976).

earned grades from Blackmun in twelve of them.[96] He earned a 6 on one occasion, four times earned a 4/5, and earned a 5 in the other seven times he appeared. Blackmun did not seem to think he was an exceptional advocate, as is evidenced in his oral argument notes for *Freytag v C.I.R.*,[97] in which he wrote: "6, better than usual." Chief Justice Roberts's grades were average for attorneys, and his mean score of 4.8 was equal to the mean for all attorneys during this period. Justice Alito fared a bit better. In twelve arguments he earned three 6s, seven 5s, and two 4s.[98] His mean grade was slightly above average—a 5.08. Overall, neither of these two Justices was statistically different from the average advocate. Indeed, in a difference of means test, Justice Alito's and Chief Justice Roberts's grades were indistinguishable from the mean grade.

In contrast to Chief Justice Roberts and Justice Alito, Justice Ginsburg took a more typical path for those who appear multiple times before the Court. While she earned a C+ at her first appearance, she earned two B's thereafter, and in her final argument in our sample, she earned an above-average 6.[99]

B. Does the Quality of Oral Argument Affect the Final Votes on the Merits?

Although it is important to understand how Justice Blackmun evaluated arguments, as well as who earned which grades, this does not answer

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96. Blackmun assigned grades to Roberts in the following cases: 5 in *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994); 4/5 in *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863 (1994); 5 in *Bray v. Alexandria Clinic*, 506 U.S. 263 (1993); 5 in *Withrow v. Williams*, 507 U.S. 680 (1993); 5 in *Hudson v. McMillian*, 503 U.S. 1 (1992); 5 in *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992); 5 in *Suter v. Artist M.*, 503 U.S. 347 (1992); 5 in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); 4/5 in *United States v. Halper*, 490 U.S. 491 (1989).

97. 501 U.S. 868 (1991).

98. Blackmun assigned grades to Alito in the following cases: 5 in *Atkins v. Parker*, 472 U.S. 115 (1985); 6 in *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985); 5 in *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985); 4 in *United States v. Doe*, 465 U.S. 605 (1984); 5 in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); 5 in *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984); 6 in *Russello v. United States*, 464 U.S. 16 (1983); 5 in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); 5 in *Cmty. Television of So. Cal. V. Gottfried*, 459 U.S. 498 (1983); 4 in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); 5 in *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728 (1982); 5 in *Oregon v. Kennedy*, 456 U.S. 667 (1982).

99. Blackmun recorded grades for Ginsburg in the following cases: 6 in *Duren v. Missouri*, 439 U.S. 357 (1979); 80 in *Califano v. Goldfarb*, 430 U.S. 199 (1977); B in *Edwards v. Healy*, 421 U.S. 772 (1975); B in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); B in *Kahn v. Shevin*, 416 U.S. 351 (1974); C+ in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

whether the quality of lawyers' oral arguments affected the likelihood that Justices will vote for the clients they represent. By taking this next step, we are able to draw a direct link between the information attorneys present and the Justices' votes.[100]

Before proceeding, however, we must discuss our focus in this part. Clearly, the hypotheses in the previous part are directed at Justice Blackmun's behavior. We cannot, however, simply regress Blackmun's votes on his evaluation of the attorneys' arguments because of the inherent endogeneity we would face. That is, it is possible that Blackmun assigned higher grades to litigants for whom he anticipated voting. While the data analysis in the prior parts shows that Blackmun's ideological leanings played a small role in his grading of attorneys, we nonetheless want to do everything possible to rule out this possible bias. As such, we need to find another way to test whether votes are affected by the quality of oral arguments, as indicated by Blackmun's grading of attorneys. While there are several solutions, we chose to examine the influence of oral arguments on all of Blackmun's colleagues, thereby excluding him from the analysis.[101] In so doing, we ameliorate the endogeneity issue that would arise if we only analyzed Blackmun's votes. In fact, to the extent that there is endogeneity, it should stack the deck against finding an effect for Justices other than Blackmun—especially for those Justices who are ideologically at odds with him. With this in mind, we turn to our case outcome hypotheses.

First, if oral arguments are integral for the Court, Justices' decisions should be affected by the quality of arguments presented during these proceedings. Indeed, if the Justices find information from some attorneys

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100. Unlike the model that allows us to explain the grades attorneys earned, where we included all attorneys who received a grade, we excluded from this analysis cases where Justice Blackmun did not assign a grade to both the appellant's and appellee's attorney. We did so because we must compare both attorneys' grades to assess the effect of oral advocacy on the Justices' votes. One reason he may have failed to give grades in a particular case is that he may not have been fully engaged with the argument. For instance, in *Local No. 82, Furniture & Piano Movers, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526 (1984), Blackmun did not assign a grade to Mark D. Stern, the respondent's attorney. He wrote in his notes, "I am sleepy and dosed [sic] off. Hope I was not observed by spectators or Rehnquist [who sat next to Blackmun]." Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Jan. 9, 1983) (on file with the Library of Congress).

101. Another way around this problem would have been to examine Justice Blackmun's votes through the use of an instrumental variable regression. But this approach requires us to find one or more variables that are highly correlated with the quality of oral argumentation but uncorrelated with Justice Blackmun's vote in the case. We currently have no such variables that meet these criteria. For an introduction to instrumental variable models (also called simultaneous equation models), see, e.g., GREENE, *supra* note 73, at 288–95.

more credible and therefore more reliable, the Justices should be more apt to use that information when deciding how to act. Thus, we hypothesize that:

> *Oral Argument Hypothesis:* Justices are more likely to vote for the litigant whose attorney provides better oral arguments.

Second, the dominant explanation within the literature on judicial behavior emphasizes the role of policy preferences in decision making. Judicial politics scholars have argued for decades that Court decisions are influenced by the Justices' policy views.[102] While some have asserted that policy preferences alone explain decisions,[103] others have maintained that maximization of policy goals is preeminent.[104] While these scholars disagree on the extent to which policy preferences dominate, it has become clear that policy preferences affect Justices' decisions at various stages of this process: agenda setting,[105] opinion writing,[106] and decisions on the merits.[107] Thus, we expect that:

> *Policy Preference Hypothesis*: Justices are more likely to side with the attorney whose position is closer to their personal policy preferences.

In addition to their independent effects, these two variables may be conditionally related to one another. If Justices principally pursue policy-related goals but are constrained by the bounds of the law, one might expect the effect of ideological proximity to be conditioned by the quality of legal argument.[108] Similarly, Justices who are ideologically closer to a litigant's position are likely to be influenced more strongly by the quality of the oral advocacy presented on his or her behalf. Even though we expect the quality of arguments to affect all Justices across the ideological spectrum, information may have a stronger effect when a Justice is

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102. *See generally* C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 (1948); DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976); SEGAL & SPAETH, *supra* note 9.
103. *See generally* ROHDE & SPAETH, *supra* note 102; SEGAL & SPAETH, *supra* note 9.
104. *See generally* EPSTEIN & KNIGHT, *supra* note 9; MALTZMAN ET AL., *supra* note 9.
105. *See generally* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).
106. *See generally* MALTZMAN ET AL., *supra* note 9.
107. *See generally* Segal & Cover, *supra* note 90.
108. *See generally* EPSTEIN & KNIGHT, *supra* note 9; LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992); HANSFORD & SPRIGGS, *supra* note 9.

ideologically compatible with the attorney presenting the arguments. In short, the effect of one of these variables, either oral advocacy or a Justice's policy preference, will depend on the level of the other variable. Thus, we hypothesize:

> *The Conditional Effect of Oral Advocacy Hypothesis:* Justices who are ideologically closer to an attorney's position will be influenced more strongly by the quality of oral argumentation than Justices who are ideologically farther from that attorney's position. Likewise, the positive relationship between a Justice's ideological proximity to a litigant and his or her voting for that litigant will be weaker when the opposing counsel provides more compelling arguments.

Beyond the key factors of ideological proximity and credibility, it is likely that the influence of oral argumentation may be linked to a Justice's level of information about a case. In some instances, the Justices' need for information will be higher, and an attorney who provides credible information should be positioned to have more of an effect on the outcome of the case; in the event of an informational void, Justices are most likely to be swayed by attorneys' arguments. In relation to oral arguments, Chief Justice Rehnquist indicates that these proceedings sometimes help alleviate the information deficit: "I find that [oral arguments influencing my view of a case] is most likely to occur in cases involving areas of the law with which I am least familiar."[109]

While a number of factors may indicate that Justices need additional information to decide a case, one of the most pertinent factors is when a highly complex set of legal issues is present.[110] In fact, cases that come to the Supreme Court often focus on several issues, as well as on more than one constitutional or statutory question. It is these cases where lawyers, who often spend years researching a case, have more information than they can relay to the Justices through briefs. Because of the need for information in complex cases, Justices should be more receptive to high-quality arguments.[111] This expectation leads us to predict that:

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109. REHNQUIST, *supra* note 8, at 276.
110. *See generally* MALTZMAN ET AL., *supra* note 9; Bailey et al., *supra* note 49.
111. Case complexity should affect the extent to which the Justices take oral advocacy into consideration, as manifested in their votes, but it should not affect Justice Blackmun's evaluation of the quality of oral argument. Thus, we include case complexity in the vote model but not in Blackmun's evaluation of attorney arguments. For case complexity to affect Blackmun's evaluation of attorneys, he would have to evaluate all attorneys arguing in complex cases more (or less) than

The Conditional Effect of Information Need Hypothesis: The effect of oral arguments on Justices is conditional on the complexity of the case under consideration, meaning that oral arguments will have a greater influence in cases of greater complexity.

Additionally, it is possible that the effect of oral arguments is conditional on the salience of a case for the Justices. Baum argues that oral arguments may have more of an effect in cases that are less salient than other cases because, presumably, Justices' preferences are less rigid in cases about which they care less.[112] Additionally, politically salient cases have richer information environments, and as a result, the Justices have a better understanding of important case attributes that influence their decision making—such as the location of the status quo policy, the available alternative policies in the case, and the relationship between those alternatives and their preferences over distributional outcomes.[113] Thus we hypothesize that:

The Conditional Effect of Case Salience Hypothesis: The effect of oral arguments is conditional on the level of case salience, meaning that oral arguments will matter less in salient cases.

1. Data and Variables

To evaluate the extent to which the quality of oral arguments affects the Justices' decisions, we examined whether each Justice, excluding Blackmun, voted to reverse the lower court decision using the same sample of cases as in the previous analysis of attorneys' grades (a random sample of 539 cases from 1970–94). Using Spaeth,[114] we coded votes to reverse as 1 and votes to affirm as 0. Justices voted to reverse the lower court in 57.3% of the observations. Because the dependent variable is dichotomous, we estimated a logistic regression model.[115]

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attorneys in noncomplex cases. Instead we argue that Justices, facing informational asymmetry, will weigh highly credible information more heavily. The results in Table 2, however, do not differ much if we also include the complexity variable.

