Supreme Court Oral Advocacy: Does it Affect the Justices Decisions?

James F. Spriggs, Washington University in St. Louis
Timothy R. Johnson
Wahlbeck J Wahlbeck

Available at: https://works.bepress.com/james_spriggs/1/
Supreme Court Oral Advocacy: Does it affect the Justices’ Decisions?

Abstract

Using newly discovered archival data, we test hypotheses that focus on whether the oral argument phase of the Supreme Court’s decision making process affects how justices view and, ultimately decide, cases they hear on the merits. Specifically, we utilize the oral argument notes taken by Justice Harry Blackmun while he sat on the bench to test three general hypotheses. First, we examine the determinants of quality oral argumentation, hypothesizing and showing that conventional indicators of lawyer experience and resource endowments correlate highly with how well an attorney does at orals. Second, we hypothesize that the quality of attorneys’ oral argumentation has a direct influence on how the justices vote in a case. Using grades each attorney earned from Blackmun, we show that his measure of oral argument quality is a good predictor of how his colleagues will vote, and which side ultimately wins, in a case. That is, our data analysis shows clearly that the justices are more likely to vote for the litigant whose attorney provided a stronger showing during oral arguments. Third, we hypothesize that the justices communicate with one another during oral arguments, exchanging information that can help them understand the case and reason to a decision. We test this hypothesis using notes Justice Blackmun took about his colleagues’ questions and comments during orals, as well as his predictions about how many of his colleagues would vote in a case. We find that Blackmun used the information he gleaned from his colleagues during orals to begin the process of coalition formation that eventually led to the majority coalition setting legal policy.
Supreme Court Oral Advocacy: Does it affect the Justices’ Decisions?

Timothy R. Johnson¹
James F. Spriggs II²
Paul J. Wahlbeck³

I. Introduction

Throughout the twentieth century, Supreme Court justices have expressed the belief that when the sit for oral arguments to discuss cases with counsel and among themselves, these proceedings sometimes play a critical role in how they decide.⁴ 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.”⁵ Two decades later Justice Robert Jackson echoed the sentiments of the former Chief: “we think the justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations...it always is of the highest, and often of controlling, importance.”⁶ Even current justices find the arguments 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, “Things can be put in perspective during oral argument in a way that they can’t in a written brief.”⁷ These insights suggest that these proceedings may provide critical information for Supreme Court justices which, in turn, may affect

¹ Associate Professor of Political Science and Adjunct Professor of Law, University of Minnesota, http://www.polisci.umn.edu/~tjohnson/
² Professor of Political Science and Adjunct Professor of Law, Washington University in St. Louis, http://polisci.wustl.edu/sub_page.php?s=3&m=0&d=83
³ Professor of Political Science, George Washington University, http://home.gwu.edu/~wahlbeck/
⁵ CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 61 (1928).
their decisions on the merits of a case. The key questions, however, are 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?

Justices, themselves, provide answers. For them, there are two main pieces of information they can gather from the oral arguments: 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 appropriate answer to legal questions before them in cases they are deciding. 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. Specifically, former Chief Justice William Rehnquist pointed out that discussing a case directly with the advocates allows justices to evaluate counsel’s “strong and
weak points, and to ask...some questions [about the case].” 11 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. 12 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 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.” 13 This function should not be overlooked. As Justice John Harlan argued, “there 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.” 14 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 those points that pique their interests. As Rehnquist suggested, “Oral 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 when preparing briefs.” 15 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.” 16 Thus, these proceedings provide a time for justices to raise issues

13 REHNQUIST, supra note 8, at 245
15 Rehnquist, supra note 11, at 1021.
16 REHNQUIST, supra note 8, at 241.
that they believe will help them decide a case in line with their own policy preferences.  

Second, beyond gathering information from the advocates, justices posit that oral arguments can clarify their own thinking and “perhaps that of their colleagues.” In other words, during these proceedings, they contemplate how the arguments relate to their own, as well as to their brethren’s, vote to reverse or affirm the lower court decision. They do so by speaking with one another as much as they speak with counsel. As Justice Scalia argued 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.” Other justices and the lawyers involved in the process have echoed similar sentiments. 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.

---

18 See White, supra note 12, at 383. Additionally, it is interesting to note that at least one former justice attempted to test this argument. For instance, Justice Hughes provided anecdotal evidence that a justice’s impressions of a case after oral argument often conform to his or her final vote. He suggests 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 ninety percent of the time these thoughts accorded with his final vote (HUGHES, supra note 5, 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 we had at the end of the day’s session jibed with the final views we formed after the more careful study of the briefs...” (Harlan, supra note 14, at 7).
19 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, Symposium On Supreme Court Advocacy: The Supreme Court’s Use Of Hypothetical Questions At Oral Argument, 33 Cath. U. L. Rev. 555-591 (1984).
20 Interview by Paul Duke with Antonin Scalia, Associate Justice, U.S. Supreme Court, THIS HONORABLE COURT (PBS Video 1988).
22 JOHNSON, supra note 9, provides initial anecdotal evidence of this phenomenon. Specifically, his analysis of 75 civil liberties cases decided between 1972
Overall, then, justices indicate that they can draw on two specific sources of information during oral arguments: the positions set out by counsel, and the questions and comments made by their colleagues. In this paper we are interested in testing empirically the extent to which justices utilize these two sources of information that can be drawn from the oral arguments, as well as the extent to which such information affects the decisions they make. In so doing, we draw on a unique set of data: notes taken by former Supreme Court Justices Harry Blackmun and Lewis F. Powell as they sat on the bench during oral arguments. Our tests focus on two areas. First, we are interested in the quality of the advocacy (arguments) presented to the Court, especially in terms of its etiology, as well as its effectiveness. We investigate these questions empirically by utilizing unique archival evidence from notes taken by Blackmun during oral arguments while he was sitting on the Court. They allow 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. In so doing, we analyze data on how often Justice Blackmun paid attention to the views expressed by his brethren during oral arguments, 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 oftentimes provided him with a good indication of whether his colleagues would vote to affirm or reverse the lower court decision at issue.

The paper proceeds as follows. In the next section we take up our first question that focuses on whether arguments presented by counsel can affect decisions justices make. The third section 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. Our overall theoretical argument is that information plays a key role in decision making processes. In each of the following sections we posit specific informational arguments and hypotheses.

and 1986 demonstrates that justices listen to their colleagues, sometimes quite closely, during these proceedings.
II. Does the Quality of Oral Advocacy affect Supreme Court Decisions?

To plumb the extent to which arguments forwarded by counsel during orals can affect the justices, we analyze a rare and interesting source of data – evaluations of the arguments presented by attorneys who participated in these proceedings made by Justice Harry Blackmun. Specifically, Blackmun’s notes include substantive comments about each attorney’s arguments and a grade for their presentation. For example, in Florida Department of State v. Treasure Salvors23 Blackmun wrote 10 substantive comments about the argument made by the respondent’s attorney and then noted that “He makes the most with a thin, tough, case.”24 The attorney then earned a 6 on Blackmun’s 8-point grading scale. In First National Maintenance Corporation v. NLRB25 Blackmun indicated that the petitioner’s attorney “persuaded me to reverse” when assigning him a score of 5 on his 8-point scale. Blackmun also offered harsher evaluations at times. He commented on the Nebraska Assistant Attorney General’s argument in Murphy v. Hunt26 by noting, “very confusing talk about Nebraska’s bail statutes;” the attorney received a grade of 4. Similarly, in Kugler v. Helfant,27 the respondent’s attorney earned a “C” (on his A-F scale) along with the notation, “He goes too far [with his argument].”

To provide an even clearer picture of how Justice Blackmun recorded his grades, Figure 1 shows his notes from Lamb’s Chapel v. Moriches Union Free School.28 Here, Jay Sekulow, arguing for Lamb’s Chapel, earned a 5 (noted right after his name) on Blackmun’s 8-point scale, while John W. Hoefling (again, noted after his name) earned only a 4. Sekulow’s client won the case.

---

24 Justice Blackmun used a set of cryptic abbreviations in his notes. Specifically, here, he wrote, “He makes t most o a thin, tough case.”
We contend that the quality of the oral arguments may influence Supreme Court justices’ decisions by providing them with information relevant for deciding a case. The justices corroborate this argument in notations they made after sitting for oral arguments. Indeed, Justice Blackmun’s oral argument notes (as well as other justices’ notes, such as Justice Powell) are replete with examples of how information from these proceedings helped them decide cases. For instance, in *United States v. 12 200 Foot Reels of Film* Justice Powell wrote, “[A]rgument was helpful, especially as a summary of previous law – read transcript.” Again, in *EPA v. Mink* Powell notes that Assistant Attorney

---

General Roger C. Cramton provided an “excellent argument (use transcript if we write).”

Similarly, after the respondent’s argument in Jensen v. Quaring, Blackmun indicated that “This simplifies things for me.”

As these examples indicate, information from oral arguments can influence how justices view a case. This is a straightforward argument as, during these proceedings justices seek information in much the same way as members of Congress, who take advantage of information provided by interest groups and experts during committee hearings to determine their policy options or to address uncertainty over the ramifications of making a particular decision. In so doing, oral arguments can help justices come to terms with what are often complex legal and factual issues. 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.” These proceedings thus have the potential to crystallize justices’ views or to move them towards a particular outcome.

