Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument about Life, the Law, and the U.S. Supreme Court

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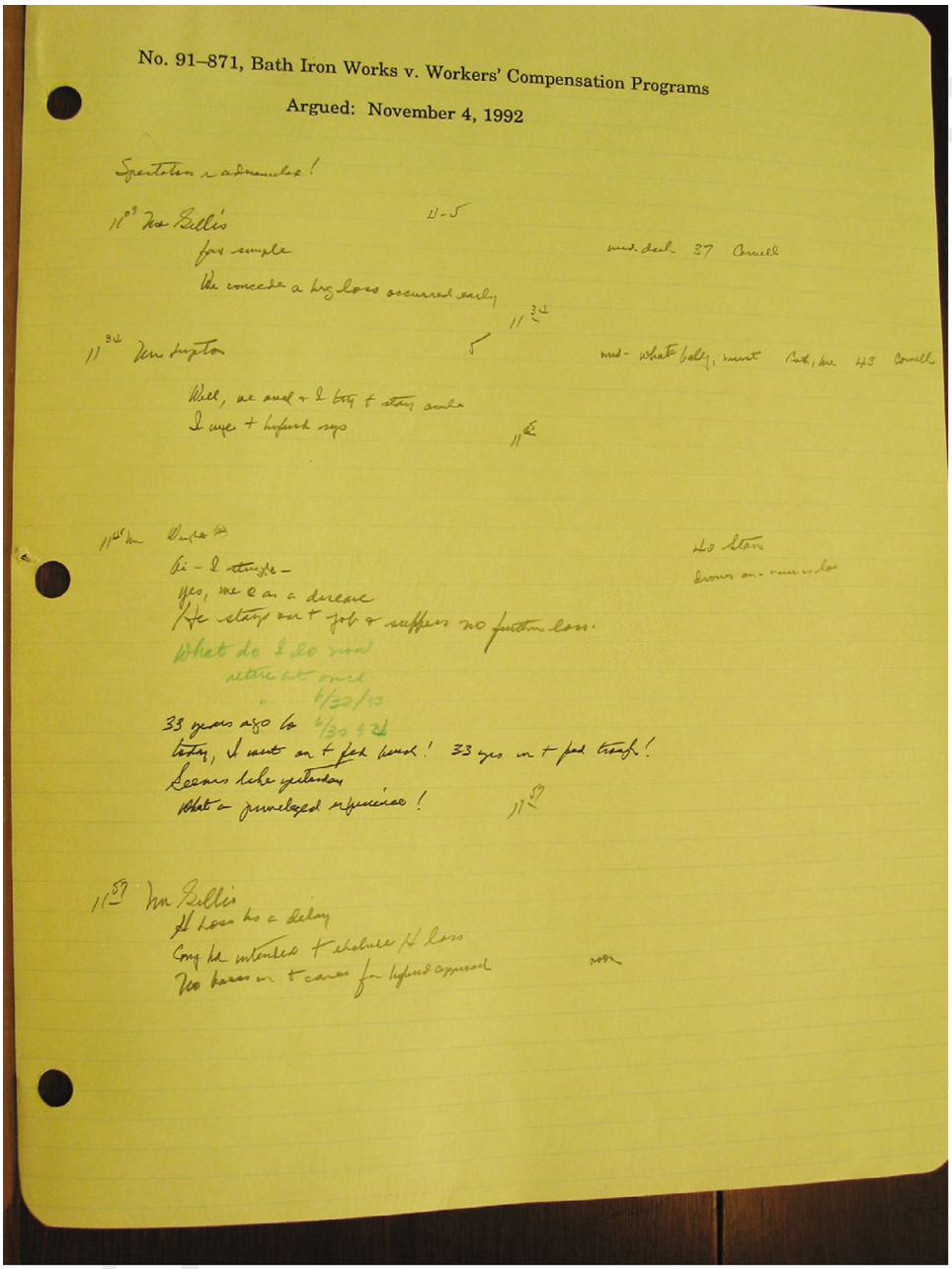
Introduction

On November 4, 1992, the U.S. Supreme Court heard oral arguments in *Bath Iron Works v. Workers' Compensation Programs*.[1] As attorneys presented their arguments, Justice Harry A. Blackmun, like the entire nation, had a lot on his mind because the night before William Jefferson Clinton had been elected the first Democratic President in twelve years. While the political implications of the Clinton victory would be undoubtedly vast, Blackmun was more concerned with how it would affect him personally. It was just days until Blackmun's eighty-fourth birthday, and it suddenly seemed viable for him to depart and allow the new President to make a politically and ideologically suitable replacement.

Thus, while Blackmun took his (usual) notes on Christopher Wright's arguments for the federal government, Blackmun's mind, and his pencil, wandered to how his life might quickly change. Writing in his characteristic green pencil, he mused about the implications of the election, "What do I do now. [R]etire at once, 6/30/93, 6/30/94." He added, perhaps nostalgically, "33 years ago today, I went on the fed bench! Seems like yesterday. What a privileged experience!"

We know what was going on in Blackmun's mind that day only because he was a habitual note-taker. In fact, as he did in *Bath Iron Works*, in almost every case Blackmun took copious notes about what transpired during oral arguments. As Linda Greenhouse wrote in **Becoming Justice Blackmun,** he seemed to keep these notes out of "an


No. 91–871, Bath Iron Works v. Workers' Compensation Programs

Argued: November 4, 1992

Figure 1. Harry A. Blackmun's oral argument notes in *Bath Iron Workers vs. Workers' Compensation Programs* (1993)

impulse to order [his] world … It was a deep impulse that reappeared throughout his long life."[2] While his notes (written with a traditional gray graphite pencil) focused mainly on the substance of the arguments,[3] Blackmun also wrote in green pencil to indicate comments outside of the legal and policy substance of the arguments themselves, including his musings about politics, personal life, and a plethora of other thoughts that

occurred to him while the attorneys argued their cases.

Blackmun's oral argument notes continue to be a treasure trove for scholars,[4] Court watchers,[5] and interested citizens.[6] However, his "green notes," the name we have given to these more personal reflections, have been paid far less attention. Our goal is to provide a better understanding of them while also providing readers with insights about the gray notes. Both are of particular interest for several reasons.

First, they offer a rare glimpse of the world through the eyes of a Justice who sat on the Court through some of its (and the nation's) most interesting and tumultuous years of the late twentieth century. Indeed, Blackmun's personal insights are one of the only opportunities scholars have ever had to peek into the mind of a U.S. Supreme Court Justice and, as such, they open the Court in a way our least publicly observable institution has not yet been open. Second, these notes add to our understanding of how Justices reach decisions. For decades, scholars have used Court outcomes (who wins, who loses, and why) to infer the factors that influence Justices' decisions, particularly their motives that are the quintessential black box of the decision-making processes. In a sense, then, Blackmun's notes allow us to open that box to explore his motivations. Third, the notes add a dimension to scholarly understanding of the Court in a way that even most historians cannot provide because these insights come, quite literally, from Blackmun's own hand as he watched law, politics, and history develop around him over the nearly quarter century he sat on the bench.

In the crux of the article we utilize Blackmun's oral argument notes to elucidate how he viewed the courtroom proceedings unfolding in front of him, including his assessment of the attorneys who appeared before the Court and his insights about his colleagues' behavior. We first explore his graphite notes (although sometimes his green notes as well) to better understand Blackmun's assessment of the arguments presented to the Court; we do so to determine whether these arguments were persuasive to him and his colleagues and to detail how he thought his colleagues would decide each case. From there, we turn more specifically to what Blackmun's green notes teach us about the Court's oral arguments, its inner workings, the dynamics between the Justices on the Burger and Rehnquist Courts, and American cultural and political history.[7] Finally, we utilize Blackmun's notes as evidence that the Justices, while certainly the top legal minds in the nation, are not particularly different from typical U.S. citizens. For instance, while listening to arguments, Blackmun sometimes thought about his favorite baseball team (the Minnesota Twins), entertained himself and his colleagues by playing games on his note paper, and reflected about his health and impending retirement. These are insights we believe serve to humanize Blackmun and his colleagues in an important way. Indeed, law is made by actual humans who possess fears, concerns, hobbies, and interests. Blackmun's notes therefore help us understand the human side of the Marble Palace.

Before completing these related analyses, however, we begin by highlighting the general historical period during which Blackmun built his legacy, from the history he lived through beyond the Court to the transformations he witnessed within the wall of the nation's highest court.

Justice Blackmun: Witness to History Within and Beyond the Marble Palace

While Justice Blackmun will always be remembered for his abortion jurisprudence,[8] he has left a much less appreciated legacy as a keen observer and record taker. His archival papers, publicly available at the Library of Congress, provide a wealth of insight into life, law, and the inner workings of the U.S. Supreme Court.[9] For more than fifteen years,

now, they have been an invaluable source of data and information that have enriched how political scientists, legal scholars, and historians understand the inner workings of the Court. Our goal in this section is not to provide a comprehensive recap of Blackmun's life but, rather, to highlight the extraordinary events that took place within and outside the Court during his twenty-four years on the bench.

Blackmun's tenure from 1970 to 1994 was a time of great international tumult for the United States. He joined the bench several years before the end of the Vietnam War and stayed long enough to witness the first Persian Gulf War. He also had a front row seat to the end of the Cold War and ultimate downfall of the U.S.S.R. Thus, his years on the bench were a time of important and transformative foreign policy for the United States.