112. Lawrence Baum, *Symposium on Oral Argument*, 5 LAW & CTS. 4 (1995).

113. Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581 (1996).

114. SPAETH, *supra* note 81.

115. The logistic regression model (also commonly referred to as the "logit model") and its close relative, the probit model, are nonlinear models used when the dependent variable of interest is a binary (also known as "dichotomous" or "dummy") variable. Conceptually, its purpose is no different than the OLS (linear regression) model, see *supra* note 73; that is, it seeks to explain variation in the

The key independent variable in our model, *Oral Argument Grade*, is derived from the grades Justice Blackmun assigned to each attorney during oral arguments. Specifically, we created a variable that compares the grades of the attorneys arguing each case. We did so by subtracting the appellee's grade, as measured by the z-score discussed above, from the appellant's grade. Larger values on this variable therefore indicate the appellant had the stronger oral argument.[116] This variable ranges from –4.50 to 4.51, with a mean of –0.11 and standard deviation of 1.05.

To control for a Justice's *Ideological Compatibility with Appellant*, we created a variable similar to *Ideological Compatibility with Attorney*, containing the Martin-Quinn score[117] of each Justice who sat during the timespan covered by our sample. We first determined the ideological direction of both the petitioner and respondent based on Spaeth's[118] measure of the ideological direction of the lower court decision. If the lower court made a liberal ruling, we assumed that the petitioner sought a conservative outcome and the respondent a liberal outcome from the U.S. Supreme Court. We then matched the Martin-Quinn measure (for which a larger, positive score indicates that a Justice is more conservative) with the ideological direction of argument we expected an attorney to make. If an attorney argued for the liberal side during a Term, we multiplied a Justice's Martin-Quinn score by –1. Alternatively, if the attorney argued for the conservative side, we coded it as the Justice's Martin-Quinn score. Larger values on this variable thus indicate that a Justice is ideologically closer to the attorney's position. This variable ranges from –6.15 to 6.15, with a mean of 0.047 and standard deviation of 2.54.

We are also interested in whether there is a conditional effect between *Oral Argument Grade* and a Justice's ideological compatibility with an attorney. We therefore included a multiplicative variable[119] of these two

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dependent variables given a set of independent variables. *See, e.g.*, J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES (1997).

116. If more than one attorney argued on a side, which happens occasionally, we used the average of the grades earned by the attorneys on that side. The results do not differ if we instead use the maximum grade earned by the attorneys.

117. Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 82. Martin and Quinn do not calculate an ideological score for a Justice in the last year of service on the Court, and for those Justice observations (n = 90), we used the Justice's ideological score for the previous year.

118. SPAETH, *supra* note 81.

119. Multiplicative variables, also known as interactive terms, allow researchers to test hypotheses that the effect of one independent variable on the dependent variable is actually conditioned by a second independent variable. In our case, the interactive term evaluates how a Justice's ideological proximity to a litigant alters the effect of a high or low grade on the likelihood that the Justice votes to reverse. On the use (and misuse) of interactive terms, see Thomas Brambor, William Roberts Clark &

variables (*Ideological Compatibility * Oral Argument Grade*). We expect this variable to have a positive coefficient, which would indicate that the positive effect of *Ideological Compatibility* increases as an attorney's arguments grow more persuasive. It would also show that the effect of *Oral Argument Grade* is larger if a Justice is ideologically more proximate to the position of an attorney.

To measure the complexity of a case, we conducted a factor analysis[120] of the number of legal provisions in a case and the number of issues involved for all cases decided by the Supreme Court between the 1946 and 1999 Terms.[121] Using Spaeth,[122] we counted the number of legal issues and the number of legal provisions at issue in a case. The factor analysis resulted in a single factor with an eigenvalue greater than one.[123] We assigned the factor score that resulted from this analysis for each case. The average *Case Complexity* is –0.009 with a standard deviation of 0.39, and it ranges from –0.53 and 1.96. To test our hypothesis that the Justices will give more weight to oral arguments in complex cases, we included an interaction term,[124] *Oral Argument Grade * Case Complexity*. A positive coefficient on this interaction variable would indicate that the effectiveness of oral arguments is greater for cases that are more complex.

For political salience, we used Epstein and Segal's dichotomous variable that measures whether an account of the case appeared on the front page of the *New York Times*.[125] For our sample of cases, 16.0% of

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Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses*, 14 POL. ANALYSIS 63 (2006); Robert J. Friedrich, *In Defense of Multiplicative Terms in Multiple Regression Equations*, 26 AM. J. POL. SCI. 787 (1982).

120. Factor analysis, as used in this context, is a data-reduction technique that uses the correlation among two or more observed variables of interest to produce a single variable, which is assumed to be a latent unobservable quantity and a linear function of the observed (or manifest) variables. *See* JAE-ON KIM & CHARLES W. MUELLER, INTRODUCTION TO FACTOR ANALYSIS: WHAT IT IS AND HOW TO DO IT (1978). In our case, we use factor analysis to model case complexity as an unobservable variable with manifestations in number of legal provisions and number of issues involved in a given case.

121. This measure, or a variation on it, is used widely in the literature. *See, e.g.*, HETTINGER ET AL., *supra* note 9; MALTZMAN ET AL., *supra* note 9; Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reactions to Supreme Court Alteration of Precedent* 64 J. POL. 534 (2002); Valerie Hoekstra & Timothy R. Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Rearguments*, 56 POL. RES. Q. 351 (2003).

122. SPAETH, *supra* note 81.

123. Selecting factors with eigenvalues only greater than 1 conforms to the Kaiser-Guttman rule and is widely employed in factor analysis models. *See, e.g.*, TIMOTHY A. BROWN, CONFIRMATORY FACTOR ANALYSIS FOR APPLIED RESEARCH 26–27 (2006).

124. *See supra* note 119.

125. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000). We realize that this measure of salience is ex post because it measures salience only after cases are

them were reported on the front page of the *New York Times*. To test whether the influence of the relative quality of the lawyers' oral arguments is conditional on case salience, we included the interaction term[126] between those two variables, *Oral Argument Grade * Case Salience*. A negative coefficient on this interaction term would be consistent with our claim and show that oral arguments matter less in cases of higher salience.

2. *Do Oral Arguments Affect the Justices' Votes?*

The results in Table 2 show that the Justices do indeed respond to the quality of oral argumentation.[127] To ensure that our estimation of the magnitude of oral argument's influence on a Justice's vote is not capturing the effect of other factors, we include a number of control variables as discussed above. Column two of Table 2 reports the results for the effect of oral argumentation without these control variables, and column three reports the results with all of the control variables included. Even when controlling for the most compelling alternative explanation—a Justice's ideology—and accounting for other factors affecting Court outcomes, the oral argument grades correlate highly with the Justices' final votes on the merits.[128] This relationship is illustrated with the substantive results of this

decided. Because we believe our model would not be specified correctly without a measure of political salience, we still choose to include it.

126. *See supra* note 119.

127. By excluding Justice Blackmun, we decrease the possibility that the oral argument measure is tainted by Blackmun's anticipated position in the case. While our first empirical model shows that Blackmun's grading of attorneys was largely not influenced by his ideological orientation, we nonetheless think it best to exclude him from this analysis. If we include him in the analysis, however, the results do not change. In addition, the number of observations in Table 2 is slightly larger (by 90 observations) than the analysis in Johnson et al., *supra* note 68, because we filled in some previously missing data.

128. It is possible that attorneys get higher grades in cases in which they have the "better" legal position, and thus the relationship we show here could reflect the effect of the legal and factual circumstances of a case. We think that the effect is more plausibly a function of attorney arguments than case facts. First, cases that are placed on the Court's docket and decided with an opinion are by their very nature difficult ones that do not result in one litigant clearly having the better side of the case. Additionally, all of the existing accounts of fact patterns are only able to focus on one issue area in their analyses. *See, e.g.*, Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); Mark J. Richards & Bert Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002); Jeffrey Segal, *Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984). Extending such an approach to an analysis of all issue areas before the Court would be inherently difficult. We are willing to bear the cost of not including facts in our analysis so that we can produce an analysis for the role of oral arguments that is generalizable across issue areas. Nonetheless, we did attempt to test for this possibility in this model by using certiorari (cert) votes. Our intuition is that cases with unanimous cert votes should indicate that the appellant has

model. When all the independent variables are held at their mean values (or modal value for a categorical variable), there is a 59.2% chance that a Justice will vote to reverse. If we set the value of *Oral Argument Grade* at one standard deviation above its mean, indicating that the appellant's attorney offered a higher quality argument, then this probability increases to 65.0%.[129] The difference is seen more clearly as the quality of competing counsel diverges; when the appellant's attorney is manifestly better than the appellee's attorney, there is an 81.4% chance that a Justice will vote for the petitioner, while this likelihood decreases to 32.9% when the appellee's attorney is clearly better.[130] This statistical result confirms our argument that the relative quality of the competing attorneys' oral arguments influences the Justices' votes on the merits.[131]

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a strong case, while minimum winning cert coalitions should indicate a case in which the litigants have more equally balanced legal and factual claims. The data do not offer much support for either idea; for example, unanimous cert coalitions do not lead to the appellant's lawyer receiving a higher grade or the appellant winning more often. These data indicate, however, that appellants are less likely to win when there is a minimum winning cert coalition. We also tested whether the "closeness" of a case might affect the measure of argument quality. To do so, we included variables for whether there was a dissent in the lower court or conflict among the lower courts. In the grade model, grades are not affected by either lower court dissents or conflict. In the outcome model, a Justice is less likely to vote for the appellant if the Court granted certiorari to resolve a lower court conflict. However, lower court dissents have no effect on how a Justice votes. Importantly, our variables of interest do not change with the inclusion of any of the aforementioned variables controlling for case facts or the closeness of a case.

   129.   The predicted probabilities are based on the model with all of the control variables (column 3 in Table 2). Also, we set all other variables at their mean (or mode for a categorical variable), and we set each interaction term at the product of the values of its two component terms.

   130.   We set the *Oral Argument Grade* variable at its maximum and minimum values in this example, holding everything else constant at the mean (mode for a categorical variable).

