

Recusal Refusal and Reform: Disqualification Decisions of U.S. Supreme Court Justices

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Abstract

Like other jurists, justices on the United States Supreme Court face the potential for conflicts of interest and biases with regard to the parties appearing before them.

However, unlike other judges, the Court recognizes the individual justice at issue as the final authority on whether to sit in a case. Critics of the Court's recusal policy argue that allowing justices the final say in their own disqualification fails to prevent the appearance of impartiality and propose review by the full Court as a reform. In this paper, I test the contention that justices' recusal decisions are influenced by strategic and self-regarding considerations with data from the Rehnquist Court. The results indicate that the legal grounds for disqualification have significant effects on incidences of non-participation, but recusal decisions exhibit substantial evidence of opportunistic and ideological behavior that call into question the usefulness of the most popular reform. Efforts to address the problems raised by recusal will require some institutional creativity on the part of Congress or the Court itself.

During the 2003 term of the U.S. Supreme Court, controversy arose over the decision of Justice Antonin Scalia to sit for the Court's disposition of *Cheney v U.S. District Court for the District of Columbia*.¹ The public, high profile nature of the controversy was sparked by a request for Scalia's recusal from the Sierra Club, one of the parties to the underlying litigation over the influence of energy industry members within the Vice President's task force on energy policy. The Sierra Club's request drew attention to the personal friendship between the Vice President and Scalia and particularly to Scalia's decision to accompany Cheney on a duck-hunting trip after the Court agreed to hear the case.² Contributing to the public attention over Scalia's denial of the request was his decision to recuse himself from the Pledge of Allegiance case, *Elk Grove Unified School District v. Newdow*³ due to a public speech he had given opining on the 9th Circuit's decision. Also, Scalia issued a memorandum, over 20 pages in length, defending his decision to sit in the *Cheney* case.⁴

Although Scalia's decisions to sit or not to sit in these individual cases was interesting itself, one of the most compelling issues raised by these choices is the Supreme Court's traditional practice of recognizing the individual justice to whom a recusal motion is directed as the final authority on whether recusal is warranted (Mauro 2004). To many observers, it made little sense that an actor whose impartiality is in

¹ 124 S.Ct. 2576 (2004).

² Sierra Club, Motion to Recuse, Supreme Court docket No. 03-475

³ 124 S.Ct. 2301 (2004)

⁴ 541 U.S. ____ (2004). During the same term, questions of impartiality were raised about Justice Ruth Bader Ginsburg's association with the National Association for Women (Serrano and Savage 2004). Legal scholars have also raised questions about the propriety of certain justices' participation in *Bush v Gore*, 531 U.S. 98 (2000), another recent, high-profile case. See generally Ifill (2002).

question should decide without review whether that question is reasonable. Moreover, these incidents publicized the fact that safeguards of judicial impartiality in the federal system are applied differently, some would say incompletely, to the Supreme Court. As a consequence, reform proposals made a brief appearance in national news and editorials. However, reform measures must be considered carefully and adopted only if they are likely to have beneficial effects without causing more problems than they resolve.

Despite the potential for unreviewable discretion represented by the individual recusal decisions of justices, political scientists have had almost nothing to say about the subject to date. Black and Epstein (2005) write that a search of a prominent database of political science research finds not a single article on judicial recusal, despite the concerns raised by it. In this paper, I seek to begin the analysis of Supreme Court recusal decisions with a study of justices on the Rehnquist Court, paying specific attention to the potential for internal strategic considerations influencing the patterns of recusal among the justices. If recusal patterns tend to favor participation in closely decided cases, it lends support to the notion that justices might not be able to evaluate the propriety of their participation with an impartial eye. Evidence that justices behave strategically in recusal, as they have been found to do in other preliminary decisions, calls into question the utility of the most popular reform proposal, however.

Recusal Reform and the Institution of the Supreme Court

Disqualification⁵ of Supreme Court justices raises special problems. Unlike the circuit or district courts, there is no resource or mechanism available to replace a justice recused from a particular decision. As declared in a Statement of Recusal Policy issued

⁵ Although “disqualification” and “recusal” within the judiciary are not entirely overlapping concepts, I will use both terms in this article interchangeably to describe decisions not to sit in individual cases.

by seven of the sitting justices in 1993, and quoted by Scalia in his *Cheney* memo, “[e]ven one unnecessary recusal impairs the functioning of the Court” (Ginsburg, et al.). An overly cautious recusal policy may allow parties to manufacture disqualification grounds in order to shape the Court they wish to hear their cases. Thus, the important values of maintaining impartiality for parties appearing before the Court and public faith in the judiciary must be balanced carefully against the possibility of new problems a reform proposal might create.