Domestically, Blackmun sat on the High Court through six presidential elections, including the reelection of the President who appointed him and the election of the President who would ultimately replace him. In addition, he watched as scandal led to the resignation of Vice President Spiro Agnew and as Watergate led to the resignation of several Attorneys General and ultimately to the downfall of President Richard Nixon. Closer to his own bailiwick, Blackmun was front and center for two of the most hotly contested Supreme Court nomination battles in U.S. history: those of Judge Robert Bork and Justice Clarence Thomas.

Inside the Marble Palace, Blackmun observed a number of historically significant developments in the law, transformations of personnel on the bench, and changes in relationships among his colleagues. His tenure covered major jurisprudential developments on a host of landmark issues including reproductive rights,[10] gender and racial equality,[11] the free exercise and establishment of religion,[12] the reinterpretation of the Court's long-standing obscenity standard,[13] campaign finance,[14] and the death penalty.[15]

Beyond legal changes, Blackmun witnessed considerable ideological transformation on the bench and he often took notes about these dramatic shifts. During his first five terms, he watched the retirements of Justices Hugo L. Black and William O. Douglas, the final remaining New Deal appointees of President Franklin D. Roosevelt. As Douglas and Blackmun sat together in the Courtroom during their final day as colleagues and for Douglas's final oral argument, Blackmun wrote, "WOD retires today."[16] He then added, "My last day on this seat,"[17] meaning that he would be moving to a new seat closer to the center of the bench because more senior Justices sit nearer the center while new Justices sit nearer the wings.[18]

After Black and Douglas retired, only two of the Court's stalwart liberals remained, Justices William J. Brennan and Thurgood Marshall. Blackmun also remarked when Douglas's replacement, John Paul Stevens, joined the bench. As he sat for Stevens's first argument just two months after Douglas's departure on January 12, 1976, Blackmun wrote, "January 1976 Session. JPS #1."[19] This nomination was particularly important because, while a Republican President (Gerald Ford) nominated Stevens, Stevens, like Blackmun, moved well to the ideological left during his long tenure on the bench.[20]

Maybe more important than Stevens's nomination was President Reagan's first nomination just six years later. In 1981, Blackmun watched as the first woman, Justice Sandra Day O'Connor, donned the black robe. Oddly, despite Blackmun's penchant for noting historically significant events, he made no mention of O'Connor's ascension to the bench.[21] Two days later, however, he did note that she was missing at arguments.[22] While he may have missed recording O'Connor's first argument, toward the end of her first term, Blackmun made

Harry Blackmun ate lunch with Hugo Black (facing backward) on a sunny day in the courtyard at the Supreme Court shortly before the Alabama Justice stepped down from the bench. When a colleague retired, Blackmun carefully jotted down the event in his notes.

a prophetic notation about his newest colleague, predicting in *Union Labor Life Insurance Company v. Pireno*[23] that, "This case may well depend on SOC's vote." Of course, as is now clear, many cases depended on how she decided.[24]

While the ascension of Stevens and O'Connor did not fully signify a shift of the Court's ideological makeup, the movement toward a more conservative bench took its most obvious turn when Chief Justice Warren Burger made it clear that he was retiring after the 1985 term. His decision became official on September 26, 1986 when the Senate confirmed William H. Rehnquist as the new Chief Justice. Ten days later, on the first Monday of October, Blackmun kept record of the change, "OT 1986 WHR, CJ."[25] At the same time, perhaps the most conservative Justice to date—Antonin Scalia—joined the Court in the seat left vacant when Reagan elevated Rehnquist to Chief. Again, Blackmun did not mention Scalia's first day but, as with O'Connor, he noted the first time Scalia missed an argument, writing in *Meese v. Keene*,[26] "AS out."

Two years later, Justice Anthony Kennedy became Reagan's fourth appointee to the Court after Justice Lewis Powell retired. It was clear from the very beginning that Blackmun had a special relationship with Kennedy. What he and Blackmun had in common was ostensibly being the third choice of the appointing President. In fact, Blackmun often called himself "old number three" and then suggested to Kennedy—upon his arrival to the Court—that they were both "number 3's."[27] Again, Blackmun did not make specific note of Kennedy's first argument but did write "AK is quiet" during proceedings on February 22, 1988.[28]

The transition to perhaps the most ideologically conservative Court in U.S. history was complete with the confirmation of Justice Thomas in the fall of 1991. Thomas took the bench for the first time on November

4 and this time Blackmun noted the arrival of his new colleague. In his shorthand he wrote, "CT first on bench."[29] During the second case that day, beginning at 11:05 A.M., Blackmun also noticed what would soon become conventional wisdom about Thomas. Specifically, he noticed, "No? yet from CT?"[30] Of course, neither Blackmun nor anyone else would predict that Thomas would only ask twelve questions in the time they sat with each other or that, up until this point, he would ask a total of just thirty-three questions (1991–2019).

Now, a quarter-century after his departure from the bench, we take a closer look at Blackmun's oral argument notes that show how, amid these historic events and Court transformations, Blackmun assessed what transpired during these proceedings. We begin, in the next section, by analyzing how Blackmun assessed the attorneys who appeared at the nation's highest court.

Attorney Performance During Oral Arguments

Before entering into private practice and ultimately ascending to the federal bench, Blackmun was an adjunct professor at St. Paul College of Law (now Mitchell Hamline School of Law) and for a time at the University of Minnesota Law School.[31] Perhaps this early career teaching experience stuck with Blackmun when he joined the Court because he certainly acted like a professor in one respect: he regularly evaluated the oral arguments presented by each attorney. These grades provide insights into a number of fascinating questions, such as the criteria Blackmun used for his grades, whether these grades indicate who provided better arguments in a case, whether the grades indicate who would win, whether famous attorneys earned higher grades than their less experienced counterparts, and who earned the best and worst grades.

Initially, it is important to gain a sense of how, and on what basis, Blackmun graded counsel. Throughout many Court terms, the grades themselves changed as he employed three different scales: A–F from 1970 to 1974; 1–100 from 1975 to 1977; and 0–8 from 1978 to 1993.[32] Ninety-five percent of Blackmun's notes discuss the substantive legal and policy arguments made by counsel, while only five percent focus on presentation style or on the Justice's personal views of the attorneys.[33] Blackmun was not simply giving grades because he liked or disliked a particular attorney making the argument or because he agreed with the ideological rationale of an argument. Rather, the correlation between his notes and the final grades makes it relatively clear he was grading the substantive arguments presented.

Blackmun's own notes support our claim. Consider what he wrote of former Solicitor General, Kenneth Starr, "What a Boy Scout goodie-goodie."[34] While this comment indicates Blackmun may not have thought much of him personally, Starr still earned a relatively high grade of 6 on the eight-point scale.[35] Blackmun also did not let his subjective evaluations of the attorneys' descriptive characteristics influence his grading. Although he described Vernon Teofan as "plump" and "loud"[36] and Archibald Cox as "hoarse" and "deaf,"[37] both received 6s. In short, Blackmun seems to have been genuinely interested in determining whether an attorney presented a good argument, even if he wrote less-than-flattering personal notes about them.

Further, as a supplement to his grades, Blackmun often commented about the strength or weakness of each attorney's specific arguments. For example, in *Florida Department of State v. Treasure Salvors*,[38] he wrote ten substantive comments about the argument by respondent's attorney Paul Horan, who earned a 6, and then noted, "He makes t most with a thin, tough, case."[39]

Similarly, in *First National Maintenance Corp. v. NLRB*,[40] Blackmun indicated of Norton J. Come, the petitioner's attorney, who was assigned only a 5, "The argument has persuaded me to reverse."[41]

While the preceding analysis focuses on good grades attorneys earned, at times he also offered harsher evaluations. Of Nebraska Assistant Attorney General Terry R. Schaaf's argument in *Murphy v. Hunt*,[42] he noted "very confusing talk about Nebraska's bail statutes." Schaaf then earned a grade of 4. Cal Johnson Potter III's argument in *Godinez v. Moran*[43] received a 1.5, with Blackmun claiming it to be "one of the worst arguments" he had ever heard. Arthur Joel Berger, Assistant Attorney General of Florida, earned a 65 out of 100 for his argument in *Maness v. Wainwright,*[44] with Blackmun noting, "This guy for me is a bust."

It was one thing for Blackmun to have graded the arguments presented to the Court. The important question is to what end did he do so. Did his grades assess who was the better attorney during argument and does being the better attorney equate with winning a case? The answer to both queries is yes; Blackmun's oral argument grades correlate highly with Justices' final votes on the merits. Examining the votes of all Justices who sat with Blackmun, Johnson, and his colleagues demonstrates that a Justice who is ideologically predisposed to *vote against* the petitioner has a 32.2 percent chance of supporting the petitioner when the respondent attorney presents oral advocacy that in Blackmun's estimation is considerably better than the petitioner's argument. By contrast, the likelihood of voting for the petitioner's position increases to 47.6 percent when the same Justice encounters a petitioner who outmatches the respondent's attorney at oral arguments.[45] It is important to note that Johnson and his colleagues analyzed the votes of all the Justices who sat on the Court with Blackmun—rather than just Blackmun's own votes. In short, Blackmun's colleagues were picking up the same sense of attorney quality or lack thereof that Blackmun noted privately.

The magnitude of the effect of oral advocacy is even more pronounced for justices *who are ideologically supportive* of an attorney with the stronger oral argument. A justice who favors the petitioner ideologically in a case in which the respondent offers better arguments has a 64.4 percent chance of voting for the petitioner but, when the petitioner provides better oral arguments, this increases to 85.2 percent.[46] The bottom line is that, just as he did when grading his law students, decades before joining the bench, Blackmun had a good eye for arguments.