There are good reasons why we expect oral arguments to affect Supreme Court justices’ decisions. Most generally, justices often face uncertainty, and they need information about a case and the law in order to set policy in ways that will promote their goals. It is in this context that lawyers appear before the Court and attempt to provide the justices with information that will help their client’s cause. Counsel do so by providing “a clear presentation of the issues, the relationship of those issues to existing law, and the implications of a decision for public policy.”

While the justices often come to oral arguments after reading the written briefs and the lower court record, these proceedings themselves provide additional and relevant

32 Supra note 30.
37 See, e.g., Wasby et al., supra note 9, and Johnson, supra note 9.
information to the Court.\textsuperscript{39} In fact, Johnson demonstrates that justices often “seek new information during these proceedings” to help them reach decisions as close as possible to their desired outcomes.\textsuperscript{40} Others corroborate many of Johnson’s findings with in-depth case studies.\textsuperscript{41} Additionally, Wasby et al. find that oral arguments focusing on the procedural posture of a case have led to many of the Court’s \textit{per curiam} dispositions.\textsuperscript{42}

\section*{A. Probing the Quality of Oral Arguments}

The first step in our analysis is an examination of the factors 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 an attorney being positioned to make better arguments, namely, the educational and career experience of attorneys coupled with the resources available to them. 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 simply a function of Justice Blackmun’s ideological proclivity to prefer one attorney’s position over the other’s arguments. We contend, and show, 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 on 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 section are ground in two literatures. First, we draw upon the social choice literature which 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

\textsuperscript{39} See, e.g., JOHNSON, supra note 9; Johnson, supra note 17.
\textsuperscript{40} Johnson, supra note 17, at 5.
\textsuperscript{41} Wasby et al., supra note 9; Cohen, supra note 9; Benoit, supra note 9.
must perceive the source of the information to be credible or reliable. 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 reason why 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.

One of the long-standing ideas in judicial politics is that repeat players, by virtue of factors including experience and resources, are more likely to enjoy litigation success. 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. Specifically, McGuire finds that attorneys who litigate before the Court more frequently than their competitors are more likely to prevail in their case. 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 the most successful advocate to appear before the Court; in fact

---

43 See, e.g., David Austen-Smith, Information and Influence: Lobbying for Agendas and Votes, 37 AM. J. POL. SCI. 799 (1993); Arthur Lupia & Mathew McCubbins, The Democratic Dilemma: Can Citizens Learn What They Really Need to Know? (1998); Joseph Farrell & Matthew Rabin, Cheap Talk, 10 J. ECON. PERSP. 103 (1996); Vincent P. Crawford & Joel Sobel, Strategic Information Transmission, 50 ECONOMETRICA 1431 (1982). 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, “the 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” (1993, 800).

44 See Austen-Smith, supra note 43.


the Solicitor General’s office wins well over 70 percent of the cases in which the government participates. While scholars have offered various explanations for the Solicitor General’s success, it is generally agreed that many of the nation’s best appellate advocates often work for this office and are among the most experienced attorneys to appear before the Court. This means the justices often want to hear their views. As Justice Powell put it to Chief Justice Burger in one case: “the 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.” Thus, we hypothesize:

**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 non-governmental 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. Empirically, we know Justice Blackmun was cognizant of where those appearing at oral arguments attended law school. For instance, in *Southland Corporation v. Keating* he noted of John F. Wells (counsel for appellees): “This guy was #2 at Stanford when [Rehnquist] was #1 and [O’Connor was] #3.”

---


51 McGuire, *supra* note 46.

Similarly, in *Monroe v. Standard Oil Company* 53 (1981) he indicates that appellee attorney Paul S. McAuliffe had a degree from Yale. 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 more likely to earn higher grades from Blackmun.

Beyond the contribution of education, attorneys have unique professional experiences that add to their professional training. For some Supreme Court litigators, a crucial component of their training was a 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 not 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. 54 As with law school prestige, Justice Blackmun thought this factor was important at oral arguments; in *Daniels v. Williams* 55 he describes attorney Stephen Allan Saltzburg as a “[Marshall] clerk.” Further, in *United States v. American Bar Endowment* 56 he notes that Francis M. Gregory was a “[Brennan] clerk”; and in *United States v. Halper* 57 he recorded that John Roberts was a “[Rehnquist] clerk.” Thus we predict:

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

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 attorneys because they are seen as providing more credible and better arguments for the justices. 58 This may be due to their relationship with, and proximity to, the Court. 59 This leads us to predict:

---

54 McGuire, *supra* note 46, at 163.
59 Id. at 183.
Washington Elite Hypothesis: Private attorneys from Washington, D.C. are more likely to earn higher evaluations than are attorneys from outside the beltway. Academic lawyers and lawyers for interest groups are also often viewed as “notable practitioners,” and they often have more experience than other attorneys.60 We expect, then, that academic counsel such as Lawrence 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 drives how justices vote, we must ensure that this measure is not being tainted by ideological colors.61 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 1994.62 These

---

60 MCGUIRE, supra note 46.
62 We used 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 percent sample of the population of cases.

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 each case, and we use the data
grades are located 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 a number of factors commonly discussed in the judicial politics literature 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 orals, and are simply based on the attorney’s rhetorical performance. Content analysis of Blackmun’s oral argument notes for 70 cases (13 percent of the sample) demonstrates that it is the former and not the latter. Specifically, we coded each sentence in his notes for whether it discussed the substance of an attorney’s argument or the presentation style of that attorney. We found that 95 percent (1,064) of the sentences in Blackmun’s notes discuss the attorneys’ substantive arguments, while only 5 percent (49) focus on stylistic comments about the presentation or on more general comments such as “bad argument.” These data overwhelmingly indicate Blackmun was concerned about the substance of arguments.63

The second issue we must confront is that Justice Blackmun’s grading system changed over the course of his tenure on the Court. In fact, he employed three different grading scales: A-F from 1970-1974; 1-100 from 1975-1977; and 1-8 from 1978 to 1993 (see Tables 1a-1c for the frequency with which he assigned grades to attorneys under each grading scheme as well as the mean and standard deviation for each scheme).64 To compare 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.

63 We can not 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 orals 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.

64 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 and the A-F scale, 1-100 scale, and 1-8 scale respectively have a kurtosis 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)
his 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. 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. 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. Larger positive scores denote 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 estimate an OLS regression. Additionally, because an attorney may appear multiple times before the Court we employ robust standard errors clustered on each attorney. We do 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

---

65 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; and we transformed them to 89, 79, and 69, respectively.

66 We measured the z-score in the following way: \( \frac{(X - \text{Mean})}{\text{Standard Deviation}} \). See W. 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.

67 Ordinary Least Squares 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 chapter 6 in W. H. Greene, Econometric Analysis (3d ed. 1997).

68 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 Halbert White, A Heteroskedasticity-Consistent Covariance Matrix Estimator and a Direct Test for Heteroskedasticity, 48 Econometrica 817 (1980).
Tables 1a-1c provide data on the nature of each grade scale.

<table>
<thead>
<tr>
<th>Grade</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A / A-</td>
<td>40</td>
<td>9.2</td>
</tr>
<tr>
<td>B+/ B/ B-</td>
<td>276</td>
<td>63.4</td>
</tr>
<tr>
<td>C+/ C/ C-</td>
<td>108</td>
<td>24.8</td>
</tr>
<tr>
<td>D+/ D</td>
<td>10</td>
<td>2.3</td>
</tr>
<tr>
<td>F</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>Total (non standardized mean grade)</td>
<td>435</td>
<td>99.9</td>
</tr>
<tr>
<td>standard deviation</td>
<td></td>
<td>82.05</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Grade</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>90s</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>80s</td>
<td>72</td>
<td>43.4</td>
</tr>
<tr>
<td>70s</td>
<td>91</td>
<td>54.8</td>
</tr>
<tr>
<td>≤ 60s</td>
<td>2</td>
<td>1.2</td>
</tr>
<tr>
<td>Total (non standardized mean grade)</td>
<td>166</td>
<td>100.0</td>
</tr>
<tr>
<td>standard deviation</td>
<td></td>
<td>77.36</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Grade</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>7</td>
<td>17</td>
<td>3.3</td>
</tr>
<tr>
<td>6</td>
<td>85</td>
<td>16.4</td>
</tr>
<tr>
<td>5</td>
<td>219</td>
<td>42.4</td>
</tr>
<tr>
<td>4</td>
<td>176</td>
<td>34.0</td>
</tr>
<tr>
<td>3</td>
<td>18</td>
<td>3.5</td>
</tr>
<tr>
<td>2</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>Total (non standardized mean grade)</td>
<td>517</td>
<td>100.0</td>
</tr>
<tr>
<td>standard deviation</td>
<td></td>
<td>4.88</td>
</tr>
</tbody>
</table>

We include variables in our model to test each of the hypotheses discussed above. First, we include a measure of litigating experience based on McGuire’s definition of experience. Specifically, we coded the number of times an attorney previously appeared before the U.S. Supreme Court at

---

69 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. The results are largely the same when we clustered by case.