   131.   The effect of *Oral Argument Grade* is not influenced much by how we estimate the model. However, the effect of the interaction term, *Ideological Compatibility * Oral Argument Grade*, is somewhat less stable. If we attempt to control for potential heteroskedasticity in ways other than we used in Table 2 (robust standard errors clustered on Justice), *Oral Argument Grade*'s coefficient and confidence interval remain largely similar but the results for the interaction terms differ. See, *supra* note 74 for a description of robust standard errors. If we use a logit model with robust standard errors clustered on Court cases (and include fixed effects for the Justices), then the interaction terms for *Ideological Compatibility * Oral Argument Grade* (p = .12) and *Oral Argument Grade * NYT* (p = .09) are not significant, though the coefficients have the correct sign. If we use a heteroskedastic probit model (where heteroskedasticity is allowed to be in the oral argument grade variable), then the data suggest that the influence of oral arguments does not increase as the Justice becomes ideologically closer to the litigant's position, but the influence of oral argument is conditional on the salience of a case. If we use a logit model with robust standard errors that are not clustered on Justices, then the results are similar to those reported in Table 3. Finally, if we run these models without the interaction term, *Oral Argument Grade* remains positive and statistically significant. Importantly, in all of the above discussed models, the *Oral Argument Grade* variable remains positive and statistically significant.

TABLE 2: LOGIT ESTIMATES OF THE JUSTICES' PROPENSITY TO REVERSE A
LOWER COURT'S DECISION (1970–94)

| Variable	Coefficient (Robust Standard Error)	Coefficient (Robust Standard Error)
Oral Argument Grade Ideological	0.296 (.051)*	0.232 (.046)*
Compatibility with Appellant	0.304 (.040)*	0.315 (.041)*
Case Complexity	0.032 (.055)	0.037 (.068)
Case Salience	–0.189 (.101)	–0.130 (.101)
Ideological Compatibility * Oral Argument Grade	0.027 (.006)*	0.028 (.006)*
Oral Argument Grade * Case Complexity	–0.135 (.090)	–0.130 (.085)
Oral Argument Grade * Case Salience	–0.246 (.058)*	–0.209 (.068)*
Control Variables		
U.S. Appellant	---	0.466 (.104)*
U.S. Appellee	---	–0.750 (.098)*
S.G. Appellant	---	0.388 (.108)*
S.G. Appellee	---	–0.220 (.136)
Washington Elite Appellant	---	0.377 (.103)*
Washington Elite Appellee	---	0.089 (.129)
Law Professor Appellant	---	–0.740 (.156)
Law Professor Appellee	---	–1.602 (.226)*
Former Clerk Appellant	---	–0.236 (.094)
Former Clerk Appellee	---	–0.171 (.198)
Elite Law School Appellant	---	0.040 (.114)
Elite Law School Appellee	---	–0.135 (.083)
Difference in Litigating Experience	---	–0.137 (.012)

Variable	Coefficient (Robust Standard Error)	Coefficient (Robust Standard Error)
Constant	0.387 (.049)*	0.420 (.042)*
Number of Observations	3421	3421
Log Likelihood	−2107.14	−2047.87

*p ≤ 0.01 (one-tailed test)

One might wonder whether this finding is an artifact of Justices being more responsive to arguments provided by lawyers who advocate positions consistent with their policy preferences. We can definitively state that this is not the case. Our data show that the effect of the difference between the petitioner's and respondent's oral argument quality varies with the Justice's ideological support of the lawyer's position. Nevertheless, even though the impact of oral arguments is statistically different depending on the Justice's ideological predilections, the effect of *Oral Argument Grade* is positive and statistically significant through nearly the entire range of *Ideological Compatibility*.[132] Thus, even Justices who are ideologically opposed to the position advocated by a lawyer have an increased probability of voting for that side of the case if the lawyer provides a higher quality oral argument than the opposing counsel. The magnitude of this effect is sizeable, as Figure 3 indicates. It demonstrates that nearly all Justices are influenced by the quality of oral arguments, but those Justices who are ideologically closer to a lawyer's position have an enhanced tendency to support that lawyer if he or she presents better oral advocacy than does the opposing counsel. In short, oral advocacy has a generally large and robust effect on the way in which Supreme Court Justices vote.

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132. *Oral Argument Grade* is statistically significant for 97.5% of the data, and remains positive, but not significant, for values of *Ideological Compatibility with Appellant* less than −5.6. Specifically, we cannot rule out the null hypothesis that the oral argument grades do not matter for Justice Douglas when lawyers represent litigants advocating conservative outcomes. This result does not indicate that ideologically distant Justices are never influenced by the quality of oral arguments. The data, for example, do show that when Justices such as Rehnquist, Brennan, or Marshall encounter a litigant advocating a position with which they ideologically disagree, they are influenced by the quality of oral argumentation.

FIGURE 3: THE EFFECT OF ORAL ADVOCACY CONDITIONAL ON JUSTICE IDEOLOGY[133]
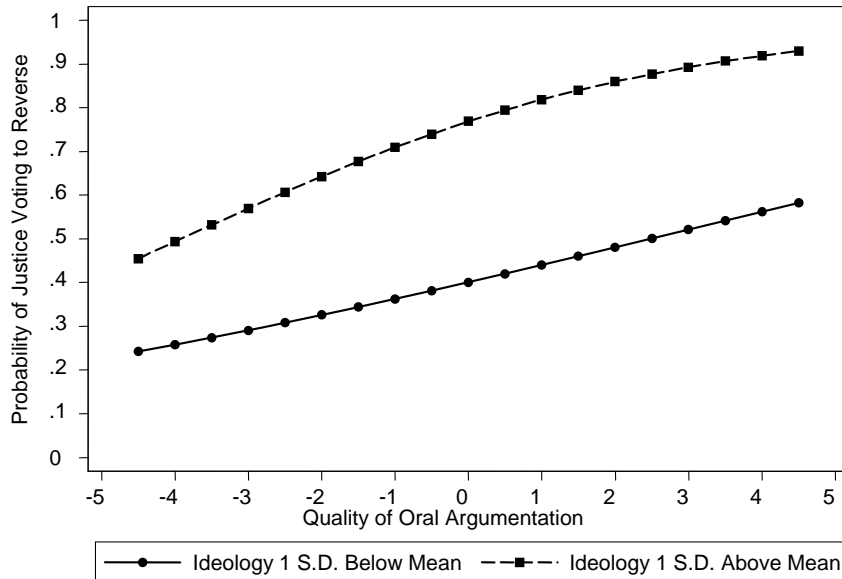
For instance, consider a Justice who is ideologically opposed to the petitioner (specifically, a Justice who is one standard deviation below the mean on *Ideological Compatibility with Appellant*). This Justice has a 35.6% chance of supporting the petitioner when the respondent presents oral advocacy that is considerably better than the petitioner's. By contrast, the likelihood of voting for the petitioner's position increases to 43.8% when this Justice encounters a petitioner who outmatches the respondent's attorney at oral arguments.[134] As seen in Figure 3, the magnitude of the effect of oral advocacy is even more pronounced for Justices who are ideologically supportive of the attorney with the stronger oral argument. When the Justice favors the appellant ideologically but the appellee offers

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133. *Quality of Oral Argumentation* represents the difference between the quality of oral advocacy by the appellant's and appellee's attorneys, with larger scores indicating that the appellant presented better arguments. Note that for this figure and for Figure 4, the cases included are only those that are not on the front page of the *New York Times* (as per our measure of salience).

134. We set the value of *Oral Argument Grade* one standard deviation above its mean when the petitioner's lawyer was better (0.939) and one standard deviation below the mean when the respondent's attorney was better (–1.162). All other variables were set at their means (or modal values for categorical variables), and we set each interaction term at the product of its two component variables.

more credible arguments, the Justice has a 70.0% chance of voting for the appellant; when the appellant provides better oral arguments, then this percentage increases to 81.6%.

Let us now consider the effect of the ideological distance between a Justice and a litigant. Holding other variables constant at their means (or modes for categorical variables), a one-standard deviation shift from below to above the mean of *Ideological Compatibility with Appellant* alters the probability of a Justice voting to reverse from 0.396 to 0.763. Figure 4 provides a graphical depiction of the influence of ideological distance, conditional on the difference in the quality of the attorneys' oral arguments. It shows that the ideological distance between a Justice and a litigant has a pronounced influence on a Justice's vote.

As we predicted, the effect of ideological distance is also conditioned by the relative quality of the attorneys' oral advocacy. For instance, consider a Justice who is supportive of the petitioner's position (*Ideological Compatibility with Appellant* = 3). Under this scenario, when the petitioner's attorney is better than the respondent's (one standard deviation above the mean value of *Oral Argument Grade*), a Justice has an 83.6% chance of voting for the petitioner. When the respondent's attorney is better (one standard deviation above the mean value of *Oral Argument Grade*), this number drops to 72.3%.

FIGURE 4: THE EFFECT OF IDEOLOGICAL DISTANCE CONDITIONAL ON THE QUALITY OF ORAL ARGUMENTS
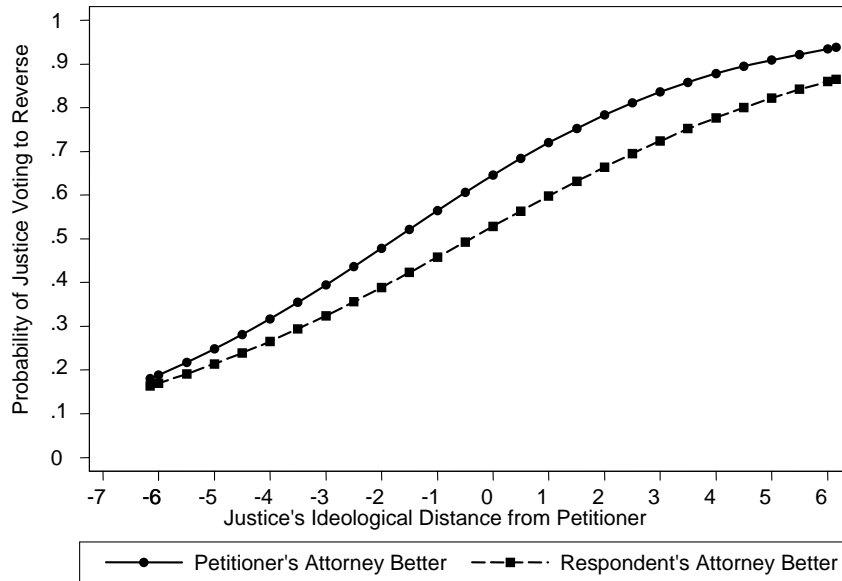
It is also clear from our model that the salience of a case conditions the extent to which the quality of arguments affects Justices' votes. Indeed, while Justices are more likely to reverse the judgment below when the petitioner's attorney provides better arguments, this effect is much more pronounced in cases that do not appear on the front page of the *New York Times*. This relationship is seen clearly in Figure 5, which demonstrates the effect of oral argumentation separately for salient and nonsalient cases (the simulation applies to Justices who are one standard deviation above the mean on *Ideological Compatibility with Appellant*, and all other variables are set at the mean, or mode for a categorical variable).