Reform proposals themselves are quite limited. As the highest court in the judicial hierarchy and the head of a constitutionally established branch of government, there is no natural external forum to hear appeals from justices’ decisions not to recuse. Law professor Jeffrey W. Stempel has proposed that parties requesting the disqualification of a Supreme Court justice should be able to ask the remaining justices for de novo review of a decision not to recuse (Stempel 1987). His proposal comes after considering and rejecting alternatives, such as review of disqualification by a special external body or by judges on the DC Circuit Court of Appeals, due to procedural and constitutional defects (Stempel 1987, 654-5).

This proposal was also raised during the *Cheney* controversy. Steven Lubet, a law professor specializing in judicial ethics, told a reporter that a decision in favor of Scalia’s impartiality “would have been more reassuring if the identical opinion had come from the full court” (Biscupic 2004). Alan Morrison, representing the Sierra Club in the *Cheney* case, argued that the Court had the power to act if Scalia declined to disqualify himself and indicated that he would seek the full Court’s review (Mauro 2004). Finally, ranking Democratic member of the House Judiciary Committee John Conyers, in letters

to Chief Justice Rehnquist and relevant committee chairmen, requested that the Court and the House consider procedures for review of justices' recusal decisions (Waxman and Conyers 2004; Conyers and Berman 2004).

Permitting the whole Court to consider a recusal request when the individual justice declines to recuse is of questionable value, however. Strategic voting by the justices is one concern. Previous research by political scientists has demonstrated the tendency of justices to vote strategically, especially at stages prior to the final decision (Benesh, Brenner and Spaeth 2002; Boucher and Segal 1995; Caldeira, Wright and Zorn 1999). Strategic voting is also possible at a recusal stage if justices can collectively exclude colleagues from a decision on which they are likely to disagree. In such circumstances reform might exacerbate rather than remedy the problem of impartiality.

Alternatively, justices may be disinclined to second-guess the conclusions of their brethren with regard to impartiality, meaning that the reform will have no substantive effect. Anecdotal evidence suggests that justices are unlikely to police the ethics of their colleagues effectively. Stempel discusses instances in which it appears that unofficial consultation with other justices has prevented recusals in questionable circumstances (1987, 641-2, 654-6). Rehnquist recently issued a memo to accompany the Court's denial of certiorari in *Microsoft v United States*, declining to recuse himself after consultation with colleagues.⁶ Justice Stevens has revealed that consultation with other justices dissuaded him from recusing himself in *Grutter v Bollinger*⁷ (Lane 2004).

⁶ 530 U.S. 1301 (2000). Rehnquist's son represented Microsoft at the time in a private antitrust case separate from the matter then before the Court.

⁷ 593 U.S. 306 (2003). A former law clerk of Stevens' had been dean of the University of Michigan law school at the time the affirmative action policy in dispute had been adopted.

Before committing to a reform that could allow justices to manipulate their membership on individual cases or permit the whole Court to provide cover for individual justices' decisions to participate in cases they should sit out, we should substantiate that the patterns of justices' recusal behavior indicate problems. The practical significance of an incautious recusal decision is magnified if the justices' participation determines the outcome of the decision, although this might be a circumstance where justices are less likely to recuse. Also, if justices consciously or unconsciously exercise less caution in their recusal decisions, choosing to err on the side of participation rather than non-participation, when they perceive recusal suggestions to be based on their judicial perspective, then the case for reform of Supreme Court recusal practice is strengthened.

The internal dynamics of the Court create the potential for other influences on justices' individual recusal behavior. Justices are usually perceived by observers and may tend to perceive themselves as belonging to one or another "wing" or "block" within the Court based on judicial philosophy or ideology. In fact, concern that litigants will attempt to use disqualification to shape the Court favorably to their case stems from the assumption that certain justices' votes can be predicted accurately from previous knowledge of their predilections.⁸ This concern may lead justices identified as especially "ideological" to perceive questions about their impartiality as objections to their established judicial philosophy. In another memo defending a non-recusal, Rehnquist

⁸ On the predictability of justices' votes, see the Symposium, "Forecasting U.S. Supreme Court Decisions" in *Perspectives on Politics*.