70 This measure of experience is well established in the literature. See, e.g., McGuire, supra note 46; Wahlbeck, supra note 38; James F. Spriggs II & Paul J. Wahlbeck, Amicus Curiae and the Role of Information at the Supreme Court, 50 Pol. Res. Q. 365 (1997).
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 on a brief does not count for this purpose). The number of prior appearances ranges from 0 to 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 one case is a bigger shift than the difference between appearing in 84 or 85 cases), we use the natural log of this count of appearances before the Court. This variable—labeled as Litigating Experience--has a mean of .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 a title was attached to an attorney. 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 is the Solicitor General, we created a variable that is coded 1, and that is coded 0 for all other attorneys (labeled Solicitor General in the table). We created a similar variable for Assistant Solicitors General; if they argue then we code Assistant Solicitor General as 1, while all other attorneys take on a value of 0. The Solicitor General constitutes 2.4 percent of the attorneys in our sample and Assistant Solicitors General appeared as the attorney in 13.0 percent.

Next, we coded for whether the arguing attorney is from the federal government. It is coded 1 anytime the U.S. 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 U.S. government 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

---

71 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 chapter 4 in John Fox, *Applied Regression Analysis, Linear Models, and Related Methods* (1997).
Approximately 12 percent 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 attorneys are coded 0. This mean value of Attorney Attended Elite Law School is .39 and the standard deviation is .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 in each case. If an address was found in Washington D.C., excluding federal government attorneys, we code Washington Elite as 1. All other attorneys are coded 0. About 11 percent 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 is listed as a professor at a law school, we coded Law Professor as 1, while all others are coded 0. Nearly two percent 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 one percent 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

---

72 Although there are annual rankings of law schools, 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, one can be assured that 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).
was a former Court clerk. The list includes all clerks who worked at the Court from 1932-1991.73 We coded *Former Court Clerk* as 1 if an attorney had served in this capacity and all others are coded 0. Nearly seven percent of the attorneys in our sample previously worked as a clerk for one of the justices.

Finally, we measure the ideological compatibility of the attorney’s position and Justice Blackmun. Using the ideological direction of the lower court decision (coded as either liberal or conservative),74 we determine whether an attorney represented the liberal or conservative position. Second, we employ 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’ ideology across time.75 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 code *Ideological Compatibility* as the negative value of the Martin-Quinn score for Justice Blackmun. Alternatively, if the attorney argued for the conservative side we used Justice Blackmun’s Martin-Quinn score for this variable. Higher values therefore indicate Blackmun is ideologically closer to the attorney’s position. This variable ranges between -3.72 and 3.98, with a mean of .009 and a standard deviation of 1.06. This measure is consistent with work that examines the ideological relationship between justices and the Solicitor General.76

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

---

73 For a discussion of the quality of clerks, and the degree to which they are hot commodities once they leave the Court, see Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (2006) and Artemus Ward and David Weiden, *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (2006).

74 We draw these data from Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953-2005 Terms* (Michigan State University 2006). For a full discussion of how we define these outcomes, see *id.*, at 52-55.


76 See Bailey et al., *supra* note 48.
to find petitioners’ arguments more favorable. Thus, we include a dummy variable that equals 1 when the attorney represents the petitioner and 0 otherwise.

2. The Correlates of Argumentation Quality?

We posit that attorneys with more litigating experience, better legal education and training, and greater resources will receive higher evaluations because such attorneys will offer the Court more credible and compelling arguments than less experienced or less resourceful attorneys. The results in Table 2 provide support for this expectation. Specifically, they show that any single measure of attorney credibility has a modest effect on their oral argument grade, but when one examines a set of these attorney characteristics then we observe considerable variation across the model’s predictions of the attorneys’ grades. Importantly, the analysis also indicates that Blackmun’s evaluations are a reasonable measure of the quality of attorney’s oral presentations.

Table 2: OLS Regression Estimates of Justice Blackmun’s Assessment of the Quality of Oral Argumentation before the Court (1970-1994)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Significance (one-tailed test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigating Experience</td>
<td>0.262</td>
<td>0.051</td>
<td>.000</td>
</tr>
<tr>
<td>Solicitor General</td>
<td>0.370</td>
<td>0.218</td>
<td>.05</td>
</tr>
<tr>
<td>Assistant Solicitor General</td>
<td>0.102</td>
<td>0.118</td>
<td>.19</td>
</tr>
<tr>
<td>Federal Government Attorney</td>
<td>0.165</td>
<td>0.097</td>
<td>.05</td>
</tr>
<tr>
<td>Attorney Attended Elite Law School</td>
<td>0.209</td>
<td>0.066</td>
<td>.001</td>
</tr>
<tr>
<td>Washington Elite</td>
<td>0.401</td>
<td>0.106</td>
<td>.000</td>
</tr>
<tr>
<td>Law Professor</td>
<td>0.217</td>
<td>0.183</td>
<td>.12</td>
</tr>
<tr>
<td>Attorney Argues for Interest Group</td>
<td>-0.163</td>
<td>0.253</td>
<td>.52</td>
</tr>
<tr>
<td>Former Court Clerk</td>
<td>0.276</td>
<td>0.119</td>
<td>.01</td>
</tr>
<tr>
<td>Ideological Compatibility with Attorney</td>
<td>0.051</td>
<td>0.025</td>
<td>.02</td>
</tr>
<tr>
<td>Appellant Attorney</td>
<td>-0.121</td>
<td>0.060</td>
<td>.05</td>
</tr>
</tbody>
</table>


78 See McGuire; McGuire (1998), supra note 46.
As predicted, attorneys with more prior litigating experience before the Court present better oral arguments. To determine how the coefficient of .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. Doing so indicates that a one-unit change in this variable increases a lawyer’s grade by 1.6 points on the hundred point scale, and a lawyer who has the maximum level of experience in our data earns an average of seven points more than those with the minimum experience. Additionally, attorneys from the U.S. government, especially those from the Solicitor General’s office, provide more compelling oral advocacy. When the Solicitor General personally argues, his grade is 2.3 points higher on the 100 point scale than our reference category of attorneys located outside of Washington. Federal government attorneys not in the Solicitor 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. 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 the Beltway. Former Supreme Court clerks earn a 1.7 point 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. The coefficient for Ideological Compatibility with Attorney is appropriately signed and statistically distinguishable from no effect. Substantively, a one-unit increase in ideological compatibility resulted in a .32 point change in Blackmun’s evaluation of the attorney’s information when comparing attorney’s transmitting information close to Blackmun and 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

conservative reputations, alumni do not select cases strictly on ideological grounds. Graduates of Harvard and Yale, for instance, systematically represent parties on both sides of the ideological divide.

82 McGuire, supra note 46.

83 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, e.g., 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 (1995), supra note 46). 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 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.
increased by about 1.2 points. Thus, Blackmun’s evaluations of attorneys are not greatly influenced by his own ideological leanings. 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.

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 attorney; and a less credible non-Washington attorney. The Solicitor General receives an 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 four

---

84 We also measured ideology using Segal-Cover scores (Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of Supreme Court Justices, 83 AM. POL. SCI. REV. 557 (1989); Segal et al., Ideological Values and the Votes of Supreme Court Justices Revisited, 57 J. POL. 812 (1995)), and the results are similar to those in Table 2. 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, supra note 75, at 147-149.

85 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 that position. To investigate the possibility of strategic attorneys, we included a dummy variable in our analysis for whether Blackmun assigned higher grades to attorneys when he was the median justice on the Court (1978 and 1979) than in other years. The 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 scores, supra note 75, and is available in Epstein et al., The Supreme Court Compendium: Data, Decisions, & Developments 260-261 (4th ed. 2007).

86 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 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 zero 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 add the mean of the unstandardized grade (78.8) and the regression constant to this product to arrive at the expected grade.
steps higher than his less credible non-Washington counterpart, a B+ compared to a C. For us, this confirms the validity of Blackmun’s evaluations as reflecting the quality of argumentation, especially in light of ideology’s small substantive effect. The next section offers a qualitative look at who earned the highest grades from Blackmun. Following that, we demonstrate statistically that the quality of oral argumentation has a pronounced influence on the justices’ votes on the merits.

3. Who Actually Earned the Best Grades?

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

We begin with the early period – when Justice Blackmun assigned letter grades. Recall from Table 1a that the average attorney during this period received a B- (82.1%). However, 18 attorneys averaged an A- or better before the Court, and four others averaged a high B+.87 Many of the names on this list will be familiar to Court watchers, from Deputy Solicitor General Friedman and Solicitor General 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 Solicitor General in our sample, he averaged a grade of 92.91. 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-SG appearances before the Court, he earned an A and a B+ from Blackmun.

Other attorneys also fared well before the Court during this period. Archibald Cox (prior to becoming Solicitor General) earned an A-/B+ as well as a B (both well above average grades from Blackmun). Similarly, Joseph Califano earned an A- on three occasions and a B+ in one appearance.