FIGURE 5: THE EFFECT OF ORAL ADVOCACY CONDITIONAL ON CASE SALIENCE (WHETHER THE CASE APPEARED ON THE FRONT PAGE OF THE *NEW YORK TIMES*)
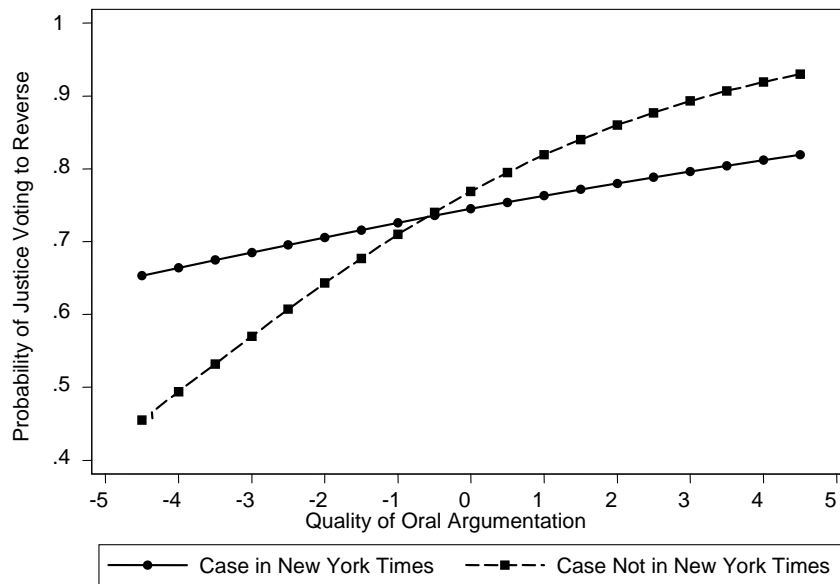
The final element of our story does not work as expected. We argued that when Justices have a greater need for information, they would be more likely to listen to the information presented to them. Our measure of this condition—legally complex cases (as seen in *Oral Argument Grade * Case Complexity*)—is statistically insignificant. One reason why this variable may not support our argument is that it may not tap informational asymmetry as much as it taps an information environment that is difficult for both attorneys and Justices.

In summary, our data analyses show convincingly that Supreme Court Justices' final votes on the merits of a case are heavily influenced by oral advocacy. The litigant whose attorney provides the stronger oral argument is substantially more likely to win the case, even after we control statistically for other factors likely to influence Justices' votes.

IV. DO JUSTICES LISTEN TO ONE ANOTHER DURING ORAL
ARGUMENTS?[135]

The data in the previous part clearly indicate that the arguments counsel present to the Court affect the Justices' votes. In this part, we further suggest that Justices can gather information about their colleagues' views of a case from what they say during the oral arguments. Such behavior is intuitive as, in order for the Court's decisions to become good law, five Justices must agree on the holding and legal rationale. As such, Justices need to be aware of where their colleagues stand and how they may possibly vote in the case once they reach conference and the opinion-writing stage of the decision-making process.

An example demonstrates how Justices may garner such information during the oral arguments. On May 29, 1973, the Supreme Court decided *Columbia Broadcasting System, Inc. v. Democratic National Committee* (CBS, DNC).[136] Justice Lewis F. Powell's behavior six months prior to the final outcome—during oral arguments—provides an example of how these proceedings play an integral role in the Supreme Court's decision-making process. An investigation of Justice Powell's oral argument notes in *CBS* indicates that he paid particular attention to the questions asked and comments made by Justices White and Stewart about whether this case actually implicated First Amendment jurisprudence. At one point during the arguments Powell noted: "Justice Stewart pointed out that . . . the respondent's argument is primarily an [equal protection] argument rather than First Amendment."[137] Similarly, he indicated Justice White's view on this issue: "J. White noted this is not an ordinary 1st Amendment case because we have here an *administrative agency* decision finding that free speech interests are best met by present regulatory system."[138]

Justice Powell's personal post–oral argument but pre-conference notations suggest that he was intrigued about the issues raised by Justices

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135. Portions of this part are derived from JOHNSON, *supra* note 11, at 57–70.

136. 412 U.S. 94 (1973). The case originated when the Federal Communication Commission (FCC) issued an administrative decision against the Democratic National Committee (DNC). Specifically, the DNC brought a complaint to the FCC when a Columbia Broadcasting System (CBS) affiliate refused to sell the organization airtime meant for editorial advertisements intended to help raise money and promote the DNC's policy against the Vietnam War. *Id*. at 98. The FCC ruled against the DNC and argued that a broadcaster who provides full and fair coverage of public issues does not have to sell airtime to "responsible entities" for editorial purposes. *Id*. at 99.

137. Oral Argument Notes from Lewis F. Powell, Justice, U.S. Supreme Court (Oct. 16, 1972) (on file with the *Washington University Law Review*).

138. *Id*.

Stewart and White during these proceedings: "Argument suggests that the . . . issue may be [Equal Protection] rather than Free Speech."[139] Additionally, during conference discussion, Justice Douglas's notes as well as Justice Powell's own notes demonstrate that Powell continued to think about the issue raised by Stewart and White. By the time conference concluded, Powell was inclined to agree with their interpretation of the case: "[W]e do not find state action issue as clear as other Justices. Yet, the arguments of Stewart and White are persuasive. I am impressed with view that in long run there will be greater free speech with a limited regulation of broadcast industry."[140] Thus, it seems that Justice Powell used the oral arguments to gather information about his colleagues' preferences and that he may at times have been persuaded by their arguments.[141]

During his tenure on the Court, Justice Blackmun took notes similar to Justice Powell's during oral arguments. Specifically, he also noted quite a few comments made by his colleagues in many of the cases he heard. In this part, we focus on Justice Blackmun's oral argument notes to test the assumption that Justices can and do utilize oral arguments as an opportunity to learn about how their colleagues want to decide specific cases. Evidence that Justices use these proceedings for this purpose suggests that they do more than gather information from the litigants and amici curiae who appear before them. Rather, we can say that they also find these proceedings important for the information they provide to the Justices about their colleagues.

A. Information and Decision Making

We argue that political actors need information to help them assess other actors' preferences. While this information can come from many sources, game theory literature indicates that under certain conditions, "cheap talk"—defined as costless signals sent between decision makers—can be an effective method of communication.[142] Farrell suggests that if all

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139. *Id*. at 8. Page eight of his oral arguments notes is the exact location where he notes Justice Stewart's comments, while he notes Justice White's comments on page seven.

140. Powell, *supra* note 137.

141. In the end, Justice Powell actually joined the majority coalition, as did Justice White. *CBS*, 412 U.S. at 96. While Justice Stewart agreed with most of the decision, he wrote a separate concurring opinion. *Id*. at 146 (White, J., concurring).

142. *See* JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1994); Crawford & Sobel, *supra* note 44; Joseph Farrell, *Cheap Talk, Coordination, and Entry*, 18 RAND J. ECON. 34

players expect to reach a state of equilibrium and will follow the equilibrium once it is announced, then "cheap talk can help coordinate behavior to produce . . . equilibria."[143] In addition, Crawford and Sobel indicate that players' preferences must coincide with one another in order for coordination to occur.[144] As Lupia and McCubbins explain, "[P]ersuasion does not occur if the principal believes that the speaker is likely to have conflicting interests. If, however, the principal believes that common interests are more likely, then persuasion is possible."[145]

For our purposes, cheap talk (in this case oral arguments) helps actors coordinate on two levels. First, it allows coordination between actors with similar preferences because it is inherently easier for them to agree than it is for actors with divergent views to do so. For example, Morrow notes that legislative debate "provides a way for legislators with similar underlying preferences to coordinate their votes," because "[m]embers are unlikely to take cues from those whose underlying values are greatly different from their own."[146] More generally, this is a necessary condition in order for actors to coordinate with one another through cheap talk signals.

Second, we suggest that it can help actors coordinate when groups make decisions under majority rule—where the median decision maker almost always must join a coalition in order for it to be a winning coalition.[147] Although extant cheap talk literature does not specifically address communication in this manner, we argue that these signals provide one mechanism through which actors can learn the preferences of the pivotal voter because all actors in a group likely share some common interests with the median. As such, they can use the median's cheap talk signals to assess her preferences, and then use these messages when trying to build a majority coalition. The general point, however, applies to both of our assumptions: in order for cheap talk to help actors coordinate, it is necessary that they at least perceive that they share common interests.

We consider Supreme Court oral arguments as a forum for cheap talk between the Justices where each question and comment from a Justice

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(1987).
143. Farrell, *supra* note 142, at 35.
144. Crawford & Sobel, *supra* note 44.
145. LUPIA & MCCUBBINS, *supra* note 44, at 50.
146. MORROW, *supra* note 142, at 256.
147. *See generally* DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958); Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, 95 AM. POL. SCI. REV. 361 (2001).

signals her preferences to the rest of the Court. More specifically, as the introduction suggests, Justices can use these proceedings to help coordinate with one another about the final policy outcomes of cases they hear.

This discussion is consistent with the way many scholars and appellate attorneys view oral arguments. For instance, Wasby et al. argue that "it is not surprising that the judges would naturally use part of the oral argument time for getting across obliquely to their colleagues on the bench arguments regarding the eventual disposition of a case."[148] They conclude that "[a]nother, less noticed function is that oral argument serves as a means of communication between the judges."[149]

Appellate advocates agree with these scholarly accounts. Shapiro posits that "[d]uring the heat of debate on an important issue, counsel may find that one or more Justices are especially persistent in questioning and appear unwilling to relent. This may be the case when a Justice is making known his or her views in an emphatic manner . . . ."[150] Neuborne goes a step further and suggests that he often feels like an intermediary between the Justices when he appears at oral argument: "Sometimes I think I am a post office. I think that one of the Justices wants to send a message to another Justice and they are essentially arguing through me."[151]

Drawing on the assumptions about decisions under risk and cheap talk, along with their application to the Supreme Court, we test two hypotheses about how Justices use oral arguments in the coalition formation process. First, as noted above, in order for cheap talk to be effective, it is necessary for actors to have some common interests. This leads us to hypothesize:

> *Ideological Proximity to Blackmun Hypothesis*: Justice Blackmun is more likely to pay attention to messages sent by colleagues who are closer to him ideologically than to assess the messages of those who are ideologically distant from him.