Flipping the Bench: Attorneys' Attempts to Persuade

Blackmun's copious oral argument notes certainly indicate he was a very good listener and that he knew well the attorneys' positions in each case he heard. Thus, it is no wonder the students sometimes persuaded the teacher to change his mind about a case. While our focus is on Blackmun, the persuasiveness of oral arguments is not limited to him, as other justices have been quite clear that they sometimes changed how they viewed a case after argument. Indeed, Rehnquist once wrote that, "In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench."[47] Systematically, one recent study reveals that Blackmun actually changed his votes in some cases based on the arguments counsel presented,[48] doing so just over ten percent of the time. That he switched at all suggests that attorneys can, and sometimes do, utilize their thirty minutes to persuade justices to change their positions.

Blackmun's notes provide specific instances of how he was persuaded by counsel's arguments. For example, during respondent's argument in *Allied Chemical & Alkali Workers of America, Local Union No. 1*

v. Pittsburgh Plate Glass Co.,[49] he wrote, "I was on board here B/4 argument but now definitely lean toward +."[50] Even when he was "on board" in a case, sometimes argument helped him rethink his position. In a 1983 term case, the argument by respondent's attorney led Blackmun to write, "I am shifting my view."[51] Likewise, in *Ford Motor Co.*,[52] he wrote, "I think I have turned around on this case, at least in part." At other times Blackmun seemed to have been fully persuaded to change his vote. Consider *First National Maintenance Corp. v. NLRB*, where he wrote, "The argument has persuaded me to +." Again, during the 1989 term Blackmun indicates that then Assistant Solicitor General John Roberts may have persuaded him to change his view of the case. During Roberts's rebuttal he noted, "Am I turned around in this case?"[53] Similarly, during *Fuentes v. Shevin*,[54] Blackmun penned that, "He persuades me but will he persuade all the others?"

Remembering Persuasive Attorneys

While Blackmun was probably familiar with many attorneys who argued before the Court, he could not have known them all—even those whom scholars might consider relatively famous. His notes, then, indicate that he had ways to remember who argued. Specifically, he wrote down characteristics of the attorneys including his (possible) estimates about their age and what they looked like at the rostrum. As with the other aspects of his notes, Blackmun was nothing if not meticulous in this area. Each description was made on the right-hand side of his lined paper and always appeared on the same lines as he wrote counsel's name, the time each argument began, and the grade he had assigned. These descriptors are exemplified in a single line about James Strain in *CTS v. Dynamics Corp.*:[55] "young, beard, 42, dull, Hastings, WHR Clerk like Jim Brudney."[56]

Physical cues were particularly important to Blackmun. For instance, he described attorney Frank Whalen, who argued in *Sarno v. Illinois Crime Commission*,[57] as "gravel voice, frowny, widow's peak, sclerotic." Martin Wald, who argued *Firestone Tire Co. v. Bruch*,[58] was "short, grey, glasses, 54, blunt." In contrast, Robert Fishell, arguing for the petitioner in *Owen v. Owen*,[59] was "large, soft spoken … Pretty dull, slow." Blackmun even notated the appearance of attorneys with whom he was clearly familiar. He described the outfit of future Justice Ruth Bader Ginsburg in *Califano v. Goldfarb*,[60] even though it was not her first case before the Court, "in red and red ribbon today."

Possibly the most important information for Blackmun was attorneys' experience. In fact, his notations often focused on where attorneys attended law school, whether they clerked for the Court earlier in their career, or how they practiced law. These factors parallel research that suggests such factors may have an impact on who is likely to win a case.[61]

Consider, first, where attorneys attended law school. In *Firestone*, Blackmun remarked that petitioner attorney Wald attended "Chicago." Other times he used his prototypical shorthand when mentioning law schools. Thus, while Kathi Drew argued for the state of Texas in *Texas v. Johnson*,[62] Blackmun noted she was from "SMU."[63] In *McCarthy v. Bronson*,[64] he indicated Christopher Cerf was from "Colum."[65] In *Reed v. United Transportation Union*,[66] he pointed out that John Gresham was from BU (Boston University) and in *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*,[67] Blackmun noted that Harold Talisman was from OSU (The Ohio State University). In other cases, he wrote that Nina Kraut was from "Vt" (presumably Vermont), even though she actually attended law school in the neighboring state of New Hampshire. Similarly, he noted that Rex E. Lee and Chris Hansen attended "Chicago," David Soloway went to "Emory," and

Raymond K. LaJeunesse, Jr. attended "W & Lee" (Washington and Lee University).

Beyond where they obtained law degrees, Blackmun also categorized attorneys based on whether (and where) they taught law. In *Milton v. Wainwright*,[68] he wrote that Neil Rutledge was a "Duke Prof" and "(son of Wiley?)." In *Buckley*, Ralph K. Winter was a "Yale prof" and in *White v. Weiser*,[69] Charles L. Black was a "Yale professor." During other arguments, Blackmun wrote that Lewis B. Kaden was a "Colum prof,"[70] Vivian Berger was a "Columbia prof,"[71] and Gerald López was a "Stan prof."[72] He also noted professors without mentioning specific institutions, as he did with William Burnham, Edwin Bradley, George Colvin Cochran, Barry Nakell, and Archibald Cox.

Finally, whether an attorney clerked at the Court signaled experience to Blackmun. Thus, in *Firestone* he wrote that Mr. Sullivan was a "TM clerk." Interestingly, Blackmun initially noted when Christopher Cerf argued *Carella v. California*[73] in 1989 that he was a "CJ clerk," but there was a problem. Cerf never clerked for Rehnquist. However, when Cerf argued *McCarthy* in 1991, Blackmun properly identified that he had been an "SOC clerk."[74] During arguments in the landmark *Buckley v. Valeo*, Ralph Winter, Jr. was a "former TM Clerk." In *CTS v. Dynamics Corp*., James Strain "was a WHR clerk like Jim Burway." Marsha Berzon in *International Union v. Johnson Controls*[75] was a "former WJB Clerk."[76]

It is interesting that Blackmun was so attuned to these details because research suggests the grades we discuss above are based on the quality of the attorneys who appear before the Court. Thus, attorneys who were former clerks or who taught at elite law schools were more likely to make winning arguments to the Court.[77] Combining this insight with cues in Blackmun's notations, it is intuitive that he would remember those who made the best (or sometimes the worst) arguments.

Blackmun's Judgment of His Colleagues' Oral Argument Behavior

Blackmun also spent much time listening to, and making notes about, his colleagues' actions, interactions, questions, comments, and general oral argument behavior. In this section, we analyze how he responded to his colleagues' behavior and what such behavior taught him about how a case may be decided.

Assessing Colleagues' Verbosity

Initially, we note that during Blackmun's tenure on the bench, there was a relatively major change in how Justices acted during oral arguments. There was a massive increase in the number of times Justices spoke during the mid-1970s, followed by a clear decline through the early 1980s (See Fig. 2). In particular, during the 1979 term each Justice spoke on average about twenty times per argument session; this decreased to twelve times per session in 1985. In addition, contrary to the conventional wisdom that Justices began to speak much more once Justice Antonin Scalia joined the bench in 1986, the increase happened prior to his ascension to the bench, with the Justices speaking more throughout the decade before Scalia's appointment. The substantial increase in the number of times Justices spoke while Blackmun was on the bench changed the dynamic of how they interacted with one another.[78]

While scholars debate how such prolific questioning affects case outcomes, Blackmun's own notes suggest he was often annoyed by his colleagues' behavior. Perhaps he would have preferred a return to the Marshall Court era (1801–1835), when attorneys were more likely to orate before the Court rather than engage in a fast-paced debate with the Justices.[79] We know this because Blackmun frequently commented on how often or how little his colleagues spoke, occasionally even

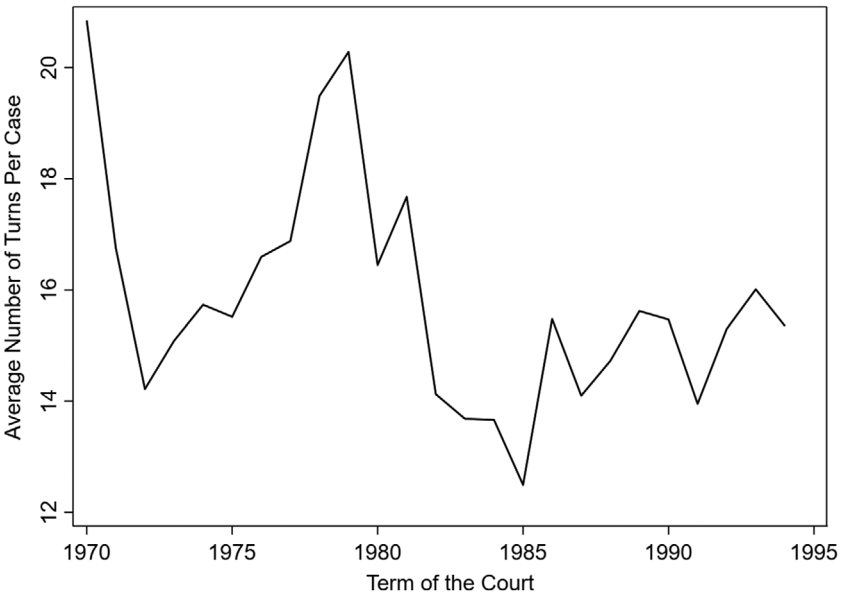


Figure 2. Average number of Justice utterances per case by term of the Court.

tallying their number of turns. For instance, in *Harris v. Forklift Systems*,[80] he counted the questions asked by three of his colleagues whom he often thought asked too many questions: Justices Ginsburg, Scalia, and Souter.[81] The upper right-hand corner of Figure 3 shows that these three colleagues spoke often during the proceedings: Ginsburg twenty-seven times, Scalia twenty times, and Souter eight times.