The pattern changes slightly once Justice Blackmun began to use his 100 point scale (1975-1977). Solicitors General still seem to fair the best, but there is 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

---

87 Note that we calculated the average grade for each attorney by averaging all the grades the received within a particular grading regime.
Solicitor General Friedman earned an 83, while Deputy Wallace earned an 81 and an 80. Other government attorneys did not perform as well. Deputy Solicitor General Frey only earned a 75, and Assistant Attorney General 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. 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 (1978-1994), Justice Blackmun turned to his 8 point scale. Again, Solicitors General performed quite well. Indeed, Solicitor General McCree earned two 7’s (note that only one attorney received the highest grade of 8, so a 7 is quite good), Solicitor General Lee earned a 6 and two 5’s, and Solicitor General Starr earned two 6’s. Deputy Solicitor General Wallace earned a series of 7’s and 6’s in addition to an average 5, and Deputy Solicitor General Shapiro earned a 7.

There was also a wide range for private attorneys. Laurence Tribe earned a 7 and 7/6 while William Kunstler earned a 6/5. Additionally, Stephen Shapiro earned two 6’s. The lowest score of this time period was a 2 earned in 1981 by Robert M. Beno.

The point, for us, is that the grades of those who did well in their appearances match our data quite well. Indeed, Solicitors General, former clerks, and law professors (all proxies for experience) seem to earn the best grades when arguing before the Court. These anecdotes therefore strengthen the general findings we draw from our data.

4. Supreme Court Justices before the Bench

Beyond the best advocates to appear before the Court, 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 only once. After he left the bench Justice Arthur Goldberg was tapped to argue on behalf of Curt Flood in *Flood v. Kuhn.* He earned an above-average grade

---

of 81 on Blackmun’s 100 point scale, but lost the case. Justice Scalia argued one case prior to his elevation to the Court where he earned an 85, which puts 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: Justices Alito, Ginsburg, and Chief Justice Roberts. According to Justice Blackmun, both Roberts and Alito were average advocates. Prior to becoming Chief Justice, Roberts argued 20 cases, and earned grades from Blackmun in twelve of them. He earned a 6 on one occasion, four times earned a 4/5 and earned a 5 the other seven times he appeared. Blackmun did not think he was an exceptional advocate, as is evidenced in his oral argument notes for Freytag v CIR.89 Here, he wrote: “6, better than usual.” Roberts’ average grade was just that, average, since his mean score of 4.8 was equal to the mean for all attorneys. Justice Alito fared a bit better. In 12 arguments he earned three 6’s, seven 5’s, and two 4’s. 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’ grades were indistinguishable from the mean grade.

In contrast to Roberts and 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.

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 whether the quality of lawyers’ oral arguments affects the likelihood 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.90

---

90 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 do so because we must compare both attorneys’ grade to assess the effect of oral advocacy on the justices’ votes. One reason he may have failed to give grades in
Before proceeding, however, we must discuss our focus in this section. Clearly, the hypotheses in the previous section 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 Blackmun assigned higher grades to litigants for whom he anticipated voting. While the data analysis in the prior sections 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 source of 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. 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 three 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 evaluate information from some attorneys as being more credible and therefore more reliable, they should be more apt to use it when deciding how to act. Thus, we hypothesize that:

---

91 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 a variable(s) that is (are) highly correlated with the quality of oral argumentation but uncorrelated with his 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 67 at chapter 16.
Oral Argument Hypothesis: Justices will have a higher probability of voting 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 scholars have argued for decades that Court decisions are influenced by the justices’ policy views. 92 While some have asserted that policy preferences alone explain decisions, 93 others have maintained that maximization of policy goals is preeminent. 94 While these scholars disagree on the extent to which policy preferences dominate, it has become clear that they affect decision making at various stages of this process: agenda setting, 95 opinion writing, 96 and decisions on the merits. 97 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. 98 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 ideologically compatible with the attorney presenting the arguments. In short, the effect of one of these variables, either oral

---

93 Rohde & Spaeth, supra note 92; Segal & Spaeth supra note 61.
96 Maltzman et al., supra note 94.
97 Segal & Cover, supra note 84.
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 away 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 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 because it is under conditions of information asymmetry that justices’ beliefs about the likely consequences of different choices can be swayed the most. In relationship to oral arguments, Chief Justice Rehnquist indicates that these proceedings sometimes help alleviate this information deficit: “we find that it [oral arguments influencing his view of the case] is most likely to occur in cases involving areas of the law with which I am least familiar.”

While a number of factors may indicate that justices need additional information to decide a case, one of the most pertinent is a highly complex set of legal issues. In fact, cases that come to the Supreme Court often focus on several issue dimensions, as well as on more than one constitutional or statutory question. It is these cases where lawyers, who often spend years researching the case, have more information than the justices, even after briefs have been submitted. Because of the need for information in complex cases, justices should be more receptive to high quality arguments. This leads us to predict that:

---

99 REHNQUIST, supra note 8, at 276.
100 MALTZMAN ET AL., supra note 94; Bailey et al., supra note 48.
101 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
Conditional Effect of Information Need Hypothesis:
The effect of oral arguments on justices is conditional on the complexity of the case under consideration.

Additionally, it is possible that the effect of oral arguments is conditional on the salience of a case for the justices. Indeed, Baum argues that oral arguments may have more of an effect in cases that are less salient than other cases because presumably justice’s preferences are less rigid in cases about which they care less.102 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.103 Thus we hypothesize that:

Case Salience Hypothesis: The effect of oral arguments is conditional on the level of case salience.

1. Data and Variables

To evaluate the extent to which the quality of oral arguments affects the justices’ decisions, we examine whether each justice, excluding Blackmun, voted to reverse the lower court decision. Using Spaeth,104 we code such votes as 1 while votes to affirm are coded 0. Justices voted to reverse the lower court in 57.3 percent of the observations. Because the dependent variable is dichotomous, we estimate a logistic regression model.105

The key independent variable in our model is the measure of Justice Blackmun’s grades given to each attorney. 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.\footnote{If more than one attorney argued on a side, which happens occasionally, we use 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.} This variable ranges from -4.49 to 4.51, and has a mean of -0.11 and standard deviation of 1.04.

To control for a justice’s Ideological Compatibility with the Appellant, we created a variable similar to Ideological Compatibility with Attorney, containing the Martin-Quinn score\footnote{Martin & Quinn, supra note 75.} of each justice who sat during the time span covered by our sample. We first determined the ideological direction of both the petitioner and respondent based on Spaeth’s\footnote{SPAETH, supra note 74.} measure of the ideological direction of the lower court decision. If the lower court made a liberal ruling, we assume the petitioner seeks a conservative outcome and the respondent seeks a liberal outcome from the U.S. Supreme Court. We then matched the Martin-Quinn measure with the ideological direction of argument we expect an attorney to make. If an attorney argued for the liberal side during a term, we coded this variable as the negative value of the justice’s Martin-Quinn score. Alternatively, if the attorney argued for the conservative side we coded it as the justice’s Martin-Quinn score. Higher values thus indicate a justice is ideologically closer to the attorney’s position. This variable ranges from -6.15 to 7.15, with a mean of .473 and standard deviation of 2.55.

We are also interested in whether there is a conditional effect between the grade Justice Blackmun gave an attorney, and his ideological compatibility with that attorney, we include a multiplicative variable\footnote{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: Robert J. Friedrich, In Defense of Multiplicative Terms in Multiple Regression Equations, 26 AM. J. POL. SCI. 787 (1982); Thomas Brambor et al., Understanding Interaction Models: Improving Empirical Analyses, 14 POL. ANALYSIS 63 (2006).} of these two variables (Ideological Compatibility with Attorney × Ideological Compatibility with the Appellant).
Compatibility * Oral Argument Grade). We expect this variable to have a positive coefficient.

To measure the complexity of a case, we conducted a factor analysis\(^{110}\) 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.\(^{111}\) Using Spaeth,\(^ {112}\) we counted the number of legal issues and the number of legal provisions at issue in a case. The factor analysis results in a single factor with an eigenvalue greater than one.\(^ {113}\) We assign the factor score that resulted from this analysis for each case. The average Case Complexity is -0.010 with a standard deviation of .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 include an interaction term,\(^ {114}\) Oral Argument Grade * Case Complexity. This variable tests whether the effect of oral arguments is greater for cases that are more complex.

For political salience we use Epstein and Segal’s dichotomous variable that measures whether an account of the case appeared on the front-page of the *New York Times*.\(^ {115}\) To test whether the influence of ideological distance is conditional on case salience, we also include the interaction term\(^ {116}\) between those two variables, Oral Argument Grade * Case Salience.

110 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. In our case, we use factor analysis to model case complexity as a unobservable variable with manifestations in number of legal provisions and number of issues involved in a given case. See JAE-ON KIM & CHARLES W. MUELLER, INTRODUCTION TO FACTOR ANALYSIS: WHAT IT IS AND HOW TO DO IT (1978).

111 This measure, or a variation on it, is used widely in the literature (e.g., MALTZMAN ET AL., supra note 94; Valerie Hoekstra & Timothy R. Johnson, Delaying Justice: The Supreme Court’s Decision to Hear Rearguments, 56 Pol. Res. Q. 351 (2003)).

112 SPAETH, supra note 74.

113 Selecting factors with eigenvalues only greater than one confirms 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).