Second, the median Justice is almost always needed for a majority coalition to form.[152] Thus, we also hypothesize:

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148. STEPHEN L. WASBY ET AL., DESEGREGATION FROM *BROWN* TO *ALEXANDER*: AN EXPLORATION OF COURT STRATEGIES xviii (1977).

149. Wasby et al., *supra* note 11, at 418.

150. Stephen Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 547 (1984).

151. Interview by Paul Duke with Burt Neuborne, Inez Milholland Professor of Civil Liberties and Director of the Brennan Center for Justice at NYU, THIS HONORABLE COURT (PBS Video 1988).

152. WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 64–65 (1964) (noting that Justices

> *Median Justice Hypothesis*: Justice Blackmun is more likely to use oral arguments to assess the median Justice's policy preferences than to assess those of other Justices.

B. Data and Methods

To test the above hypotheses, we constructed a data set that relies on oral argument notes taken by Justice Blackmun during his tenure on the Court. Specifically, we drew a sample of 1,155 cases between the 1985 and 1993 Terms. We coded *every* unique sentence in Justice Blackmun's notes to determine the type of information in each sentence and whether he attributed what was said to one of his colleagues. This resulted in 1,212 references to policy questions, statements, or positions taken by his colleagues during the oral arguments in these cases.[153]

For example, take Justice Blackmun's oral argument notes in *Belknap, Inc. v. Hale*,[154] presented in Figure 1. In those notes, Justice Blackmun specifically references the comments of Justices White and Rehnquist. In addition, he remarks that Justices White, Rehnquist, O'Connor, and Chief Justice Burger were bearing down on the attorney, Samuel Alito.

These notes help provide an explicit "measure of learning" for Blackmun. In other words, we submit that he wrote down a colleague's question or comment when he believed he could learn something about that particular Justice's preferences. In turn, we posit that he used this knowledge to determine which Justices were most likely to help him form a viable majority coalition. More generally, these notes provide an opportunity to study how political actors learn about other actors' preferred outcomes. Given that scholars have rarely studied how political actors do so, Justice Blackmun's notes offer insight into strategic interaction.[155]

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need "four additional votes . . . to speak with the institutional authority of the Court" and that additional votes have a smaller marginal value). Maltzman, Spriggs, and Wahlbeck provide systematic empirical evidence of Murphy's conjecture. *See* MALTZMAN ET AL., *supra* note 9.

153. We define policy statements as those arguments that focus on legal principles the Court should adopt, courses of action the Court should take, or a Justice's beliefs about the content of public policy. *See* EPSTEIN & KNIGHT, *supra* note 9; JOHNSON, *supra* note 11.

154. *See supra* note 37.

155. Certainly this analysis focuses on one Justice; however, given that game theory scholars argue that actors have information to make probability assessments about other actors' preferences but almost never empirically explore where this information comes from, this is a contribution to the literature.

This data set includes an observation for each Justice in every case in the sample. The dependent variable, then, is a count of the total number of notations made by Justice Blackmun about each Justice's statements per case. It varies between 0 and 4 comments for a given Justice in a case, and he noted approximately 0.13 comments per case for each of his colleagues. Because this variable is discrete, we cannot use traditional linear regression to statistically model this phenomenon. As Long points out, "[t]he use of the LRM [linear regression models] for count outcomes can result in inefficient, inconsistent, and biased estimates."[156] A reasonable alternative is the Negative Binomial Regression model.[157]

The statistical model includes two independent variables to test the above hypotheses. To measure the *Ideological Distance from Blackmun* for each Justice, we first determined each Justice's ideological orientation based on Martin-Quinn scores, which provide an ideal point estimate for each Justice for each year he or she sat on the Court.[158] We then calculated the absolute value of the ideological distance between Justice Blackmun and each of his colleagues. A larger, positive value therefore indicates that the Justice was ideologically more distant from Justice Blackmun, and a value of 0 implies a Justice shared Justice Blackmun's ideological position. This variable has a mean of 2.38 (and a standard deviation of 1.03), with a minimum value of 0.18 and a maximum value of 4.94.

Second, to measure *Median Justice*, we used each Justice's Martin-Quinn score to determine if he or she occupied the median ideological position on the Court. We coded *Median Justice* as 1, and all other Justices received the value of 0.

We also included several variables to control for other motivations for Justice Blackmun's behavior. First, to control for whether Blackmun listened more to new colleagues or to those with whom he sat for a number of years, we calculated the number of Terms Blackmun sat with a given colleague. To do so, we summed the years they served together on the Court. The mean number of years served is 12.2, and this variable

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156. LONG, *supra* note 115, at 217.

157. GREENE, *supra* note 73, at 931. While a Poisson model is also an appropriate modeling choice for count outcomes, the data we employ do not lend themselves to this technique. Indeed, in both models, the mean of the dependent variable is much smaller than its standard deviation. This means the Poisson model would produce consistent but inefficient estimates as well as downwardly biased standard errors. *See* LONG, *supra* note 115, at 230. Thus, we use the Negative Binomial Regression, which accounts for the overdispersion of zeros by allowing "the conditional variance of y to exceed its conditional mean." *Id.*

158. Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 82.

ranges from 0 (either Blackmun's or a colleague's first year on the Court) to 23 years.[159]

Second, our measure of case complexity is similar to the one used earlier.[160] The factor analysis[161] includes the number of legal issues raised in the case and the number of legal provisions at issue for all cases decided by the Supreme Court between the 1970 and 1993 Terms; it resulted in a single factor with an eigenvalue greater than 1.[162] We assigned the factor score that resulted from this analysis for each case. The average *Case Complexity* measure in our sample was 0.14 with a standard deviation of 0.59.

Third, we account for the fact that Justice Blackmun may be more likely to listen to the Chief Justice because he holds the power to assign the majority opinion if he is in the majority coalition.[163] To do so, we included a dummy variable that equals 1 for the Chief Justice and 0 for all associate Justices.

Fourth, it is possible that Justice Blackmun was more likely to listen to Justices who had expertise in a particular area of law. To measure *Expertise* for each Justice, we first calculated an opinion ratio (OR) in specific issue areas. The OR is the number of cases in which a Justice wrote a dissent or concurrence divided by the number of like cases that reached the Court since that Justice's appointment through the Term preceding the case in question.[164] This measure is a standard one in the judicial politics literature.[165] We then compared each Justice's OR to the

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159. The intuition here is that Justice Blackmun may be more likely to assess and note the arguments of new Justices because he does not know their preferences as well as he knows those of colleagues with whom he has worked for a number of years. This is akin to the literature on socialization, freshmen effects, and voting fluidity. *See, e.g.*, Timothy M. Hagle, *"Freshman Effects" for Supreme Court Justices*, 37 AM. J. POL. SCI. 1142 (1993); J. Woodford Howard, Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43 (1968); Maltzman & Wahlbeck, *supra* note 113. Note that we also tested the new Justice variable by coding it as only the first Term that Blackmun and each colleague sat together on the Court. Doing so yields similar results.

160. *See supra* Part III.B.1.

161. *See supra* note 120.

162. *See supra* note 123.

163. *See, e.g.*, ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT (1986); David Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, *in* THE FEDERAL JUDICIAL SYSTEM: READINGS IN PROCESS AND BEHAVIOR 147–60 (Thomas P. Jahnige & Sheldon Goldman eds., 1968).

164. Because this measure is based on information up to the Term preceding the case in question, it is updated annually to reflect a Justice's learning and the development of expertise over time. We take our definition of issue area from Spaeth's *value* variable (which denotes the broad issue in a case, such as criminal rights, first amendment, economics, and the like). *See* SPAETH, *supra* note 81, at 52.

165. MALTZMAN ET AL., *supra* note 9.

OR for the other Justices serving on the Court when the case was heard. Our measure of *Expertise* is then each Justice's z-score, which compares the Justice's OR with the mean OR for all Justices serving on the Court divided by the standard deviation of OR among that group of Justices. A larger, positive score indicates that a Justice has more expertise than the average for all Justices then on the Court, whereas a smaller, negative score reflects less expertise than the average Justice. The mean of this variable is 0.02, and the standard deviation is 0.95, varying from a low of −2.26 to a high of 2.67.

Finally, we included a variable to capture whether Justice Blackmun was more inclined to cite comments by his colleagues in salient cases. We used the level of amicus curiae participation in a case on the merits as our measure of salience.[166] Given that amicus participation has dramatically increased over the Terms included in this sample, we calculate Term-specific z-scores to determine whether a case had more amicus filings than the average case heard during a Term. This variable has a mean of 0.02 and a standard deviation of 0.99.

C. Results

Table 3 provides the results of the statistical analysis.[167] To interpret the coefficients in our negative binomial regression model, we translated them into predicted probabilities. Note first that when all of the variables in the model are held at their mean or mode, there is a 9.4% probability that Justice Blackmun will note at least one comment from a given colleague. The model confirms our first hypothesis: that Justice Blackmun is more likely to note one or more comments made by colleagues who are ideologically more proximate to him. Substantively, there is only a 7.2% probability that Blackmun will note one or more comments from a Justice farther from him ideologically (specifically, two standard deviations above the mean value of *Ideological Distance from Blackmun*). However, this

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166. *See* JAMES L. GIBSON, UNITED STATES SUPREME COURT JUDICIAL DATA BASE, PHASE II (University of Houston 1997).

167. Note that the Negative Binomial Model, rather than a Poisson, is the appropriate modeling choice. We determine this through a significance test of the alpha coefficient, presented in Table 3. A Z-test of $H_o: \alpha = 0$ can be used to test for overdispersion, since when α is 0, the Negative Binomial reduces to a Poisson. LONG, *supra* note 115, at 237. The results demonstrate that α is greater than 0. *Id*. Thus, the Negative Binomial is better able to capture this phenomenon than a Poisson model. *Id*. Additionally, the highly significant Wald χ^2 test indicates that the Negative Binomial model is more appropriate than the Poisson. *Id*.

probability increases to 13.6% for Justices who are ideologically close to Justice Blackmun (specifically, two standard deviations below the mean value of *Ideological Distance from Blackmun*). This result provides initial evidence in support of the cheap talk argument that it is easier to send and receive messages (which may help two actors coordinate) when their preferences are similar.

The coefficient for *Median Justice* does not support our hypothesis that Justice Blackmun is more likely to pay attention to the median Justice on the Court. In fact, additional analyses indicate that he also does not focus on Justices closer to the median. Instead, the dominant pattern seems to be that Justice Blackmun tended to avoid writing down comments of Justices who were ideologically distant from the median Justice.