However, these notes do not tell the full story of the day *Harris* was argued. During the October 13, 1993, session, Blackmun kept an additional tally of how often his colleagues spoke across both cases argued that day.[82] In this note, Ginsburg, Scalia, and Souter spoke twenty-seven, fifteen, and eleven times, respectively. In the second case, *Landgraf v. Usi Film Products*,[83] they spoke twenty-one, eighteen, and seven times, respectively. In short, Blackmun often kept track of those colleagues he viewed as "going over the line" in speaking most often.

As his tenure wore on, Blackmun became increasingly annoyed at the number of questions asked by some of his colleagues. Consider the last years he spent on the bench, from 1986 to 1994. In the October 1986 term, the Court heard arguments in a highly salient establishment clause case, *Edwards v. Aguillard*.[84] During Jay Topkis's argument for Aguillard, Blackmun noted that "He jumps on AS—good!" Making clearer that Blackmun may have been less upset with Scalia's view of the case than with his verbosity is the fact that the next sentence says, "Why ds AS n shut up?"

Of course, while Blackmun often showed disdain for Scalia's verbosity, Scalia was not the only colleague about whom Blackmun complained. In *United States v. R.L.C.*,[85] Blackmun wrote that "CJ mentions JPS and AS are talking too much."[86] Not only was he often annoyed by his colleagues' loquaciousness, he was also sometimes unhappy when questions were asked. At the outset of the petitioner's argument in *Davis v. U.S.*,[87] Blackmun noted that "As usual, SOC has the first [question]."[88]

The key is that Blackmun was quite sensitive about his colleagues' behavior during oral argument. While this may not, in itself, be interesting, there is evidence that the number of times Justices speak affects

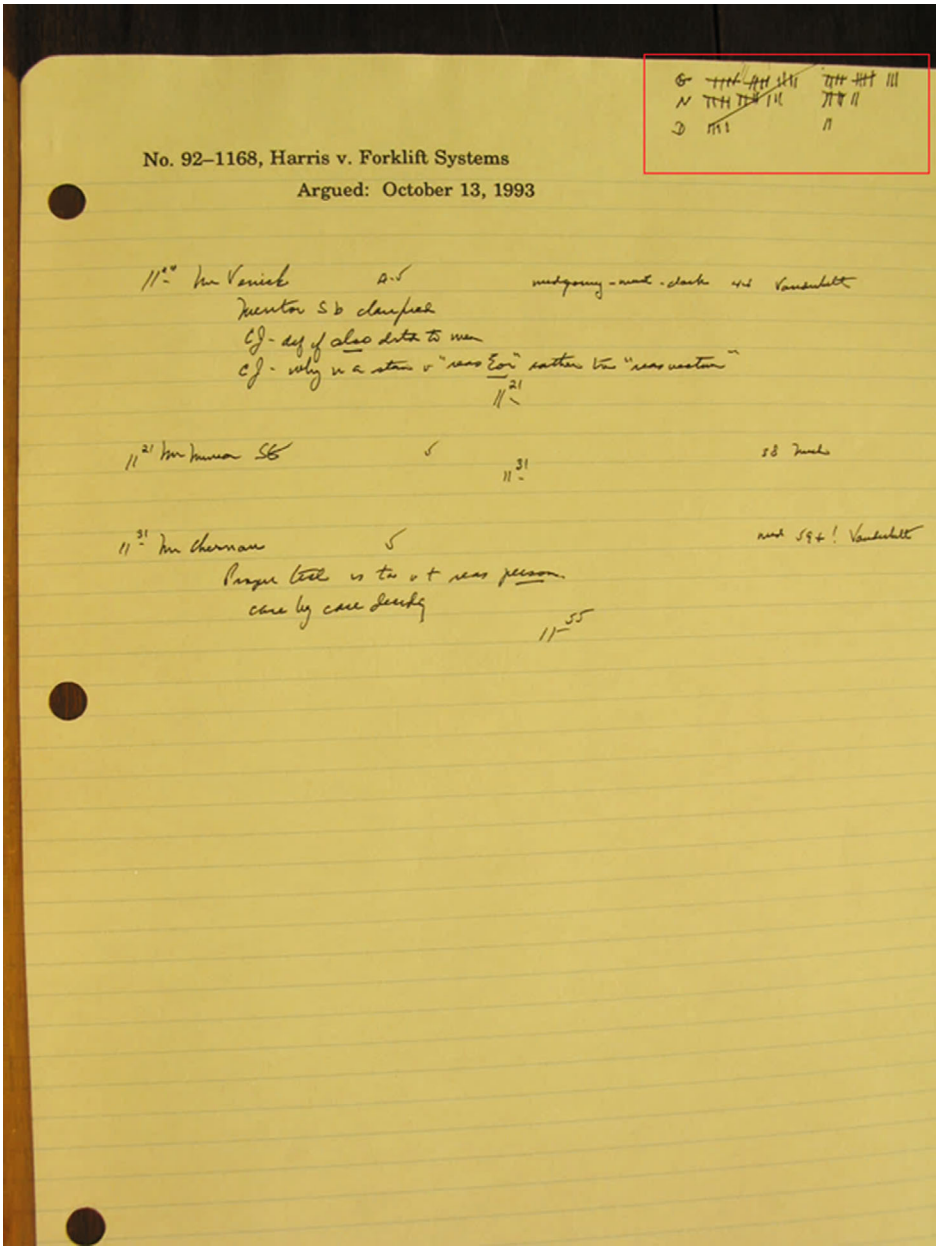


Figure 3. Harry A. Blackmun's oral argument notes in *Harris v. Forklift Systems* (1993).

case outcomes.[89] As a result, Blackmun's knowledge of who was asking how many questions, and to which side, probably helped him determine who would win the case. This is also evidenced by the fact that he also noted the frequency with which his colleagues posed hostile questions to the attorneys.

Because Blackmun was unhappy with the verbosity of some of his colleagues, what about his relationship with the Justice who is most famous for not speaking during oral arguments? Late in his career Blackmun formed an ideologically improbable relationship with Justice Thomas. Perhaps an early reason was that Thomas shared his

view of questions from the bench, or lack thereof.[90] Indeed, Thomas is notorious for asking almost no questions, and he actually went more than a decade without asking a substantive question of the attorneys.[91] This is not much different from how he acted when he joined the Court, when he asked so few questions during his time with Blackmun (eleven questions in three full terms) that Blackmun kept track of almost every time Thomas spoke. Interestingly, it took almost two full weeks for Thomas to first speak and, when he did so, Blackmun reacted by writing, in *Collins v. Harker Heights Texas*,[92] "T asks his 1st? 1:43 P.M."

While Thomas spoke four more times during his inaugural term, Blackmun noted none of them. However, he did record when Thomas asked his first question a month into the following term. On November 9, 1992, Blackmun indicated that "T asks his 1st? o t Fall."[93] Finally, he seemed to realize, well before Courtwatchers and the press did, that Thomas was probably not going to ask many questions during his tenure. Indeed, during the last case argued in the 1993 term, also the last case for which Blackmun sat, he wrote, "CT asks no? all term."[94] His sense of history was certainly prescient.

Predicting Colleagues' Votes[95]

However annoyed Blackmun may have been with how often his colleagues spoke during oral arguments, each speaking turn provided him with key insights into the positions each Justice would take in a case. In fact, recent work demonstrates that, overall, Blackmun predicted eight percent of his colleagues' votes but made at least one vote prediction in nineteen percent of the cases he heard.[96] What did he predict and how successful was he in doing so?

In *Spallone v. United States*,[97] a housing desegregation case, the Court focused its attention on a key procedural question. The City of Yonkers, New York, planned to build subsidized housing projects in an area already predominately populated by minority groups and litigation ensued under Title VII of the Civil Rights Act. The lower court ordered the city and council members (Spallone was one) to desegregate the residential housing and, after extensive delay by the council, they were held in contempt and received major sanctions. Each member remaining in contempt was fined $100 the first day with the fine doubling for each consecutive day of noncompliance; failure by any member to comply by August 10, 1998, resulted in commitment to the custody of the United States Marshall. The Supreme Court examined whether a District Court could impose such draconian sanctions on specific council members.

Blackmun's oral arguments notes in *Spallone* provide an example of how oral argument may provide a road map for the Court's action. In this case, he correctly predicted seven of his colleagues' votes and made clear how he would vote.[98] (See lower left part of Fig. 4 for Blackmun's predictions.) Yet he was uncertain about how O'Connor would vote, which he indicated by the "O?" This is important because she was the crucial fifth vote and Blackmun could not get a handle on which way she would vote based on oral arguments. In addition, and perhaps surprisingly, on the very bottom line, in green pencil, Blackmun notes "CJ will assign to himself." "CJ" in this case was Chief Justice Rehnquist and he, indeed, wrote the majority opinion. Thus, in *Spallone* at least, Blackmun gleaned more information from oral argument than simply the probable final voting pattern. Our point is that, while it was most common for Blackmun to predict the final merits vote and composition of the voting coalitions, he would also, on occasion, offer predictions about who would craft the majority opinion.