114 See supra note 109

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

116 See supra note 109.
2. Do Oral Arguments Affect the Justices’ Votes?

The results in Table 3 show that the justices do indeed respond to the quality of oral argumentation.\footnote{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.} 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 a justice’s final vote on the merits.\footnote{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 are 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., 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, 78 AM. POL. SCI. REV. 891 (1984); Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 AM. POL. SCI. REV. 323 (1992). 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 a strong case, while minimum winning cert coalitions should indicate a case in which the litigants have equally balanced legal and factual claims. The data do not offer much support for either idea, and, for example, unanimous cert coalitions do not lead to the appellant’s lawyer receiving a higher grade or the appellant being more likely to win. The data indicate, however, that appellants are less likely to win when there was 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.} This relationship is illustrated with the substantive results of this model. When all the independent variables are held at their mean values (or modal value for a categorical variable), there is a 59.4 percent 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 65.5 percent.\textsuperscript{119} The difference is seen more clearly as the divergence in the quality of competing counsel increases; when the appellant’s attorney is manifestly better than the appellee’s attorney, there is an 82.2 percent chance that a justice will vote for the petitioner, while this likelihood decreases to 32.7 percent when the appellee’s attorney is clearly better.\textsuperscript{120} This confirms our argument that the relative quality of the competing attorneys’ oral arguments influences the justices’ votes on the merits. These findings withstand controls for other possible confounding factors, as seen in column two of Table 3.\textsuperscript{121}

\textsuperscript{119} The predicted probabilities are based on the model with all of the control variables (column 3 in Table 3). 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.

\textsuperscript{120} We set the \textit{Oral Argument Grade} variable, respectively, at its maximum and minimum values in this example, holding everything else constant at the mean (mode for a categorical variable).

\textsuperscript{121} The effect \textit{Oral Argument Grade} is robust to how we estimate the model. However, the effect of the interaction term, \textit{Ideological Compatibility * Oral Argument Grade} is less robust. If we attempt to control for potential heteroskedasticity in ways other than we used in Table 3 (robust standard errors clustered on justice), \textit{Oral Argument Grade}’s coefficient and confidence interval remain largely unchanged, while the interaction terms’ confidence intervals widen. While the interaction term is statistically significant if we use a heteroskedastic probit model (where heteroskedasticity is allowed to be in the \textit{Oral Argument Grade} variable), it is only marginally statistically significant ($p=.07$) if we use a logit model with robust standard errors that are not clustered on justices, or if we use a logit model with robust standard errors clustered on Court cases (and include fixed effects for the justices) ($p=.23$), and \textit{Oral Argument Grade * NYT} is not significant ($p=.23$). In these models, the \textit{Oral Argument Grade} variable remains positive and statistically significant. Finally, if we run these models without the interaction term, \textit{Oral Argument Grade} remain positive and statistically significant.
Table 3: Logit Estimates of the Justices’ Propensity to Reverse a Lower Court’s Decision (1970-1994)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient (Robust Standard Error)</th>
<th>Coefficient (Robust Standard Error)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oral Argument Grade</td>
<td>0.301 (.043)*</td>
<td>0.238 (.041)*</td>
</tr>
<tr>
<td>Ideological Compatibility with Appellant</td>
<td>0.304 (.036)*</td>
<td>0.315 (.038)*</td>
</tr>
<tr>
<td>Case Complexity</td>
<td>0.064 (.106)</td>
<td>0.072 (.075)</td>
</tr>
<tr>
<td>Case Salience</td>
<td>-0.179 (.106)</td>
<td>-0.122 (.108)</td>
</tr>
<tr>
<td>Ideological Compatibility * Oral Argument Grade</td>
<td>0.023 (.013)*</td>
<td>0.024 (.012)*</td>
</tr>
<tr>
<td>Oral Argument Grade * Case Complexity</td>
<td>-0.098 (.101)</td>
<td>-0.095 (.100)</td>
</tr>
<tr>
<td>Oral Argument Grade * Case Salience</td>
<td>-0.179 (.106)*</td>
<td>-0.181 (.072)*</td>
</tr>
</tbody>
</table>

Control Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient (Robust Standard Error)</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Appellant</td>
<td>0.455 (.104)*</td>
</tr>
<tr>
<td>U.S. Appellee</td>
<td>-0.767 (.095)*</td>
</tr>
<tr>
<td>S.G. Appellant</td>
<td>0.343 (.105)*</td>
</tr>
<tr>
<td>S.G. Appellee</td>
<td>-0.211 (.138)</td>
</tr>
<tr>
<td>Washington Elite Appellant</td>
<td>0.392 (.102)*</td>
</tr>
<tr>
<td>Washington Elite Appellee</td>
<td>0.076 (.143)</td>
</tr>
<tr>
<td>Law Professor Appellant</td>
<td>-0.077 (.164)</td>
</tr>
<tr>
<td>Law Professor Appellee</td>
<td>-1.560 (.210)*</td>
</tr>
<tr>
<td>Clerk Appellant</td>
<td>-0.257 (.099)</td>
</tr>
<tr>
<td>Clerk Appellee</td>
<td>-0.162 (.192)</td>
</tr>
<tr>
<td>Elite Law School Appellant</td>
<td>0.044 (.116)</td>
</tr>
<tr>
<td>Elite Law School Appellee</td>
<td>-0.123 (.081)</td>
</tr>
<tr>
<td>Difference in Litigating Experience</td>
<td>-0.124 (.014)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.257 (.053)*</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>3331</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-2051.65</td>
</tr>
</tbody>
</table>

*p<.05
Is this finding an artifact of justices being more responsive to arguments provided by lawyers who advocate positions consistent with their policy preferences? 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.\textsuperscript{122} 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 2 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.

\textsuperscript{122} Oral Argument Grade is statistically significant for 97.9 percent 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. What it does imply is that Justice Douglas (here the most ideologically extreme justice) is not statistically significantly affected when facing attorneys advocating a position he ideologically disfavored.
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 32.2 percent 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 47.6 percent when this justice encounters a petitioner who outmatches the respondent’s attorney at orals. As seen in Figure 1, 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 more credible arguments the justice has a 64.4 percent chance of voting for the appellant; when the appellant provides better oral arguments then this percentage increases to 85.2.

123 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 the appellant presented better arguments. Note that for this figure, and for Figure 3, the cases included are only those that are not on the front page of the New York Times (as per our measure of salience).

124 We set the value of Oral Argument Grade one standard deviation above its mean when the petitioner’s lawyer was better and one standard deviation below the mean when the respondent’s attorney was better. 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.
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 .396 to .763. Figure 3 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 the 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 a justice has an 81.0 percent chance of voting for the petitioner. When the respondent’s attorney is better this drops to 70.6 percent.

**Figure 3: 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 4, 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 4: 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 Compatibility * Case Complexity), is statistically insignificant. One reason why this variable may not support our argument is that it may not tap information asymmetry as much as it taps an information environment that is difficult for both attorneys and justices.

**III. Do Justices Listen to one another during Oral Arguments?**

While the data in the previous section suggests that the arguments counsel present to the Court affects the justices’ votes, the introduction suggests justices also garner information about their colleagues’ views 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 a legal or policy choice. 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.

---

125 Portions of this section are derived from JOHNSON, *supra* note 9, at Chapter 3.
An example demonstrates how justices may garner such information during the oral arguments. On May 29, 1973 the Supreme Court decided *Columbia Broadcasting System v. Democratic National Committee.*\(^{126}\) While this case had important First Amendment implications, Justice Lewis F. Powell’s behavior six months prior to the final outcome – during oral arguments – provides another reason why these proceedings play an integral role in the Supreme Court’s decision making process. Indeed, 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 notes that, “J. Stewart pointed out that…the respondent’s argument is primarily an E/P (equal protection) argument rather than 1st Amendment.”\(^{127}\) 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 (emphasis in original) decision finding that free speech interests are best met by present regulatory system.”\(^{128}\)

Justice Powell’s personal—post-oral argument but pre-conference—notations suggest that he was intrigued about the issues raised by Stewart and White during these proceedings: “Argument suggests that the…issue may be E/P rather than Free Speech (see p8 these notes).”\(^{129}\) Additionally, during conference discussion Justice Douglas’ notes, as well as Powell’s own notes, demonstrate that Powell continued to think about the issue raised by Stewart and White. In fact, by the time conference concluded, Powell was leaning toward agreeing with their interpretation of the case: “we do not find state action issue as clear as other Justices. Yet, the arguments of Stewart and White are persuasive. I am

---

\(^{126}\) 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. 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.