TABLE 3: NEGATIVE BINOMINAL REGRESSION OF JUSTICE BLACKMUN'S PROPENSITY TO RECORD COMMENTS OF COLLEAGUES AT ORAL ARGUMENTS (1970–94)

Variable	Coefficient	Robust Standard Error	Significance (two-tailed test)
Ideological Distance from Blackmun	–0.17	0.03	0.00
Median Justice	–0.10	0.10	0.32
Years Served with Blackmun	–0.01	0.01	0.01
Case Complexity	–0.14	0.07	0.06
Chief Justice	0.77	0.09	0.00
Expert Justice	0.02	0.03	0.42
Case Salience	0.10	0.04	0.01
Constant	–1.53	0.10	0.00
Number of Observations	9078		
Log Likelihood	–3690.44		
Wald Chi Square	98.88		0.00
Alpha	1.26	0.19	0.00

Three of the control variables provide additional understanding for why Justice Blackmun focused on this information. He was more likely to record comments made by Justices with whom he had served for a shorter period of time, made by the Chief Justice, and in salient cases. His

probability of citing comments or questions made by the Chief Justice is 18.1%, as compared to 9.4% for associate Justices. In salient cases (those two standard deviations above the mean), he had a 12.4% probability of citing a given Justice, and this number decreased slightly to 11.5% in nonsalient cases (two standard deviations below the mean on this variable). Justice Blackmun was also less likely to cite comments in his notes for colleagues who had served with him for a longer period of time. In the first year a Justice was on the bench with Justice Blackmun, Blackmun had a 11.5% chance of making notations at orals about her, while this number lowered to 8.6% by the time they had served together for 23 years (this comparison reflects a two-standard deviation shift around the mean of this variable).

While there is a quite large confidence interval around the point estimate for *Expert Justice* (and thus we have much less confidence in this effect), the data suggest Justice Blackmun may have been slightly more likely to note comments of those he believed were experts in a particular area of law. The probability that he noted a comment from a perceived expert was 9.8%, while it dropped to 9.0% for those who seem to have little expertise with an issue area. It does not appear that Justice Blackmun was any more likely to reference comments of colleagues during orals in complex cases.

V. CAN JUSTICES PREDICT CASE OUTCOMES DURING ORAL ARGUMENTS?

The findings in the previous part provide preliminary support for the theoretical claim about why oral arguments are vitally important for the Court: they provide necessary information that helps Justices learn about how their colleagues want to act so that they can more effectively build coalitions when deciding on the merits of a case. An additional question is, what do they do with that information? One answer is that they try to predict exactly how their colleagues will vote in cases they hear.

We know this is sometimes the case because Justice Blackmun exhibited this behavior. Three examples demonstrate how he did so. Figure 1, which presented the notes Justice Blackmun took in *Belknap, Inc. v. Hale*,[168] included the notation of "+ R-W-CJ-P." This reflected Justice Blackmun's prediction that Justices Rehnquist (R), White (W), Powell (P), and Chief Justice Burger (CJ) would affirm (+) the lower court

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168. *See supra* note 37.

decision.[169] During its 1979 Term, the Supreme Court decided *Harris v. McRae*[170] which, inter alia, held that the Hyde Amendment did not violate the Due Process Clause of the Fifth Amendment.[171] Although this case is important because of its implications for the right of poor women to obtain abortions, it is also interesting for what transpired two months prior to the Court's final decision. While sitting for the oral arguments in *McRae*, Justice Blackmun wrote a note predicting how the case would turn out. Specifically, he speculated that "[a]ll Justices in their questions telegraph their attitudes. Result will be 6-3 or 5-4 to reverse."[172]

In *McRae*, Justice Blackmun seemed quite sure his prediction was accurate, while in other cases he seemed less sure of his conjecture. For instance, in *Tower v. Glover*[173] he wrote "– 5-4, we [sic] would guess or + 5-4."[174] Here, he predicted that Justices Brennan, Marshall, White, and he would vote to affirm, while Chief Justice Burger and Justices Rehnquist and O'Connor would vote to reverse.[175] He was unsure how Justice Stevens and Justice Powell would vote.[176] In still other cases, Blackmun did not attempt to predict his colleagues' ultimate positions.

These examples indicate that during oral arguments, Justice Blackmun sometimes attempted to predict case outcomes as well as how some or all of his colleagues would vote.[177] Interestingly, there is significant variation

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169. A "+" signifies that Justice Blackmun expected a vote to affirm, while a "–" indicates that Justice Blackmun predicted a vote to reverse. Justice White wrote the opinion for the Court in this case, affirming the lower court decision. His decision was joined by Chief Justice Burger, and Justices Rehnquist, Stevens, and O'Connor. Justice Powell joined Justice Brennan's dissenting opinion.

170. 448 U.S. 297 (1980).

171. The Court ruled that states are not required to pay for medically necessary abortions for which federal reimbursement was unavailable under the Hyde Amendment. *Id*. at 318. Additionally, the majority held that the federal funding restrictions established by the Hyde Amendment were constitutionally valid. *Id*. at 322.

172. Oral Argument Notes from Justice Blackmun, Justice, U.S. Supreme Court, (Apr. 4, 1980) (on file with Library of Congress). He made similar comments in many other cases. For example, in *Smith v. Barry*, 502 U.S. 244 (1992), he wrote, "Justices telegraph their posit[ions]—CJ—A—K." Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Dec. 2, 1991) (on file with Library of Congress).

173. 467 U.S. 914 (1984). In *Glover*, the Court ruled that state public defenders are not immune from liability for misconduct. *Id*. at 916. Justice Blackmun's convention is to use a negative sign as shorthand for "reverse", and a positive sign as shorthand for "affirm".

174. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Feb. 22, 1984) (on file with the Library of Congress.).

175. *Id.*

176. *Id.*

177. Scholars have attempted to predict the Justices' votes based on how they act during oral arguments. *See, e.g.*, Sarah Levien Shullman, *The Illusion Of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271 (2004).

in the frequency with which he predicted his colleagues' votes. In the oral argument notes he took during cases decided in our sample of cases (1986 to 1993 Terms), he made predictions for 12.4% of the participating Justices, while he predicted at least one of his colleagues' votes in over 34% of those cases. The question we ask in this part is, why did Justice Blackmun jot down this information for some Justices in some cases and ignore some colleagues in other cases? Was it simply an exercise born of boredom or fancy and thus a random compilation of his colleagues' anticipated behavior on the merits? Or is there a strategic motivation behind the circumstances under which he attempted to predict his colleagues' votes?

Just as in the previous part, we argue that the collegial nature of Supreme Court decision making explains in part why Justice Blackmun noted predictions for some Justices and not for others. As such, we posit that while listening to the exchanges between his colleagues and counsel during oral argument, Blackmun considered information that could help him come to terms with the coalitions that might eventually form. He then used these proceedings to build himself a map that would enhance his ability to be forward thinking as the Court moved toward the resolution of a case. To support this argument, we offer one final analysis based on a sample of Justice Blackmun's oral argument notes from cases decided between the 1985 and 1993 Terms—specifically whether he attempted to predict his colleagues' votes on the merits in the sample of cases we employed in the previous part.

A. Theoretical Foundation

In order for Supreme Court Justices to make decisions, they must be able to assess the likely outcomes of those choices. The outcomes that most concern Supreme Court Justices are the legal doctrines articulated in the Court's opinions and the distributional consequences they anticipate those legal rules will have on American society.[178] The legal doctrines announced in the Court's majority opinions, of course, depend on the agreement of at least a majority of the Justices. In game-theory terms, the Justices' payoffs are thus interdependent; that is, the payoff a Justice will receive in a given case (as flowing from the ultimate effects of a decision) result from an aggregation of all of the Justices' choices in a case. As a

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178. EPSTEIN & KNIGHT, *supra* note 9; HANSFORD & SPRIGGS, *supra* note 9; MALTZMAN ET AL., *supra* note 9.

result, information about their colleagues' preferences and likely choices are necessary for Justices to make choices capable of moving legal doctrine in their preferred direction. One important issue is determining exactly how Justices go about gathering the information they need about their colleagues when making decisions. In this part, we argue that Justices can attempt to forecast their colleagues' actions in a case by using information gleaned from questions and comments made during oral arguments.

Recent research provides evidence that, although Justices may know their colleagues' preferences generally,[179] they may not be so certain in specific cases. First, Justices' preferences can and do change over time.[180] Second, Justices' preferences vary across issue areas.[181] Third, some cases tap multiple issue dimensions,[182] which creates ambiguity about which dimension is controlling.[183] This combination of factors suggests that even though Justices may be able to generally predict their colleagues' preferences, they often possess some uncertainty about how other Justices want to act in particular cases.[184] Recent research, for example, indicates that the Chief Justice is more likely to pass at conference when he has greater uncertainty about his colleagues' votes. As such, he can view his colleagues' conference votes and then determine which vote will best advance his policy interests.[185]

Because Justices cannot always anticipate their colleagues' actions in specific cases, they must procure information about their colleagues' views. While existing literature indicates that many opportunities exist for Justices to gather this information—e.g., certiorari votes in the present case[186] and past merits votes in similar cases[187]—oral arguments provide

179. HANSFORD & SPRIGGS, *supra* note 9; MALTZMAN ET AL., *supra* note 9; Timothy R. Johnson, James F. Spriggs, II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 348 (2005) [hereinafter Johnson et al.].

180. Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal & Harold J. Spaeth, *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801 (1998); Epstein et al., *supra* note 82; Martin & Quinn, *supra* note 82.

181. EPSTEIN ET AL., *supra* note 91.

182. SPAETH, *supra* note 81.

183. Maltzman & Wahlbeck, *supra* note 113.

184. MALTZMAN ET AL., *supra* note 9.

185. Johnson et al., *supra* note 179, at 356–58.

186. Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999).

187. JOHNSON, *supra* note 11.

an important forum for them to do so. Specifically, as the previous part demonstrates, we consider these proceedings as a forum where Justices can gather information about their colleagues' preferences by listening to the questions and comments they make.

The notion that oral arguments can help Justices learn about their colleagues' preferences in particular cases is supported by the fact that the Justices ask myriad questions during these proceedings. Johnson, for example, finds that in a sample of 75 cases, the Justices asked questions or made comments a total of 5,567 times.[188] During the time frame of his study, oral arguments averaged one hour in length, which means that the Justices asked almost 75 questions per hour. Additionally, Johnson finds that Justice Powell noted 193 comments made by his colleagues in a sample of 150 cases decided between 1972 and 1986.[189] Further, Justice Blackmun wrote down 1,212 comments regarding his colleagues' questions at oral arguments in our sample of 1,155 cases.[190] Given the vast number of questions and comments from the bench, those sitting on the Court can learn about their colleagues' views of a case during oral arguments.[191] This argument is consistent with the evidence we present from the previous part which suggests that Justices themselves, scholars, and appellate attorneys believe this type of information transmission takes place during these proceedings.