Unlike *Spallone*, Blackmun's predictions in *Cruzan v. Missouri Department of Health*[99] were perfect.[100] In other cases,

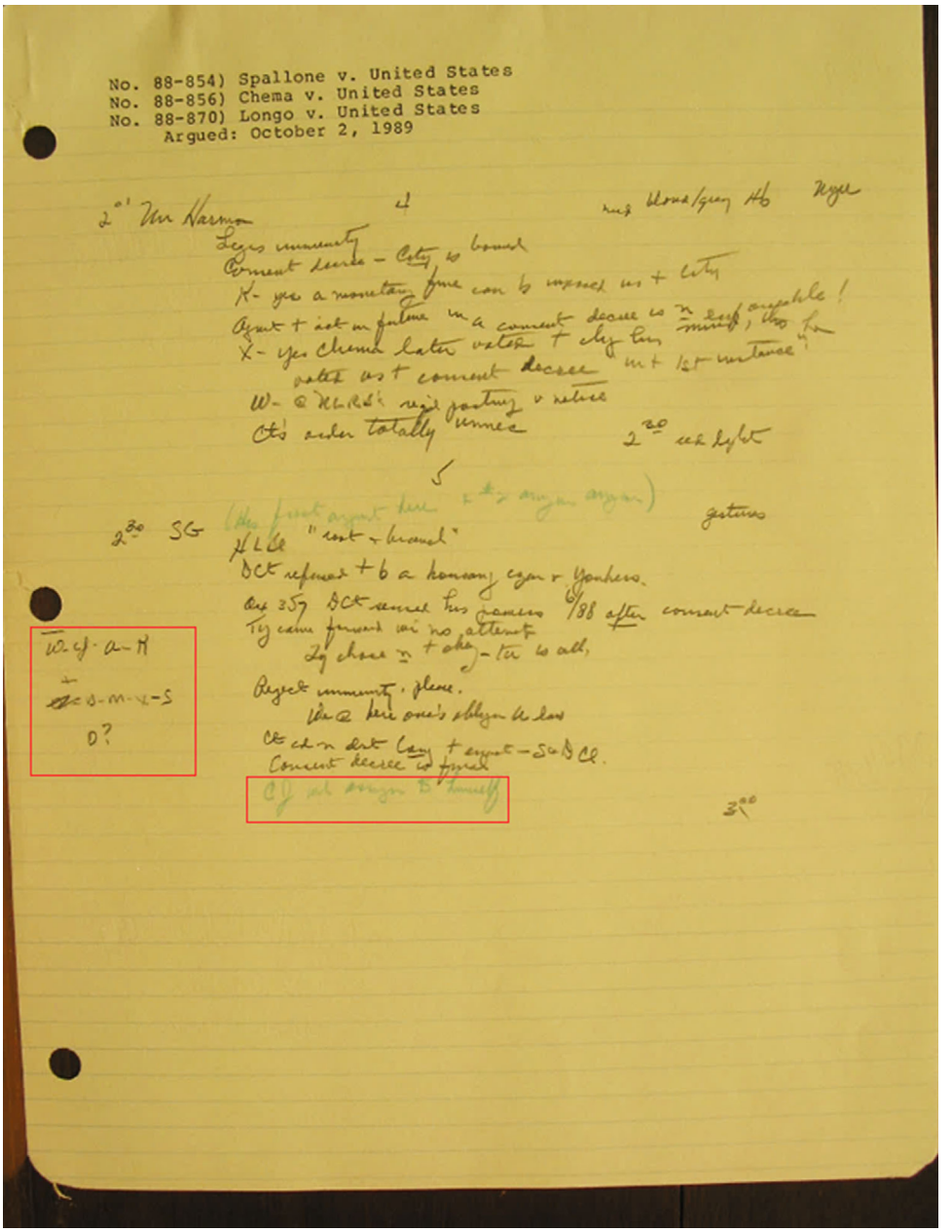


Figure 4. Harry A. Blackmun's oral argument notes in *Spallone v. United States* (1990).

he was less sure about how his colleagues would decide. *Tower v. Glover*[101] provides an example, as he wrote "– 5–4, I would guess or + 5-4."[102] More specifically, he predicted that Brennan, Marshall, and White would join in affirming while Burger, Rehnquist, and O'Connor would reverse but he was unsure about Stevens and Powell. This case indicates that Blackmun did not attempt to predict the ultimate position of every single colleague in every case and, even when he did, he sometimes expressed uncertainty about individual votes or the ultimate case outcome.

Even when Blackmun was uncertain about votes, he occasionally ventured an educated guess as to how a case would end. In *Barnes v. Glen Theatre Inc.*,[103] concerning whether a state prohibition against complete nudity in a public place violated the First Amendment, Blackmun correctly predicted there would be five votes to reverse and four to affirm, but he placed question marks next to four of the votes. This uncertainty was well-founded as he made two mistakes: he predicted Scalia would be in the minority to affirm and White would be in the majority to reverse (the other two question marks were O'Connor and Souter).

In other cases, Blackmun seemed especially confident in the signals he obtained from oral argument. During its 1991 term, in *Smith v. Barry*,[104] he wrote, "Justices telegraph their posit[ions] – CJ – A – K." Similarly, in *Williams v. Zbaraz*[105] and *Harris v. McRae*,[106] abortion cases decided during the 1979 term, Blackmun noted, "All Justices in their questions telegraph their attitudes. Result will be 6–3 or 5–4 to reverse." He proved prophetic as, by a 5–4 vote, the Court reversed and held that the Hyde Amendment, which prohibited the use of Medicaid funds to pay for discretionary abortions, was constitutional.

Overall, these examples indicate that during oral argument Blackmun often attempted to predict case outcomes as well as how some or all of his colleagues would vote.[107] However, there is significant variation in the frequency with which he made such predictions. During the Rehnquist Court (1986–1993 terms), he made predictions for twelve percent of the participating Justices, while he predicted at least one of his colleagues' votes in nearly thirty-four percent of those cases. As to how successful he was, seventy-six percent of Blackmun's predictions were correct and he was slightly more successful when he noted more of his colleagues' questions and comments. Indeed, when he recorded only one notation about a colleague's comments, he successfully predicted that Justice's final vote seventy-four percent of the time, but if he noted more than one reference, his success increased to eighty percent,[108] which is greater than the predictive power of the conventional political science models that predict how Justices votes.[109]

Blackmun's Thoughts Beyond the Substantive Arguments

Certainly, as he sat for oral arguments, Blackmun was most focused on the arguments, substance, and possible outcomes of each case. However, Justices, like anyone else, may sometimes allow their minds to wander. In this section, we complete our journey through Blackmun's notes as we examine his thoughts about history, his career, and his place on the Court. We also show what happens when a Justice becomes bored during argument, as anyone might. We begin with history—as we did in the introduction.

As we read, coded, and transcribed his notes, it became clear that Blackmun thought about historic (and historical) points in U.S. history that occurred on or around the day of a given argument, even if the events were not in any way related to the case at hand. In particular, Blackmun's mind often wandered to thinking about Presidents and presidential elections. For instance, during *Weinberger v. Rossi*,[110] a case that hinged on the definition of the word "treaty," Blackmun remembered the first President's birthday, "George Washington 250th birthday." While the case did not fall on the actual anniversary, it was only five days after the actual date.

Blackmun also took note of upcoming presidential elections. In *Edwards v. Arizona*,[111] he knew he and his colleagues were more concerned with the battle between Republican nominee Ronald Reagan and incumbent Jimmy Carter than they were with the arguments, "White has not listened to a word of this argument—election; who is in