\(^{128}\) Powell, *id.*

\(^{129}\) 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.
impressed with view that in long run there will be greater free speech with a limited regulation of broadcast industry.”130 Thus, it seems that Powell used the oral arguments to gather information about his colleagues’ preferences and that he was ultimately persuaded by their arguments.131

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 section we focus on Blackmun to test the assumption that justices can and do utilize oral arguments as an opportunity to learn about how their immediate 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 theoretic literature indicates that under certain conditions cheap talk – defined as costless signals sent between political actors – can be an effective method of communication.132 Farrell suggests that if all 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.”133 In addition, Crawford and Sobel indicate that players’ preferences must coincide with one another in order for coordination to occur.134 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.”135

130 Powell, supra note 127.
131 In the end, Justice Powell actually joined the majority coalition, as did Justice White. While Justice Stewart agreed with most of the decision, he wrote a separate concurring opinion.
132 JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1994); Joseph Farrell, Cheap Talk, Coordination, and Entry, 18 RAND J. ECON. 34 (1987); Crawford & Joel Sobel, supra note 43.
133 Id. Farrell, at 35.
134 Crawford & Sobel, supra note 43.
135 LUPIA & MCCUBBINS, supra note 43.
For our purposes, cheap talk (in this case oral arguments) helps actors coordinate on two levels. First, based on the above literature 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.”\(^{136}\) More generally, this is a necessary condition in order for actors to coordinate with another through cheap talk signals.

Second, we extend cheap talk theory by arguing that it can help actors coordinate when groups make decisions under majority rule – where the median almost always must join a coalition in order for it to be a winning coalition.\(^ {137}\) Although extant cheap talk literature does not specifically address communication in this manner, we argue that these signals provide one mechanism by 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 signals her preferences to the rest of the Court. More specifically, as the introduction suggests, justices 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 judicial scholars and appellate level attorneys view oral arguments. For instance, Wasby et al. argue that, “it is not surprising that the judges would use part of the oral argument time for getting across obliquely to their colleagues on the bench arguments regarding the eventual

\(^{136}\) Morrow, supra note 132, at 256.


disposition of a case.” They conclude elsewhere that, “Another, less noticed function is that oral argument serves as a means of communication between judges…”

Appellate level advocates agree with these scholarly accounts. Shapiro posits that, “During 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…” 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.”

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:

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

Second, the median justice is almost always needed for a majority coalition to form, and almost always shares some common interests with each member of the Court. Thus, we also hypothesize:

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

---

139 Wasby et al., supra note 9, at 418.
141 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).
142 WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).
B. Data and Methods

To test the above hypotheses we constructed a unique data set that relies on oral argument notes taken by Justice Blackmun during his tenure on the court. Specifically, we drew a random sample of 1543 cases between 1970 and 1994. These notes are significant because they provide an explicit measure of learning for Blackmun. In other words, we argue he only 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 a unique opportunity to study how political actors learn about other actors’ preferred outcomes. Given that scholars have rarely studied how political actors do so, Blackmun’s notes offer significant insight into the key behind strategic interaction.143

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 a sample of 1469 references to policy questions, statements, or positions, taken by his colleagues during the oral arguments.144

The overall data include 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. Because this is a discrete measure we cannot use traditional linear regression to model this phenomenon. As Long points out, “The use of LR [linear regression] models for count outcomes can result in inefficient, inconsistent, and biased estimates.”145 A reasonable alternative is the Negative Binomial Regression model.146

143 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 significant contribution to the literature.

144 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 94; Johnson, supra note 17).

145 LONG, supra note 105, at 217.

146 GREENE, supra note 67, 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
The model includes two independent variables to test our hypotheses. To measure the Ideological Distance from Blackmun for each justice we first determined each justice’s ideological orientation based on Martin and Quinn scores, which provide an ideal point estimate for each justice for each year he or she sat on the Court.\textsuperscript{147} We then calculated the absolute value of the ideological distance between Justice Blackmun and each of his colleagues. Our expectation is that he will treat colleagues on the same side of the ideological spectrum as himself differently than other justices. We therefore converted the absolute value such that it takes on negative values if a justice is on the opposite side of the ideological spectrum from Blackmun. Specifically, we multiplied the value of this variable by -1 if Blackmun’s ideological score was greater than 0 and the justice’s score was less than Blackmun’s; and we multiplied it by -1 if Blackmun’s score was less than zero and the justice’s score was greater than Blackmun’s. A positive value therefore indicates that the justice was closer than Blackmun to the pole on which Blackmun sat, whereas a negative value indicates that the justice was either on the opposite side of the ideological divide or a Blackmun ally who was closer to the center. This measure assumes that Blackmun had a preference on the case outcome and that a justice more proximate to the pole would be a more reliable vote for that outcome.

Second, to measure Ideological Distance from Median, we first took the absolute value of the difference between each justice’s ideological location (using the Martin and Quinn scores) and the ideological location of the median justice on the Court in that term. We then converted this measure such that it takes on negative values if the justice is on the opposite side of the ideological spectrum from Blackmun. Specifically, we multiplied the value of this variable by -1 if Blackmun’s ideological score was greater than 0 and the justice’s score was less than Blackmun’s; and we multiplied it by -1 if Blackmun’s score was less than zero and the justice’s score was greater than Blackmun’s. Because we are interested in the ideological proximity between Justice Blackmun and his colleagues we expect both of these

\textsuperscript{147} Martin and Quinn, supra note 75.
variables to have a negative and significant relationship with Blackmun’s decision to note a colleague’s question or comment from the oral arguments.

We also include several variables to control for possible alternative explanations for Justice Blackmun’s behavior. First, to control for whether Blackmun listens to new colleagues more or to those with whom he has sat for a number of years, we calculate 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 11.2 and this variable ranges from 0 (either Blackmun’s or a colleague’s first year on the Court) to 23 years.148

Second, our measure of case complexity is similar to the one used earlier.149 The factor analysis150 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 resulted in a single factor with an eigenvalue greater than one.151 We assign the factor score that resulted from this analysis for each case. The average Case Complexity measure in our sample was .13 with a standard deviation of .56.

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.152 To do so we include a dummy variable that equals 1 for the chief justice and zero for all associate justices.

Fourth, it is possible that Justice Blackmun is more likely to listen to justices who have an expertise in a particular area of law. To measure Expertise for each justice, we first calculated an

148 The intuition here is that Justice Blackmun may only assess, and therefore note, the arguments of new justices because he does not know their preferences as well as 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 103). 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.
149 See supra pp. 31-32.
150 See supra note 110.
151 See supra note 113.
opinion ratio in specific issue areas. The opinion ratio (OR) is the number of cases in which a justice wrote a dissent or concurrence divided by the number of like case that reached the Court since that justice’s appointment and up to the term preceding the case in question. This measure is a standard one in the literature. We then compared each justice’s OR to the 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 high score indicates that a justice has more expertise than the average for all justices on the Court, whereas a low score reflects less expertise than the average justice.

Finally, we include a variable to capture whether Justice Blackmun is more inclined to cite comments by his colleagues during salient cases. Unlike in the previous section on Blackmun’s grades, we can use a more nuanced measure of case salience. In particular, we use the level of amicus curiae participation in a case on the merits. 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 and standard deviation of .03 and .98 respectively.

C. Results

Table 4 provides the results of the analysis. To interpret the coefficients in our negative binomial regression model, we translate them into predicted probabilities. Note first that, when all of the variables in the model are held at their mean or mode, there

---

153 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 (2006) value variable. Supra note 74, at 52.

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

155 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. As Long (supra note 105, at 237) argues, “a one-tailed test of $H_0: \alpha = 0$ can be used to test for overdispersion, since when $\alpha$ is zero the Negative Binomial reduces to a Poisson.” The results demonstrate that $\alpha$ is greater than zero. Thus, the Negative Binomial is better able to capture this phenomenon than a Poisson model. Additionally, the highly significant Wald $\chi^2$ test indicates that the Negative Binomial model is more appropriate than the Poisson.
is a 9.4 percent probability that Justice Blackmun will note at least one comment from one of his colleagues. The model confirms our first hypothesis, as Blackmun is significantly more likely to note one or more comments made by colleagues who are on his side of the ideological pole but who are close to the median justice \( (p = 0.00) \). Substantively, there is only a seven percent probability that Blackmun will note one or more comments from a justice farthest from him ideologically. However, this probability increases to 26.2 percent for justices who are on the other side of the ideological spectrum, yet close to the median justice. This modestly supports the cheap talk argument that it is easier to send and receive messages, which may help two actors coordinate, when their preferences are similar.

### Table 4: Negative Binominal Regression Justice Blackmun’s Propensity to Cite Colleagues at Oral Arguments (1970-1994)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Significance (one tailed test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relative Ideological Distance from HAB</td>
<td>-0.02</td>
<td>.00</td>
<td>.00</td>
</tr>
<tr>
<td>Ideological Distance from Median</td>
<td>-0.31</td>
<td>.02</td>
<td>.00</td>
</tr>
<tr>
<td>Years Served with Blackmun</td>
<td>0.02</td>
<td>.00</td>
<td>.00</td>
</tr>
<tr>
<td>Case Complexity</td>
<td>-0.13</td>
<td>.06</td>
<td>.03</td>
</tr>
<tr>
<td>Chief Justice</td>
<td>0.17</td>
<td>.08</td>
<td>.02</td>
</tr>
<tr>
<td>Expert Justice</td>
<td>0.11</td>
<td>.03</td>
<td>.00</td>
</tr>
<tr>
<td>Case Salience</td>
<td>0.08</td>
<td>.04</td>
<td>.01</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.02</td>
<td>.07</td>
<td>.00</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>11757</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-4350.55</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>Wald Chi Square</td>
<td>253.71</td>
<td>.00</td>
<td></td>
</tr>
<tr>
<td>Alpha</td>
<td>1.34</td>
<td>.18</td>
<td>.00</td>
</tr>
</tbody>
</table>

Additionally, as predicted, Justice Blackmun is significantly more likely to note one or more questions and comments raised by colleagues ideologically close to the median justice than he is to note comments of justices farther away from the median \( (p = 0.00) \). Substantively, Blackmun has about a 5.8 percent chance of citing comments by a justice one standard
deviation beyond the mean away from the median. However, he has a 15 percent probability of doing so for the median justice.