B. Hypotheses

We are interested in determining the conditions under which Justice Blackmun would predict a colleague's vote. Johnson's work on oral arguments[192] is instructive here. He demonstrates that Justice Powell took

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188. *Id.* at 40–41.

189. *Id.*

190. The vast majority of his notes refer to substantive comments made by his colleagues, but sometimes he made notes about what he thought their questioning meant. For example, in *Hilton v. South Carolina Railways Commissions*, 502 U.S. 197 (1991), Justice Blackmun was intrigued by Justice White: "BRW is the one only ? here. Why is he inter[ested]?" Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Oct. 8, 1991) (on file with the Library of Congress).

191. Of course, not all Justices question the attorneys, and some almost never speak during these proceedings (as in Justice Thomas's reputation). In *Collins v. Harker Heights* (1992), Justice Blackmun noted the exact time when Justice Thomas asked his first question from the bench: "T asks his 1st ? 1:43 pm." Additionally, in *Building Trades Council v. Associated Builders*, 507 U.S. 218 (1993) he noted (with a degree of surprise) another question by Thomas: "CT asks a ?!!" Although we do not analyze it here, silence may also help Justices glean information about their colleagues. In *Hilton*, Justice Blackmun's notes state that, "AS is quiet here. Why?"

192. JOHNSON, *supra* note 11.

notes about his colleagues' questions or comments during these proceedings when he thought he could learn something from them or when the comments they made might have been helpful for building a coalition. Like Powell, the previous part demonstrates that Blackmun acted in a similar manner during oral arguments.

Here, we assert that Justice Blackmun's practice of forecasting his colleagues' votes is in part a reflection of how he saw the case beginning to shape up during oral arguments. Justice Blackmun, we suggest, went a step further by actually predicting colleagues' votes in an effort to assess the lay of the land before conference. More formally, we argue that his prediction notes helped him initially determine the contours of the conference coalitions that might form after the arguments. Based on this assumption, we derive hypotheses pertaining to the factors that influenced Blackmun's decision to note a prediction of one or more of his colleagues.

Our main focus is on the extent to which Justice Blackmun used information he gleaned from his colleagues during oral arguments to help determine how they would eventually vote on the merits of a case. We argue he was more likely to predict his colleagues' positions in a case if he took more notes regarding their oral argument comments and questions. The point is intuitive: when Justice Blackmun recorded more notes regarding a Justice then, that Justice is more likely to have revealed information (signals in game theoretic terms) about her preferences over the outcomes of a case. As such, Blackmun should be better equipped to predict how that Justice would decide. This leads us to predict that:

> *Oral Argument Hypothesis*: Justice Blackmun is more likely to predict his colleagues' votes in a case when he has taken more notes regarding their comments during oral argument.

Certainly other factors may influence Justice Blackmun's decision to predict a colleague's vote. In particular, as we note in the previous parts, ideology can and does affect how Justices interact with one another. As such, we also include two variables that focus on the ideological relationship between Justices. First, we focus on arguably the most important Justice on the Court—the median Justice. Scholars have long recognized that, in a majority-rule setting, the median decision maker is often in a privileged position.[193] This is certainly true for the median Justice on the Supreme Court. For example, between the 1986 and 1993

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193. *See supra* note 147.

Terms, the median Justice was a member of the majority opinion coalition 89.8% of the time.[194] This has led some scholars to suggest that the median Justice often drives case outcomes.[195] Given the median Justice's position and power, we predict that Justice Blackmun will be more concerned about that Justice. This leads us to hypothesize that:

> *Median Justice Hypothesis*: Justice Blackmun is more likely to predict the votes of the median Justice on the Court.

We also suggest Justice Blackmun will be more likely to think about the comments of Justices who are ideologically aligned with him. The intuition, as in the previous part, is that such Justices are more likely to provide credible information for him—information that he can view as more inherently trustworthy because of the Justice's ideological similarity to him. Thus, we posit:

> *Ideological Distance from Blackmun Hypothesis*: Justice Blackmun is more likely to predict Justices who are ideologically closer to his position.

We also focus on additional factors that might affect whether Justice Blackmun makes a prediction. These variables, which capture Justice- and case-specific factors, are identical to those we employed in the previous part and are discussed below.

Data and Methods

To test the above hypotheses, we used the same sample of cases as in the previous part with an observation for each Justice in each case.[196] Our dependent variable focuses on whether Justice Blackmun made a prediction for a particular Justice in a case and is coded 1 if he made a

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194. To calculate this, we used the Justice's Martin-Quinn scores to identify the median Justice. *See* Martin & Quinn, *Dynamic Ideal Point Estimation*, *supra* note 82. The Justices' support of the majority was derived from SPAETH, *supra* note 81, selecting observations associated with case citations and split votes, as well as orally argued opinions (whether signed or per curiam).

195. Chris W. Bonneau, Thomas H. Hammond, Forrest Maltzman & Paul J. Wahlbeck, *Who Controls the Law? The Majority Opinion Author, the Median Justice, and the Status Quo on the United States Supreme Court*, 51 AM. J. POL. SCI. 890 (2007); Chad Westerland, Who Owns the Majority Opinion (Aug. 28, 2003) (unpublished paper presented at the annual meeting of the American Political Science Association, on file with the authors).

196. We do not include cases for which Spaeth was unable to code an ideological direction for the case outcome. *See* SPAETH, *supra* note 81. We also excluded observations for Justices who did not participate in a case.

prediction and 0 otherwise. In this sample, Justice Blackmun made 1,128 predictions in his oral argument notes, representing about 12.4% of his colleagues' votes on the merits. Because this variable is dichotomous, we employ a logit model[197] with robust standard errors clustered on case.

To test our main hypothesis of interest—that Justices send signals about their preferences during oral arguments—we coded every sentence of Blackmun's oral argument notes to determine whether he wrote down legal or policy comments with attribution to a colleague. We also coded instances where he noted the nature, but not necessarily the content, of one of his colleague's questions or comments. For instance, in *Collins v. Harker Heights*[198] he writes, "Hostile ?s [Chief Justice Rehnquist], [Justice Scalia]" as they are asking questions of the petitioner's attorney.[199] We believe these insights also indicate that Blackmun is taking signals based on exactly how questions are asked. In our sample of cases, Blackmun noted a mean of 0.13 questions or comments per Justice in each case, and the *Oral Argument Information* variable ranges from 0 to 4 (per case). We expect the number of references to a colleague's questions at oral arguments to have a positive relationship with the dependent variable.

Before moving on, we should point out a potential endogeneity issue, which renders the inference we can draw from this empirical correlation suggestive rather than definitive. It is possible that a correlation between Blackmun's tendency to write down comments about a colleague's comments at oral arguments and his tendency to predict their vote results because he is preoccupied with that Justice. As a result, his proclivity to be preoccupied with given Justices leads him to both write down their comments from oral arguments and predict their votes.

To test the two ideological hypotheses, we employed the same measures we used when predicting whether Justice Blackmun would note a colleague's questions or comments. Thus, using the Martin-Quinn ideological scores, we included a variable for the absolute value of a Justice's ideological distance from Blackmun. We also included a dichotomous variable for *Median Justice*, coded as 1 if that Justice,

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197. The logit model is a member of the class of nonlinear models. *See* Maltzman & Wahlbeck, *supra* note 113 and sources therein. See *supra* note 74 on robust standard errors.

198. 503 U.S. 115 (1992).

199. Oral Argument Notes from Harry Blackmun, Justice, U.S. Supreme Court (Nov. 5, 1991) (on file with the Library of Congress).

according to Martin-Quinn scores, was the median on the Court in that year.[200]

In order to calculate the number of Terms Justice Blackmun sat with a given colleague, we summed the years they served together on the Court. The mean number of years served is 12.2, and this variable ranges from 0 (either Justice Blackmun's or a colleague's first year on the Court) to 23 years.

To measure case complexity, we conducted a factor analysis of all cases decided by the Supreme Court between the 1970 and 1994 Terms. Using Spaeth,[201] we counted the number of legal issues and the number of legal provisions at issue in a case. The factor analysis resulted in a single factor with an eigenvalue greater than 1.[202] We assigned the factor score that resulted from this analysis for each case. The average *Case Complexity* is 0.14 with a standard deviation of 0.59.

We also included variables to measure whether Blackmun was more likely to predict the votes of the Chief Justices and issue experts in a case.[203] Finally, we follow Maltzman, Spriggs, and Wahlbeck[204] in arguing that the political salience of a case can be measured by the amount of amicus curiae participation. Since amicus participation has dramatically increased over the Terms included in our sample, we calculated Term-specific z-scores to determine whether a case had more amicus filings than the average case heard during a given Term. This variable should have a positive relationship with the dependent variable.

Results

Our principal substantive interest is whether Justices can use the questions and comments made by colleagues at oral arguments to help them reduce their uncertainty about a case. When Justices initially sit for arguments, they often have uncertainty about the contours of a case and about how their colleagues will decide. These proceedings, we argue, can help them reduce this uncertainty and better understand the case and the likely actions of their colleagues on the merits. The data analyzed in Table 4 provide initial support for this argument. Specifically, we tested our oral

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200. *See supra* note 82 and accompanying text.
201. *See* SPAETH, *supra* note 81.
202. *See supra* note 120 (on factor analysis).
203. *See supra* note 164 and accompanying text (explaining how we measured issue experts).
204. *See supra* note 9.

argument hypothesis by examining whether Justice Blackmun was more likely to predict the votes of his colleagues (as recorded in his oral argument notes) if he wrote down information about their questions and comments. Table 4 presents the results of this analysis.