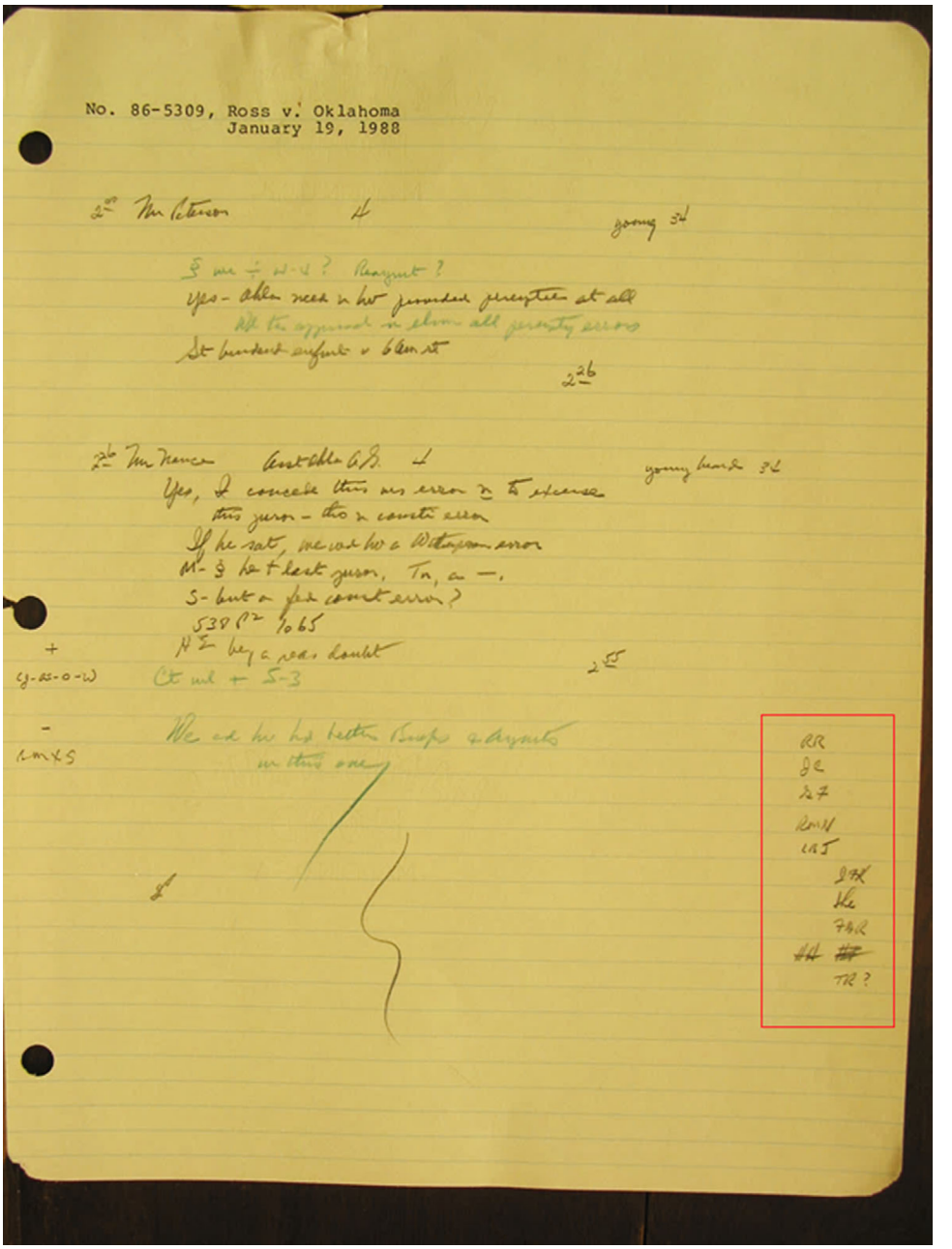


Figure 5. Harry A. Blackmun's oral argument notes in *Ross v. Oklahoma* (1988).

the courtroom? The Brethren is so excited by the election!" Blackmun likewise commemorated the 1992 election of President Bill Clinton when he wrote "Day after election."[112]

Relatedly, during a day on which he must have been particularly bored at argument, Blackmun's notes make him seem more like a distracted student, doodling in a classroom to pass time, than like an engaged adjudicator. During argument in *Ross v. Oklahoma*,[113] he tried to remember the order of the Presidents in the twentieth century (see Fig. 5). He

used the bottom corner of his page to write the initials of the Presidents in a reverse order, starting with Ronald Regan "RR" and ending with Theodore Roosevelt "TR," but he missed the four Presidents who served between Herbert Hoover and Theodore Roosevelt.

Beyond his notes about Presidents, the most interesting historical notations in Blackmun's notes focus on the anniversary of Pearl Harbor—the infamous 1941 attack that took place when he was just thirty-three years old. The first time he referred to it was in *Jones v. Rath Packing Co*.,[114] where he wrote, "35 years ago Pearl Harbor." It remained on his mind as six years later he wrote, "Pearl Harbor Day 41 years."[115] Again, the next year he penned, "Pearl Harbor Day 42 years."[116] And he continued to document the anniversary until 1992—in *United States v. McDermott et al*.[117]

While Blackmun had the image of being rather stodgy,[118] he had a lighter side as well. In fact, his thoughts often turned from important dates beyond the Court, to his favorite pastime (baseball), to his work environment, and to entertaining himself when arguments became boring. As to the first, he knew when it was "[i]ncome tax day"[119] and he noted when an argument fell on "Ash Wednesday"[120] or "Halloween."[121] Perhaps revealing his love of the winter holiday season, he liked to count the days until Christmas, "8 months hence is Christmas [e]ve."[122]

More important to his life than these hallmark dates were his beloved Minnesota Twins baseball team and his broader love for baseball. During argument in *Rufo v. Inmates of Suffolk County Jail*,[123] Blackmun wrote, "Twins 5 Blue Jays 4" about a close game against Toronto. He also exchanged notes with Justice Potter Stewart, who was also a baseball fanatic. The news of Vice President Agnew's resignation, on October 10, 1973, should have been (and was) a major news story for the Justices but it only slightly trumped the National League Championship Series (NLCS) Game five score of Stewart's Cincinnati Reds. Stewart passed a note to Blackmun from one of his clerks that read, "V.P. AGNEW JUSTICE RESIGNED!! METS 2 REDS 0." While the Court heard multiple cases that day, we know this note (and a few others about the game and resignation) were sent during arguments in *Department of Game of Washington v. Puyallup Tribe*[124] as they began (according to Blackmun's notes) at 1:23 Eastern Time, just twenty-three minutes after the start of the Reds' game.

Why both pieces of news in the same note? Perhaps because, while a resigning Vice President is important news, it was also the deciding game of the NLCS. Sadly, for Stewart, the Mets eventually won, sending them to the 1973 World Series. A couple of years later during a 1975 argument, Stewart and Blackmun bet on which team they thought would win the World Series. Blackmun waged $2.50 for the Red Sox, while Stewart felt a bit more confident, betting $4.00 for his Cincinnati Reds. Stewart's confidence ended up working in his favor, as the Reds won the series. He then graciously wrote to Blackmun two days after the game on October 23, 1975, "Dear Harry, Many thanks. It was a great season, and the Reds were darn lucky to win. P.S."[125]

On matters closer to the Court, Blackmun noted important changes to his workplace scenery. In *Jefferson v. Hackney*[126] after Chief Justice Burger carried out his plan to curve the courtroom bench, Blackmun wrote, "New bench separates Brennan and White, hurrah!" to express his excitement that the curve might help prevent their chitchat during argument.[127] More personally, in *Carter v. Stanton*,[128] he began his notes for the day by excitedly writing, "My new chair is here today!" Finally, Blackmun was a keen observer of changes or abnormalities in the courtroom. Such notes included when "the room [was] very dark,"[129] when the "electric

speaker [went] off,"[130] and when it was "very quiet in the courtroom."[131]

Amusingly, Blackmun sometimes poked fun at his colleagues. For instance, during a case argued in the midst of a 1984 winter storm, Blackmun wrote, "These old men panic about the snow."[132] He also noted that his colleagues "get so excited,"[133] and, at times, are "very excited! Like children!"[134] Blackmun was also amused in *Codd v. Velger*,[135] when Rehnquist "says these 2 attorneys deserve each other."

Mostly, however, when arguments lulled, Blackmun reflected on his own work life. He expressed frustrations on the bench in two ways: through contemplating whether he should be hearing a case and by noting when he was not paying as much attention to argument as he thought he should. He questioned whether he should have recused himself in some cases and also why he had voted to grant *certiorari* in others. For instance, in *Memorial Hospital v. Maricopa County*[136] and *Cantor v. Detroit Edison Company*,[137] he asked himself "Shd I recuse?" and "Do I recuse?" and in other cases, he specifically questioned whether he should recuse himself because of his connections to the parties. For example, in *Diamond v. Bradley*,[138] on whether computer firmware is patentable, Blackmun wrote, "Should I recuse because IBM?" referring to a possible financial interest in the company.[139] In *Roberts v. United States Jaycees*,[140] a case about whether women should be admitted as full members to Jaycees in Minnesota, he asked himself "I sat but shall I recuse?" and ultimately he did decide to recuse because he was a former member of the Minneapolis Jaycees.

As he grew older and his health began to deteriorate, Blackmun seemed to listen less to cases because he was losing his hearing and his ability to focus. In *Middlesex County Ethics Committee v. Garden State Bar Association*[141] in 1982, he first became frustrated with his hearing problem by writing "Hard for me to hear. I may as well stay home." Similarly, in *Pope v. Illinois*,[142] he wrote that it was "hard for me to hear." As time proceeded, he had increasing difficulty hearing the arguments. In one case he noted, "My h aid has gone out"[143] during *Voinovich v. Quilter*[144] in 1992.

In addition to his hearing, it appeared that as Blackmun spent more time on the bench, he was increasingly "having trouble with drowsiness,"[145] as he was sometimes "sleepy and drifted off"[146] because he "did not sleep well"[147] the prior night. At one point, he was sleeping so much that he seemed thrilled that he "stayed awake this week!"[148] This too distracted him from properly listening to oral arguments. As he drifted off, he sometimes made pen marks on his notepad and, as he indicated in *Mertens v. Hewitt Associates,*[149] he knew what they meant, "these marks are a result of my dozing. I hope it is not too noticeable."

It was clear that Blackmun's drowsiness made him self-conscious and he hoped it was not "noticed by spectators or Rehnquist."[150] During argument in *Edenfield v. Fane*,[151] he wrote, "My goodness, I struggle—Hope it is not too noticeable." In *Wright v. West*,[152] he nicely summarized his tiredness on the bench as he wrote, "Here again I am sleepy. Growing old and less fun. A year from now I should be out of this!" He also documented similar struggles with illnesses, writing when he felt "lousy today with a cold"[153] or when it had "been a long day for I feel lousy."[154]

Blackmun became increasingly worried that he was too old or infirm to continue doing the work on the Court, asking himself during *Hustler Magazine, Inc. v. Falwell*,[155] "Here I am again, what am I doing here?" He repeated this question during *Hadley v. United States,*[156] writing both "What really am I doing here?" and "What am I doing here?" a second time with the years "1970-1992-1993" attached, as he seemed to

contemplate (as he approached his eighty-sixth birthday) his twenty-three years as a federal judge.

Blackmun also documented his own history as a federal judge by noting his work anniversaries. In 1973, during argument in *National Railroad Passenger Corporation v. National Assn. of Railroad Passengers*,[157] Blackmun wrote, "14 years ago, first sat!" to record the anniversary of his first appointment as a judge to the U.S. Court of Appeals for the Eighth Circuit. He later wrote about this anniversary more than a decade later in *New York v. Class*[158] and *United States v. Paradise*.[159] In 1991, he began to see the end of his career when he wrote in *Edenfield et al. v. Fane*, "Am I nearing the end of all this business? 33 years on the federal bench!" More specifically, he bookmarked his time spent exclusively on the High Court when he wrote "My first Supreme Court argued case" in the landmark case *Swann v. Charlotte-Mecklenburg Board of Education*.[160] Many years later, during argument in *Beecham v. United States*,[161] he enthusiastically wrote "11 more day of my hearing cases here!"