Two of the controls worked as expect. Justice Blackmun is significantly more likely to cite comments of those he believes are an expert in a particular area of law as well as comments made by the chief justice.\textsuperscript{156} The probability that he will note a comment from a perceived expert is 13 percent, while it drops to 7.4 percent for those who seem to have little expertise with an issue area. Additionally, his probability of citing comments or questions made by the chief is 11 percent.

The remaining control variables do not work as we expect. For instance, Justice Blackmun is more likely to cite colleagues’ comments the more years he has been on the bench with them, and is less likely to do so in complex cases. Finally, he notes more comments in salient than in non-salient cases. This is inconsistent with Baum’ argument about when we should expect oral arguments to come into play for the justices.\textsuperscript{157}

\textbf{III. Can Justices Predict Case outcomes during Oral Arguments?}

The findings in the previous section support 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. The 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 the case because Justice Blackmun exhibited this behavior. Two examples demonstrate how he did so. During its 1979 term, the Supreme Court decided \textit{Harris v. McRae}\textsuperscript{158} which, \textit{inter alia}, held that the Hyde Amendment did not violate the Due Process Clause of the Fifth Amendment.\textsuperscript{159} Although this case is important because of its implications for the

\begin{itemize}
\item \textsuperscript{156} Note that if we run the model for only the Burger Court the sign on the chief justice switches. We believe this is due to the fact that the justices were much more inclined to listen to the questions and comments of Chief Justice Rehnquist than they were to listen to Chief Justice Burger.
\item \textsuperscript{157} Baum, \textit{supra} note 102.
\item \textsuperscript{158} 448 U.S. 297 (1980).
\item \textsuperscript{159} The Court ruled that states are not required to pay for medically necessary abortions for which federal reimbursement was unavailable under the Hyde Amendment. Additionally, the majority held that the federal funding restrictions established by the Hyde Amendment were constitutionally valid.
\end{itemize}
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 Harry Blackmun wrote a note predicting how the case would turn out. Specifically, he speculated that, “All Justices in their questions telegraph their attitudes. Result will be 6-3 or 5-4 to reverse.”

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* he wrote “–5-4, we [sic] would guess or + 5-4.” 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. He was unsure how Justice Stevens and Justice Powell would vote. 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. Interestingly, there is a significant variation in the frequency with which he predicted his colleagues’ votes. In the oral argument notes he took during the Rehnquist Court (1986-1993 terms) he made predictions for 12 percent of the participating justices, while he predicted at least one of his colleagues’ votes in nearly 34 percent of those cases. The question we ask in this section is why did Justice Blackmun jot down this information for some justices in some cases and ignored 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 section, we argue that the collegial nature of Supreme Court decision making explains why Justice

---

160 Justice Blackmun oral argument notes, April 4, 1980, supra note 158. He made similar comments in many other cases. For example, in *Smith v. Barry*, 502 U.S. 244 (1992), he wrote that, “Justices telegraph their positions – CJ – A – K.”

161 467 U.S. 914 (1984). In *Glover*, the Court ruled that state public defenders are not immune from liability for misconduct. Justice Blackmun’s convention is to use a negative sign as shorthand for reverse, and a positive sign as shorthand for affirm.

162 Scholars have, themselves, attempted to predict (with some degree of accuracy) the justices’ votes based on how they act during oral arguments. See, e.g., Sarah 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).
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—specifically whether he attempted to predict his colleagues’ votes on the merits in the sample of cases we employ in the previous section.

A. Theoretical Foundation

In order for Supreme Court justices to make efficacious decisions that will be as near their preferences as possible, they must 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. The legal doctrines announced in the Court’s majority opinions, of course, depend on the agreement of at least a majority of the justices and, in game-theoretic terms, the justices’ payoffs are interdependent. As a result, information about their colleagues’ preferences and likely choices are necessary for justices to make choices in light of moving legal doctrine in their preferred direction. The key is determining exactly how justices go about gathering the information they need about their colleagues when making decisions. In this section, we argue that justices can 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, they may not be so certain in specific cases. First, justices’ preferences can and do change over time. Second, justices’ preferences vary across

---

163 Epstein & Knight, supra note 94; Maltzman et al., supra note 94.
issue areas. 166 Third, most cases tap multiple issue dimensions, 167 which creates ambiguity about which dimension is controlling. 168 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. 169 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. 170

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. cert votes in the present case 171 and past merits votes in similar cases 172—oral arguments provide an important forum for them to do so. Specifically, as the previous section 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 Court asks myriad questions during these proceedings. Johnson, 173 for example, finds that in a sample of 75 cases the justices asked questions or made comments a total of 5,567 times. 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 174 finds that Justice Powell noted 193 comments made by his colleagues in a sample of 150 cases decided between 1972 and 1986. Further, Justice Blackmun wrote down 1476 comments regarding his colleagues’

166 Epstein et al. (2007), supra note 85.
167 Spaeth, supra note 74.
168 Maltzman & Wahlbeck, supra note 103.
169 Maltzman et al., supra note 94.
170 Johnson et al., supra note 164.
172 Id., at 40-41.
173 Id.
questions at orals arguments in our sample of 1543 cases.\textsuperscript{175} 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.\textsuperscript{176} This argument is consistent with the evidence we present from the previous section which suggests that justices themselves, scholars, and appellate level attorneys believe this type of information transmission takes place during these proceedings.

B. Hypotheses

Based on the agreement between scholars, attorneys, and the justices themselves, and starting from the assumption that Justice Blackmun used oral argument as a source of information to help guide his subsequent choices in the case, we are interested in determining the conditions under which he would predict a colleague’s vote. Johnson’s\textsuperscript{177} work on oral arguments is instructive here. He demonstrates that Justice Powell took 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 section demonstrates that Blackmun acted in the same manner during oral arguments.

Here, we assert Justice Blackmun’s practice of forecasting his colleagues’ votes is a reflection of how he saw the case beginning to shape up during oral arguments. Blackmun, we suggest, went a step further by actually predicting colleagues’ votes in an effort to assess “the lay of the land.” 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

\textsuperscript{175} 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 \textit{Hilton v. South Carolina Railways Commissions}, 502 U.S. 197 (1991), Justice Blackmun was intrigued with Justice White: “BRW is the one only here. Why is he interested?”

\textsuperscript{176} Of course, not all justices question the attorneys, and some almost never speak during these proceedings (e.g., Justice Thomas). In \textit{Collins v. Harker Heights, Texas} (1992) Justice Blackmun notes the exact time when Justice Thomas asked his first question from the bench: “T asks his 1st ? 1:43 pm.” Additionally, in \textit{Building Trades Council v. Associated Builders} (1993) he notes (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 \textit{Hilton} Blackmun notes that, “AS is quiet here. Why?”

\textsuperscript{177} \textit{JOHNSON, supra} note 9.
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 is more likely to predict his colleagues’ positions in a case if they ask more questions and make more comments during these proceedings. The point is intuitive: when a justice speaks more often, he or she is more likely to reveal information, signals in game theoretic terms, about his or 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 will be 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 colleagues’ vote. In particular, as we note in the previous sections, 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. Scholars have long recognized that, in a majority-rule setting, the median decision maker is often in a privileged position.178 This is certainly true for the median on the Supreme Court. For example, between the 1986 and 1993 terms the median justice was a member of the majority opinion coalition 89.8 percent of the time.179 This has led some scholars to suggest that the median justice often drives case outcomes.180 Given the median’s position and power we predict that Justice Blackmun will be more concerned about the justices who are ideologically closer to that position. This leads us to hypothesize that:

---

178 See supra note 152.

179 To calculate this, we used the justice’s Martin-Quinn (supra note 75) scores to identify the median justice. The justices’ support of the majority was derived from Spaeth (supra note 74), selecting observations associated with case citations and split votes, as well as orally argued opinions (whether signed or per curiam).

Proximity to Median Hypothesis: Justice Blackmun is more likely to predict the votes of justices who are ideologically closer to the median justice on the Court.

While Justice Blackmun tries to pinpoint potential swing justices in a case, he is also likely to think about justices who are on the other side of the median, yet who could still be considered his ideological allies. The intuition is that, as he is trying to determine what coalitions may form in a case, he not only wants to know who is close to the median, but which justices may set the ideological boundary if he finds himself in the majority. By having the boundaries set he can then “fill in the blanks” for where others may come down in the case. We therefore hypothesize:

Relative Ideological Distance from Blackmun Hypothesis: Justice Blackmun is more likely to predict justices who are ideologically on the opposite side of the median from him, yet still close to the median.