TABLE 4: LOGIT ANALYSIS OF JUSTICE BLACKMUN'S PROPENSITY TO PREDICT HIS COLLEAGUES' VOTES ON THE MERITS DURING ORAL ARGUMENTS

Variable	Coefficient	Robust Standard Error	Significance (two-tailed test)
Oral Argument Notes	0.78	0.07	0.00
Ideological Distance from Blackmun	0.07	0.03	0.02
Median Justice	–0.19	0.10	0.06
Years Served with Blackmun	–0.002	0.005	0.66
Case Complexity	–0.10	0.12	0.39
Chief Justice	0.95	0.08	0.00
Expert Justice	0.06	0.03	0.08
Case Salience	0.09	0.05	0.08
Constant	–2.37	0.11	0.00
Number of Observations	9078		
Log Likelihood	–3238.15		
Wald Chi Square	453.58		0.00

The positive and statistically significant coefficient for *Oral Argument Notes* provides preliminary evidence for this argument. Substantively speaking, Justice Blackmun had a 9.6% chance of predicting one of his colleague's votes on the merits if he did not record any information about his or her questions at oral argument. The likelihood of his focusing on the future vote of one of his colleagues increased to 18.9% and 33.7%, respectively, if his notes contained one or two references to that Justice's questions at oral argument.[205] If he made three such notes, then this probability jumped to 52.5%. It appears that Justice Blackmun did indeed use oral arguments as an initial device to think about the likely vote line-up in the case, although we caution the reader due to the endogeneity between the oral argument variable and Blackmun's propensity to make predictions.

Several of the additional variables included in the model also manifest a systematic relationship with Justice Blackmun's tendency to predict the other Justices' votes. First, Justice Blackmun was more likely to predict the votes of Justices who were ideologically more distant from him. One should note that this relationship is opposite of that we discovered with regard to Justice Blackmun is recording comments by his colleagues. The substantive effect of this variable, however, is slight; when changing *Ideological Distance from Blackmun* from two standard deviations above to below its mean value, the probability of his recording a colleague's vote changes from 10.6% to 8.3%. Justice Blackmun, contrary to our hypothesis, is not more likely to predict the median Justice's vote. In fact, he is also not more likely to predict the votes of other Justices close to the median, but rather tends to be considerably less likely to predict the votes of Justices who are far removed ideologically from the median Justice.

He also appears to be more likely to predict the votes of the Chief Justice, Justices who are experts in an area of law, and Justices deciding salient cases. For instance, when he did not perceive a colleague to be an expert in an issue area (a Justice who is two standard deviations below the mean expertise level), he had a 8.7% probability of predicting that colleague's vote. However, if the Justice was perceived to be an expert (a Justice who is two standard deviations above the mean expertise level), this percentage increased to 10.6%. He was also dramatically more likely to predict the Chief Justice's vote, and he did so about 21.7% of the time, as compared to predicting 9.6% of associate Justices' votes. In salient

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205. We hold constant for other variables at their mean values (or modal if a categorical variable).

cases, Justice Blackmun had a 9.9% chance of predicting a given Justice's vote, while this number dropped to 7.6% in less salient cases (where we manipulated salience two standard deviations about its mean value). Finally, he does not appear to be more or less likely to predict the votes of Justices with whom he has served longer or Justices deciding complex cases.

The question we have not yet answered is whether the predictions Justice Blackmun made were accurate. While we do not fully answer this question here, we offer some insight. Justice Blackmun made correct predictions 76% of the time. Additionally, Blackmun was slightly more successful when he noted more of the questions and comments made by his colleagues during oral arguments. Indeed, when he only recorded one notation about his colleagues' comments, he successfully predicted the Justice's final vote 74% of the time. However, if he noted more than one reference, his success increased to 80%.

These initial findings are consistent with the attitudinal model, where Segal and Spaeth[206] predicted 71% of votes correctly. It is also consistent with Boucher and Segal's[207] argument that Justices should be able to predict case outcomes. As they put it, "[f]orming a reasonably accurate probability distribution [of case outcomes] should be well within the capabilities of the Justices. If learned outsiders such as Spaeth can predict Court decisions with a fair degree of accuracy, then the ability of those on the Court to predict outcomes must be higher still."[208]

IV. CONCLUSION

We began this Article with a discussion of the prevailing views of the role of oral arguments. The predominant belief among lawyers, legal scholars, and Supreme Court Justices is that oral argument plays an important role in the decision-making process. Most political scientists who study courts, however, have either ignored oral arguments or assumed they were largely irrelevant. We started from the premise that oral

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206. SEGAL & SPAETH, *supra* note 9, at 325. Note, however, that we may be comparing apples to oranges. Segal and Spaeth try to predict all civil liberties votes, whereas Justice Blackmun does not predict every vote in every case. Thus, while this is a good illustration, we cannot make a true comparison on this point. However, in those cases where he did make predictions, he was quite good at doing so.

207. Boucher & Segal, *supra* note 186.

208. Boucher & Segal, *supra* note 186, at 827 (internal citations omitted).

arguments matter by providing information to Justices. Our goal was to offer systematic empirical evidence for this assertion.

We provided such evidence through the use of the papers of Justice Harry Blackmun. Justice Blackmun recorded notes during oral arguments and, among other things, assigned a "grade" to each attorney arguing before the Court. We used these evaluations as a quantitative measure of the quality of oral argumentation by a lawyer before the Court. Our data analysis shows, first, that these grades are reflective of the quality of oral arguments and are not tainted by ideological bias on Justice Blackmun's part. As a way to validate his grades as an indicator of quality, we utilized a linear regression model, where we explained each attorney's grade as a function of variables relating to their credibility and professional experience. We show, for instance, that attorneys who have had prior experience arguing before the Court, are part of the Washington, D.C., "legal elite" (such as prior Supreme Court clerks and private Washington, D.C., attorneys), or sit in a privileged governmental position (such as the Solicitor General's office) generally receive higher grades from Blackmun.

In addition, our evidence clearly indicates that the Justices' votes in a case depend substantially on the relative quality of the lawyers appearing before the Court. We used each Justice's vote in a case as our dependent variable, and our key independent variable captured the differential in the quality of oral argumentation of the attorneys in a case. Our data analysis shows that the probability of a Justice voting for a litigant rises substantially if that litigant's attorney presented better oral arguments, even after controlling for other likely explanations of a Justice's vote. Indeed, even Justices who ideologically disagreed with the point of view being advocated by an attorney were more likely to vote for her client if she made the stronger arguments.

We also sought to show that Justices can reduce their uncertainty about a case by listening to their colleagues' questions and comments during these proceedings. To do so, we drew again on evidence found in the private papers of Justice Blackmun. During oral arguments, Blackmun would take notes regarding his colleagues' questions, as well as sometimes try to predict their ultimate vote on the merits. We suggested that Blackmun recorded this information in part to assist him in assessing the positions of his colleagues and the issues in a case.

This portion of our analysis took place in two steps. First, we examined the circumstances under which Blackmun took notes regarding the policy questions or substantive statements made by his colleagues during orals.

We argued that if his motivation for taking these notes included a desire to help him understand the case, then we should witness him recording information from Justices who were ideologically more proximate to him and the median Justice on the Court. Since the former Justices share his ideological point of view, they would offer credible information for Blackmun's consideration. The latter Justice is often centrally important to the coalition formation process, given that the Court is a majority rule institution (at least at the merits phase). Our data analysis confirms the former hypothesis but not the latter. In addition, we argued that if the information he gleaned from oral arguments was valuable, we should find a strong and positive correlation between the frequency with which he recorded notes for a particular Justice's questions at oral arguments and his attempt to predict that colleague's vote. The data analysis provides support for this relationship and thus offers additional evidence for the informational value of oral arguments in Supreme Court decision making.

What, then, are the implications of this study? First, and most generally, it illustrates the utility of empirical legal research. While legal scholars, political scientists, lawyers, and judges often discuss oral arguments—putting forward empirical claims about the influence of these proceedings (or lack thereof) on Justices' decisions—their characterizations are based almost entirely on anecdote and speculation.[209] By developing a quantitative indicator of oral argumentation quality and subjecting it to a series of empirical tests, we offer substantial evidence for the position that oral arguments provide the Justices with information and that the attorneys' arguments influence the Justices' votes in a case.

Second, our results have implications for a debate among political scientists about the determinants of Justices' votes on the merits of a case. Attitudinalists argue that a Supreme Court Justice's preference over policy outcomes is the only systematic factor that causes her to vote for one outcome over another.[210] We show, contrary to that claim, that the quality of oral arguments strongly influences the Justices' final votes on the merits. Indeed, even when Justices are ideologically opposed to the outcome being pushed by an attorney, the quality of that attorney's oral arguments influences a Justice's final vote on the merits. In short, these data show that the attitudinal model is inaccurate in its main theoretical claim.

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209. *See supra* note 11.
210. *See* SEGAL & SPAETH, *supra* note 9.

Third, our study builds on research that shows how the process of decision making on the Supreme Court influences outcomes. Legal realists, and their intellectual offspring attitudinalists, place little explanatory emphasis on the process of decision making and instead give primacy to Justices' ideological points of view.[211] In the last decade, however, scholars have catalogued the integral effect of intra-Court rules, norms, and procedures on the Supreme Court. This research demonstrates that considerations stemming from institutional rules affect the Justices' choices, including their decisions to bargain and negotiate, the way in which they interpret precedent, and how they vote in a case.[212] In showing that oral arguments matter, we shed further light on how the judicial process can influence outcomes.

Since this article is one of the first systematic empirical analyses of this area, a variety of questions remain. For example, there are two paths through which lawyers can influence a Justice's decision. First, a lawyer may make an argument that changes a Justice's mind, leading a Justice who prefers position "X" to instead prefer position "Y." This type of influence means that a lawyer actually changes a Justice's set of desires or goals as they relate to law and policy. Second, a lawyer may provide information that affects a Justice's beliefs. Beliefs are a Justice's understandings about social causation, meaning her ideas about the relationship between particular means and the ends that would result from employing them.[213] In this Article, we do not theorize about which mechanism is likely to operate. Instead, we show that oral arguments influence Justices' decisions, and determining the circumstances under which one or the other of these two mechanisms is at work must be teased out in future research.[214] In addition, our examination of how Justice Blackmun used oral arguments to think ahead regarding the building of coalitions in a case is preliminary, and future work should further refine our understanding of this aspect of oral arguments.

We have brought to bear a great deal of empirical evidence to suggest that the quality of advocacy, as well as the interactions between Justices

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211. *See id.*

212. EPSTEIN & KNIGHT, *supra* note 9; HANSFORD & SPRIGGS, *supra* note 9; MALTZMAN ET AL., *supra* note 9; Johnson et al., *supra* note 179.

213. See Jon Elster, *Rational Choice* (1986) (distinguishing between beliefs and preferences).

214. Under many scenarios, it is likely that one would encounter observational equivalence across these two types of influence, meaning that both predict the Justice would behave in the same way. One way to overcome this problem would be to develop hypotheses under which a Justice's observed behavior would differ if one, rather than the other, path of influence was at work.

themselves, during the one-hour exchanges between Court and counsel plays an important role in how our nation's court of last resort decides some of the most important legal issues of the day.