As Blackmun thought about what he was still doing on the Supreme Court in his early eighties, he thought more and more about retirement, asking himself, "When do I retire and how?" and "What do I do now—retire at once?" during arguments *United States Dep't of Treasury v. Fabe*[162] and *Bath Iron Works*. When he started the 1992 term, he wrote, "OT 1992—here we go again."[163] Finally, in *Darby v. Cisneros*,[164] a case argued in 1993, he wrote "A year from now?" as he questioned himself about when he would retire. Blackmun seemed to know his retirement was within sight and it came the following year.

Conclusion

Harry A. Blackmun's copious oral argument notes provide the public and judicial scholars alike a rare opportunity to explore the mind of a Supreme Court Justice. Indeed, it is virtually impossible to know what goes on in the Justices' minds as they decide some of the most important legal questions facing the nation. Here, we provide a rare glimpse inside Blackmun's mind from the time he ascended the Supreme Court bench in 1970 until his eventual retirement in June 1994.

Several conclusions stand out for us. First, Blackmun was very observant of his surroundings and, as a result, he documented important events happening within the Court and beyond its walls. Second, Blackmun carried to the High Court the critical insight he developed during his time as an adjunct law professor. Indeed, he was quick to write down and grade what he saw unfolding in front of him, including insights about the attorneys who appeared before the Court and his colleagues' behavior. According to the data, Blackmun was fair and objective when it came to his assessments of the attorneys. That is, he graded every attorney based solely on the quality of their arguments.[165] Third, Blackmun was reflective and held himself accountable to uphold his responsibilities as a Justice. He was also honest with himself, seen in his observations about dozing during argument.

Arguably, the most important contribution of this article is the evidence that while Blackmun was one of the top legal minds in the nation, in a number of ways he was not particularly different from typical citizens of the United States. His mind (like everyone else's) sometimes wandered as he reflected about history transpiring around him, his emotions, and his health. As anyone would, Blackmun sometimes grew bored with arguments, became annoyed with his colleagues at times, was frustrated with the aging process, and contemplated his retirement (for several years) before deciding to do so. However, what is most notable about Harry A. Blackmun is that he was a Justice who liked to have fun, had a good sense of humor,

and enjoyed the simple pleasures of life and his job. He joked around with the attorneys and his colleagues during argument, played games using his pen and paper, and had a passion for baseball. As a Justice on the High Court, he was still himself, "even a little sentimental, [and] possessed of a sense of humor and a sense of humility…"[166]

ENDNOTES

[1] 506 U.S. 153 (1993).

[2] Linda Greenhouse, **Becoming Justice Blackmun** (New York: Times Books, 2005), pp. 2.

[3] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation on the U.S. Supreme Court: A Deliberate Dialogue** (University of Michigan Press, 2012); *see also* Timothy R. Johnson et al., *The Evaluation of Oral Arguments Before the U.S. Supreme Court*, 100 American Political Science Review 99 (2006).

[4] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *The Evaluation of Oral Arguments.*

[5] *See generally* Greenhouse, **Becoming Justice Blackmun**.

[6] A comprehensive archive of these notes, Blackmun took from the 1970 to 1994 terms containing all available notes, is accessed at https://sites.google.com/a/umn.edu/trj/oa-memos-1. This archive also includes notes taken by Justice Lewis F. Powell from the 1971 to 1986 terms.

[7] Every so often the green pencil was actually blue, such as when he noted Scalia's first case.

[8] *See Roe v. Wade,* 410 U.S. 113 (1973).

[9] *See* http://hdl.loc.gov/loc.mss/eadmss.ms003030.

[10] *See Roe*, 410 U.S. 113 (1973).

[11] *See Reed v. Reed,* 404 U.S. 71 (1971); *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

[12] *See Yoder v. Wisconsin,* 406 U.S. 205 (1972); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

[13] *See Miller v. California,* 413 U.S. 15 (1973).

[14] *See Buckley v. Valeo,* 424 U.S. 1 (1976).

[15] *See McCleskey v. Kemp*, 481 U.S. 279 (1987); *Gregg v. Georgia,* 428 U.S. 153 (1976); *Furman v. Georgia,* 408 U.S. 238 (1972).

[16] *Beer v. United States,* 425 U.S. 130 (1976).

[17] *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1975%20term/73-1869.jpg.

[18] Ryan C. Black, et al., *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions during Oral Argument*. 43 Journal of Supreme Court History 83 (2018).

[19] *United States v. Miller*, 425 U.S. 435 (1976). *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1975%20term/74-1179.jpg.

[20] *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 Northwestern University Law Review 1483, 1505–06 (2007); Ryan Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 Journal of Politics 2 (2012).

[21] In fact, Blackmun made no reference in any of the four cases argued that day. Perhaps this was because of his concerns about the future of *Roe*. As Greenhouse observes, "Nonetheless, Blackmun was wary of his newest colleague especially in light of Reagan's strong antiabortion stance in the 1980 presidential campaign." Greenhouse**, Becoming Justice Blackmun**, pp. 142.

[22] *Common Cause v. Schmitt*, 455 U.S. 129 (1982). *See* http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1981%20term/80-847,%2080-1067.jpg.

[23] 458 U.S. 119 (1982).

[24] *See* Joan Biskupic, **Sandra Day O'Connor: How the First Woman on the U.S. Supreme Court Became Its Most Influential Justice** (New York: Harper Collins, 2006); *see also* Abigail Perkiss, *A Look Back at Justice Sandra Day O'Connor's Court Legacy*, National Constitution Center Constitution Daily (July 1, 2018), accessed at https://constitutioncenter.org/blog/a-look-back-at-justice-sandra-day-oconnors-court-legacy.

[25] *Hodel v. Irving,* 481 U.S. 704 (1987).

[26] 481 U.S. 465 (1987). *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1986%20term/85-1180.jpg.

[27] *See* Pamela Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 122 Dickinson Law Review 297, 299 n.13 (2017).

[28] *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354 (1988). *See* http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1987%20term/86-1970.jpg.

[29] *Immigration and Naturalization Service v. Jairo Jonathan Elias-Zacarias*, 502 U.S. 478 (1992). *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1342.jpg.

[30] *Molzof v. United States,* 502 U.S. 301 (1992).

[31] Blackmun taught at the St. Paul College of Law from 1935 to 1941 and then at the University of Minnesota Law School from 1945 to 1947. His diary entries suggest that he enjoyed being an adjunct faculty member. In 1945, the dean at the University of Minnesota Law School tried to persuade Blackmun to become a full-time faculty member. He said he had always found the prospect of teaching law appealing but ultimately declined. *See* Tinsley Yarbrough, **Harry A. Blackmun:**

The Outsider Justice (New York: Oxford Univ. Press, 2007), pp. 54.

[32] The idea that this scale is 0-8 is based on the sample of cases used in an analysis of these grades by Johnson et al., *The Evaluation of Oral Arguments*, pp. 104. Our analysis is based on every grade Blackmun gave. There were two instances where an attorney earned a "9" both in the 1977 term. The first was Louis Loss, William Nelson Cromwell professor of Law at Harvard (who taught the likes of Ruth Bader Ginsburg, Antonin Scalia, Anthony Kennedy, and David Souter). The second was Solicitor General Wade H. McCree, who became the Lewis M. Simes Professor of Law at the University of Michigan until his death.

[33] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 104.

[34] *Rust v. Sullivan,* 500 U.S. 173 (1991).

[35] Our data indicate that fewer than fifteen percent of all attorneys earned such a grade.

[36] *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979).

[37] *Common Cause v. Schmitt,* 455 U.S. 129 (1982).

[38] 458 U.S. 670 (1982).

[39] Blackmun often used a set of cryptic abbreviations in his notes. Here, the t is short for "the." Thus, the note reads, "He makes the most of a thin, tough case." Of the other attorney in the case, Susan Smathers, Blackmun notes that "[s]he hangs in there."

[40] 452 U.S. 666 (1981).

[41] *See* http://users.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1980%20term/80-544.JPG.

[42] 455 U.S. 478 (1982).

[43] 509 U.S. 389 (1993).

[44] 430 U.S. 550 (1977).

[45] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 110.

[46] *See* Johnson et al., *The Evaluation of Oral Arguments*, pp. 110.

[47] William H. Rehnquist, **The Supreme Court** (New York: Vintage Books 2001), pp. 243.

[48] Eve M. Ringsmuth et al., *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 Political Research Quarterly 2 (2013).

[49] 404 U.S. 157 (1971).

[50] Included in his shorthand notations Blackmun's used a "+" sign to indicate affirmance of the lower court opinion and B/4 means "before."

[51] *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984).

[52] *Ford Motor Co. v. Equal Employment Opportunity Commission,* 458 U.S. 219 (1982).

[53] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[54] 407 U.S. 67 (1972).

[55] 481 U.S. 69 (1987).

[56] "Hastings" refers to U.C. Hastings Law School and Jim Brudney refers to one of Blackmun's former clerks.

[57] 406 U.S. 482 (1972).

[58] 489 U.S. 101 (1989).

[59] 500 U.S. 305 (1991).

[60] 430 U.S. 199 (1977).

[61] *See* Johnson et al., *The Evaluation of Oral Argument*, pp. 109. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 Journal of Politics 1 (1995); Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?*, 41 Law & Society Review 2 (2007).