We also focus on additional factors that might affect whether Justice Blackmun makes a prediction. First, like all decision makers, justices learn from prior interaction with colleagues. The literature in judicial politics also indicates that there is a “freshman effect” on the Supreme Court whereby it takes new justices a few years to adjust to being on the nation’s highest bench.181 Blackmun suggested that this made it more difficult to determine how new justices would act: “…the unique opportunity to develop one’s constitutional philosophy made predictions about how a new justice would vote problematic.”182 Thus, the longer justices serve together on the Court, the better able they should be to anticipate their colleagues’ preferences and likely choices in a case. We therefore predict that:

Years Served Together Hypothesis: The longer Justice Blackmun has served on the Court with other justices the more likely he will be to predict their vote at orals.

Finally, prior literature and leads us to posit that two often-discussed case-based variables might affect whether Justice Blackmun makes a prediction in a case. Specifically, much prior

182 Strum, supra note 36.
research indicates that in complex cases justices are less sure of their position. Thus, Blackmun should be less likely to make predictions about his colleagues when the case is a complicated one. In addition, in salient cases, justices are more likely to care about the outcome of the case and thus pay special attention to their colleagues’ behavior. In addition, justices’ views are often more fixed in salient cases, and are therefore less fluid.183 Thus, we offer two case-based hypotheses.

**Case Complexity Hypothesis:** Justice Blackmun will be more likely to predict his colleagues’ votes in legally complex cases.

**Case Salience Hypothesis:** Justice Blackmun will be more likely to predict his colleagues’ votes in salient cases.

### Data and Methods

To test the above hypotheses, we use the same sample of cases as in the previous section with an observation for each justice.184 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 prediction and zero otherwise. In this sample, Justice Blackmun made 1,554 predictions in his oral argument notes, or about 13 percent of his colleagues’ votes on the merits. Because this variable is dichotomous, we employ a logit model185 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, Texas*186 he writes, “Hostile ?s WHR, AS” as they are asking questions of the petitioner’s attorney. We believe these insights also indicate

---

183 Maltzman & Wahlbeck, supra note 103.

184 We do not include cases for which Spaeth (supra note 74) was unable to code an ideological direction for the case outcome. We also excluded observations for justices who did not participate in a case. The number of observations is slightly different in this model than the model in the previous section (even though we use the same data) because 21 cases have missing values on the dependent variable.

185 The probit model is a member of the class of non-linear models. See supra note 105 and source therein.

186 503 U.S. 115 (1992)
that Blackmun is taking signals based on exactly how questions are asked. In our sample of cases, he notes a mean of .12 questions or comments per case and this variable, *Oral Argument Information*, ranges from 0 to 4. We expect the number of reference’s to a colleague’s questions at oral arguments to have a positive relationship with the dependent variable.

To test the two ideological hypotheses we employ the same measures we employed when predicting whether Justice Blackmun will note a colleague’s questions or comments. Thus, we include a variable for the relative ideological distance from Blackmun as well as a variable to measure each justice’s distance from the median justice on the Court in a term.

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 12.1 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, 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. We assign the factor score that resulted from this analysis for each case. The average *Case Complexity* is 0.13 with a standard deviation of .58.

We also include variables to measure whether Blackmun was more likely to predict the votes of the chief justices and issue experts in a case. Finally, we follow Maltzman, Spriggs, and Wahlbeck and argue that the political salience of a case can be measured by the amount of *amicus curiae* participation. However, *amicus* participation has dramatically increased over the terms included in our sample. Therefore, 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.

---

187 See *supra* note 74.
188 See *supra* note 96.
When they 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 strongly support this argument. Specifically, we tested our oral 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 5 presents the results of this analysis.

Table 5: Logit Analysis of Justice Blackmun’s Propensity to Predict his Colleagues’ Votes on the Merits during Oral Arguments.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Robust Standard Error</th>
<th>Significance (one tailed test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oral Argument Notes</td>
<td>0.64</td>
<td>0.07</td>
<td>.00</td>
</tr>
<tr>
<td>Relative Ideological Distance from HAB</td>
<td>-0.02</td>
<td>0.00</td>
<td>.00</td>
</tr>
<tr>
<td>Ideological Distance from Median</td>
<td>-0.01</td>
<td>0.02</td>
<td>.31</td>
</tr>
<tr>
<td>Years Served with Blackmun</td>
<td>0.02</td>
<td>0.00</td>
<td>.00</td>
</tr>
<tr>
<td>Case Complexity</td>
<td>-0.15</td>
<td>0.11</td>
<td>.10</td>
</tr>
<tr>
<td>Chief Justice</td>
<td>0.69</td>
<td>0.06</td>
<td>.00</td>
</tr>
<tr>
<td>Expert Justice</td>
<td>0.04</td>
<td>0.03</td>
<td>.09</td>
</tr>
<tr>
<td>Case Salience</td>
<td>0.11</td>
<td>0.05</td>
<td>.01</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.38</td>
<td>0.08</td>
<td>.00</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>11736</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-4296.98</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The positive and statistically significant coefficient for *Oral Argument Notes* provides evidence for this argument. Substantively speaking, Justice Blackmun had a 10 percent chance of predicting one of his colleague’s votes on the merits if he did not record any information about their questions at oral argument. The likelihood of his focusing on the future vote of one of his colleagues increases, respectively to 18.3 percent and 29.5 percent.

---

189 The results in Table 5 do not differ much if we also include fixed effects for each justice, excluding Justice Marshall to serve as a baseline.
if his notes contained one or two references to that justice’s questions at oral argument. If he makes three such notes, then this probability jumps to 43.1 percent. It appears that 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 his propensity to make predictions.

Four of the six control variables included in the model also manifest a systematic relationship with Justice Blackmun’s tendency to predict the other justices’ votes. First, Blackmun was more likely to predict the votes of justices who were on the other side of the median than him ideologically, but who remained close to the median. When changing Relative Ideological Distance from Blackmun, from one standard deviation above to below its mean value, the probability of his recording a colleague’s vote changes from 9 percent to 11.5 percent. He also has a more pronounced tendency to focus on his colleague’s likely vote on the merits when he has served with them longer. If he served with a colleague for five years (which is one standard deviation below the mean) he had an 8.9 percent chance of predicting their vote. This percentage increased to 11.9 when he had served with a colleague for 19 years (which is one standard deviation above the mean). Finally note that when Blackmun does not perceive a colleague to be an expert in an issue area, he has a 9.4 percent probability of predicting that colleague’s vote. However, if the justice is perceived to be an expert, this percentage increases to 11.2 percent.

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 do offer some insight. Note that, overall, Blackmun makes correct predictions 76 percent of the time. Additionally, Blackmun is slightly more successful when he notes 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 predicts the justice’s final vote 74 percent of the time. However, if he notes more than one reference, his success increases to 80 percent, which is even greater than the predictive power of the attitudinal model.

---

190 We hold constant for other variables at their mean values (or modal if a categorical variable).
191 We change this variable from one standard deviation above to below its mean value.
These initial findings are consistent with the attitudinal model, where Segal and Spaeth\textsuperscript{192} predicted 71 percent of votes correctly. It is also consistent Boucher and Segal’s\textsuperscript{193} argument that justices should be able to predict case outcomes. As they put it, “Forming 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.”

IV. Conclusion

We began this piece with a discussion about the extent to which Supreme Court justices personally believe that oral arguments plays a key role in their decision making process. Our goal was to test the veracity of these statement. We have done so to a great degree. Indeed, the theoretical arguments and the rich data we used to explore whether, and to what extent, oral arguments may affect Supreme Court decisions show that the justices clearly need these proceedings as they work their way toward legal and policy decisions in a wide variety of cases they decide.

First, the justices’ final votes on the merits are heavily influenced by the quality of appellate advocacy as is evidenced in the second section of this paper. It is clear to us that Justice Blackmun was an astute observer of the oral arguments, and that his views about the quality of argumentation largely reflected what his colleagues thought about the cases they heard. Ultimately, the findings based on Blackmun’s grades indicate that attorneys appearing before our nation’s highest court must always strive to provide the highest level of advocacy possible. And, if they cannot do so, they ought to find an expert who can provide such an argument because it can and does make a difference for case outcomes.

Second, we sought to show that a justice can reduce his uncertainty about a case by listening to his colleagues’ questions and comments during these proceedings. To do so, we drew on a unique and valuable source of data found in the private papers of Justice Blackmun. During oral arguments, Blackmun would take

\textsuperscript{192} Segal & Spaeth, supra note 61, 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.

\textsuperscript{193} Supra note 171, at 827.
notes regarding his colleagues’ questions, as well as sometimes try to predict their ultimate vote on the merits. We contend that Blackmun recorded this information to assist him in assessing the positions of his colleagues and the issues in a case. Specifically, 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 convincing support for this relationship and thus provides additional and robust evidence for the informational value of oral arguments in Supreme Court decision making.

We have provided evidence that Justice Blackmun was able to assess the initial coalitions that began to form as the Court moved toward conference discussions and to the bargaining and accommodation process of a case. There is also evidence that he had significant success at doing so. Our next task is to determine the exact conditions under which he is successful.

At the end of the day we have brought to bear a great deal of evidence to suggest that the level of advocacy, as well as the interactions between justices themselves, during the one hour exchanges between court and counsel plays a key role in how our nation’s court of last resort decides some of the most important legal issues of the day.