[62] 91 U.S. 397 (1989).

[63] "SMU" is Southern Methodist University.

[64] 500 U.S. 136 (*1991*).

[65] "Colum" is, of course, Columbia Law School.

[66] 488 U.S. 319 (1989).

[67] 489 U.S. 493 (1989).

[68] 407 U.S. 371 (1972). The note to son of Wiley refers to former Justice Wiley Rutledge. Blackmun ultimately wrote "yes" next to this parenthetical.

[69] 412 U.S. 783 (1973).

[70] *Pension Benefit Guaranty Corporation v. LTV Corporation,* 496 U.S. 633 (1990).

[71] *Saffle v. Parks,* 494 U.S. 484 (1990).

[72] *City of Riverside v. Rivera,* 477 U.S. 561 (1986).

[73] 491 U.S. 263 (1989).

[74] "SOC" is Justice Sandra Day O'Connor.

[75] 499 U.S. 187 (1991).

[76] "WHR" is Justice William Hubbs Rehnquist. "WJB" is William Joseph Brennan, Jr.

[77] *See* Johnson et al., *The Evaluation of Oral Arguments*. pp. 109. Kevin T. McGuire, *Lawyers and the US Supreme Court: The Washington Community of Legal Elites*, 37 American Journal of Political Science 2 (1993).

[78] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 Loyola Law Review 331 (2009); Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the US Supreme Court?*, 29 Washington University Journal of Law & Policy 241 (2009); Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 Washington University Law Review 457 (2007).

[79] *See generally* Timothy Johnson, **Oral Arguments and Supreme Court Decision Making** (New York: SUNY Press 2004).

[80] 510 U.S. 17 (1993).

[81] Note that Blackmun used shorthand names for his colleagues. *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Johnson et al., *The Evaluation of Oral Arguments.* He typically used a colleague's last initial, as he did for Ruth Bader Ginsburg. However, in 1993 there were three Justices whose last name began with S (Scalia, Stevens, and Souter). Blackmun used the initial for Antonin Scalia's nickname—N for Nino. Because John Paul Stevens had the longest, he earned the S as his initial from Blackmun. However, until Potter Stewart left the bench, Blackmun referred to Stevens as V, as Stewart held the initial S. Finally, he used D to demarcate notes about David Souter.

[82] *See* http://www.polisci.umn.edu/~tjohnson/MEMOSfromOA-75percent/1993-10-13.jpg.

[83] 511 U.S. 244 (1994).

[84] 482 U.S. 578 (1987).

[85] 503 U.S. 291 (1992).

[86] Of course, "JPS" is John Paul Stevens.

[87] 512 U.S. 452 (1994).

[88] "SOC" is Justice Sandra Day O'Connor.

[89] *See* Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 Journal of Politics 2 (2011); Sarah Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions during Oral Argument*, 6 Journal of Appellate Practice and Process 271 (2004).

[90] *See* Kevin Merida & Michael A. Fletcher, *Thomas v. Blackmun*, Washington Post (Oct. 10, 2004), https://www.washingtonpost.com/archive/politics/2004/10/10/thomas-v-blackmun/dc5f2164-da58-4d44-8705-1f01b59f24f8/?utm_term=.dc36281acf45.

[91] *See* Ron Nell A. Jones & Aaron L. Nielson, *Clarence Thomas the Questioner*, 111 Northwestern University Law Review 4 (2007).

[92] 503 U.S. 115 (1992).

[93] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Again, the shorthand, written in full, would read "Thomas asks his first question of the Fall."

[94] *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994).

[95] Portions of this section draw on Ryan C. Black et al., **Oral Arguments and Coalition Formation**, pp. 89-92.

[96] *See* Johnson et al., *Can Justices Predict Case Outcomes at Oral Arguments?,* paper presented to American Political Science Association, Washington D.C., 2010.

[97] 493 U.S. 265 (1990).

[98] Because there was another Justice whose last name began with the letter "B" (Brennan) Blackmun refers to himself with the letter "X." He did this throughout much of his tenure as at least one other Justice had a "B" name as well—Justice Hugo Black.

[99] 497 U.S. 261 (1990).

[100] For another example where he predicted every vote correctly, see *Bd. of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237 (1991). He did, however, originally express uncertainty about White before correctly predicting his vote.

[101] 467 U.S. 914 (1984).

[102] In *Tower v. Glover*, the case originated when Billy Irl Glover was arrested on robbery charges and subsequently convicted at trial in Oregon. He later filed and lost an appeal in state court. Glover also filed an action in federal court alleging that Bruce Tower and Gary Babcock, his public defenders at trial and on appeal, respectively, conspired with state officials to secure his conviction. The Federal District Court dismissed the action, citing precedent that suggested public defenders were absolutely immune. The Ninth Circuit later reversed the District Court's decision, citing different precedent. The Supreme Court was left with the question of whether public defenders were immune from liability for intentional misconduct. The Supreme Court ultimately affirmed the Ninth circuit and ruled that state public defenders are not immune from liability for conspiring with state officials to deny a plaintiff's constitutional rights.

[103] 501 U.S. 560 (1991).

[104] 502 U.S. 244 (1992).

[105] 448 U.S. 358 (1980).

[106] 448 U.S. 297 (1980).

[107] *See generally* Ryan C. Black et al., **Oral Arguments and Coalition Formation**; Shullman, *The Illusion of Devil's Advocacy.*

[108] *See* Ryan C. Black et al., **Oral Arguments and Coalition Formation**, pp. 109.

[109] *See generally* Harold J Spaeth & Jeffrey A. Segal, **The Supreme Court and the Attitudinal Model**. (Cambridge Univ. Press 1993).

[110] 456 U.S. 25 (1982).

[111] 451 U.S. 477 (1981).

[112] *Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993).

[113] 487 U.S. 81 (*1988*).

[114] 430 U.S. 519 (1977).

[115] *United States v. Hasting,* 461 U.S. 499 (1983).

[116] *United States v. Doe,* 465 U.S. 605 (1984).

[117] 507 U.S. 447 (1993).

[118] *See generally* Greenhouse, **Becoming Justice Blackmun**.

[119] *Melkonyan v. Sullivan,* 501 U.S. 89 (1991).

[120] *Ford Motor Co. v. National Labor Relations Board,* 441 U.S. 488 (1979).

[121] *North Dakota v. United States,* 495 U.S. 423 (1990).

[122] *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990).

[123] 502 U.S. 367 (1992).

[124] 414 U.S. 44 (1973).
[125] *See* "Notes Exchanged between Justices during Court Proceedings," Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Box 116.
[126] 406 U.S. 535 (1972).
[127] *See* Ryan C. Black et al., *Chief Justice Burger and the Bench*.
[128] 405 U.S. 669 (1972).
[129] *Cole v. Richardson,* 405 U.S. 676 (1972).
[130] *Lalli v. Lalli,* 439 U.S. 259 (1978).
[131] *United States v. MacDonald*, 456 U.S. 1 (1982).
[132] *New York v. Quarles,* 467 U.S. 649 (1984).
[133] *Board of Education of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687 (1994).
[134] *U.S. Postal Service v. Greenburgh Civic Assns.,* 453 U.S. 114 (1981).
[135] 429 U.S. 624 (1977).
[136] 415 U.S. 250 (1974).
[137] 428 U.S. 579 (1976).
[138] 450 U.S. 381 (1981).
[139] Although it is unclear whether Blackmun held stock in IBM, he did recuse himself from numerous other cases because of a financial conflict of interest. *See* https://www.nytimes.com/1971/11/19/archives/justice-blackmun-sells-stocks-reenters-3-cases-before-court.html.
[140] 468 U.S. 609 (1984).
[141] 457 U.S. 423 (1982).
[142] 481 U.S. 497 (1987).
[143] The shorthand, written in full, would read "My hearing aid has gone out."
[144] 507 U.S. 146 (1993).
[145] *Liteky v. United States,* 510 U.S. 540 (1994).
[146] *Furniture Moving Drivers v. Crowley,* 467 U.S. 526 (1984).
[147] *Reiter v. Cooper*, 507 U.S. 258 (1993).
[148] *Vermont v. Cox,* 484 U.S. 173 (1987).
[149] 508 U.S. 248 (1993).
[150] *Furniture Moving Drivers v. Crowley,* 467 U.S. 526 (1984).
[151] 507 U.S. 761 (1993).
[152] 505 U.S. 277 (1992).
[153] *Webster v. Doe*, 486 U.S. 592 (1988).
[154] *Penry v. Lynaugh,* 492 U.S. 302 (1989).
[155] 485 U.S. 46 (1988).
[156] 506 U.S. 19 (1992).
[157] 414 U.S. 453 (1974).
[158] 475 U.S. 106 (1986).
[159] 480 U.S. 149 (1987).
[160] 402 U.S. 1 (1971).
[161] 511 U.S. 368 (1994).
[162] 508 U.S. 491 (1993).
[163] *Commissioner of Internal Revenue v. Soliman*, 506 U.S. 168 (1993).
[164] 509 U.S. 137 (1993).
[165] *See* Corley et al., *Does Quality Matter? Briefs versus Oral Arguments,* paper presented to Southern Political Science Association San Juan., 2020. Using Blackmun's oral argument grades, Corley and her colleague find that when the appellant's attorney is better than the appellee's attorney, the probability the Justice will vote for the appellant is .863 and this probability decreases to .247 when the appellee's attorney is better. This means that the quality of oral argument is statistically significant.
[166] *See* Glen Elsasser, *Courting Justice*, Chi. Tribune (June 6, 1990), https://www.chicagotribune.com/news/ct-xpm-1990-06-06-9002150974-story.html.