suggested that the motion to recuse in the case was motivated by a desire by the movants to exclude him because they knew his position on the merit of their legal claims.⁹

Federal Law and Supreme Court Recusal

Three sections of U.S. Code Title 28 deal with the disqualification of federal court judges. The first, § 47, is of limited scope and applicability, but directed specifically at appellate court judges and prohibits a judge from hearing or determining an appeal tried by the judge in question. Comparatively easy to apply, this section merely ensures that the same individual whose work is being reviewed does not participate in the appeal. The second section, 144, provides for the replacement of district court judges upon filing of an affidavit establishing personal bias on the part of the judge against the moving party or in favor of an adverse party. Although the section is limited explicitly to district court judges, rejection of disqualification can be appealed to the circuit and the Supreme Court. The language of these sections dates back substantially unchanged to 1911 (Federal Judicial Center [hereafter FJC] 2002; Stempel 1987).

The third section dealing with judicial disqualification, § 455, applies by its language to justices as well as lower court judges and is of much more general application than § 47. The most recent revision of § 455 was in 1974 and was intended to address several perceived defects in the previous statute governing judicial disqualification. Among the changes made to the law was the inclusion of the “reasonable question of impartiality” standard, which replaced the inherently subjective language that required recusal only when the judge’s situation rendered it improper “in

⁹ *Laird v Tatum*, 409 U.S. 824, 833-834 (1972); then-Associate Justice Rehnquist’s participation was challenged upon motion for rehearing because he had served as head of the Office of Legal Counsel at the time the domestic surveillance program in dispute had been devised and implemented. The Court, by a 5-4 vote, ruled that the plaintiffs lacked standing to challenge the program. See Stempel 1987, 591-593.

his opinion” to sit (FJC 2002, 2). Specifically, 25 U.S.C. § 455(a) states that “(a)ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

The next portion of the statute, § 455(b), elaborates on circumstances in which impartiality is certainly in question, requiring recusal. Although this section overlaps considerably with the circumstances contemplated by § 455(a), it provides a separate and more inflexible standard for recusals. Much of the section codifies customary definitions of disqualifying situations, such as cases in which the judge has a personal bias or knowledge, practiced law with one of the attorneys, or served as counsel in government employment with regard to the proceeding. Subsection 3 requires recusal if the judge has “expressed an opinion concerning the merits of the particular case in controversy,” which seems to cover Scalia’s recusal in the *Newdow* case. Section 455(b) also offers specific definitions of what constitutes a material interest of consequence, and the degree of familiarity within which spousal or personal interests implicate impartiality.

Several rules or doctrines of the recusal standards result from judicial interpretation. A “judicial ‘gloss’ on section 455” known as the “duty to sit” doctrine holds that in the interest of judicial efficiency and to discourage use of recusal motions by litigants to “judge shop,” judges should resolve close disqualification decisions against recusal (FJC 2002; Stempel 1987). The 1974 revision of § 455 has been widely, but not universally interpreted to eliminate the duty to sit doctrine (Stempel 1987; Bassett 2002). Another judge-made rule construing disqualification standards is the “extrajudicial source” doctrine (FJC 2000, 20-25). This doctrine requires in almost all circumstances that evidence of impartiality must arise from a source external not only to the proceedings

of the case at hand, but separate also from previous judicial activity, so as to protect judges from disqualification based on prior rulings on the issues at stake in a case.

Stempel refers to the practice of deferring final disposition of disqualification motions to the justice to whom the request is being made as “an almost unique illustration in American government of substantive law without force when applied to a certain institution” due to the standard’s lack of enforcement power or any procedural guarantee of neutral application (1987, 642). With the highly public nature of the *Cheney* controversy, interest in reform of judicial disqualification rules appears to be rising, but such reforms should only be made if the problems they would address are sufficiently serious. A stronger case for reform can be made if justices’ recusal decisions appear to be influenced in some way by the impact the absent justice will have on the outcome of the case or by the ideological position of the justices within the Court.

A Model of Supreme Court Justices’ Recusal Decisions

Like the disqualification standards, systematic study of justices’ recusal behavior presents several difficulties. Despite occasional statements on the matter such as those discussed above, the justices rarely comment upon or even take official notice of recusals. A study by *Legal Times* in 2004 intended to measure the extent of recusal on the Supreme Court did so by conducting a Lexis-Nexis search and counting appearances of the phrase “took no part” in relation to a justice (Mauro 2004). Between them, the justices on the Court during the 2003 term registered 2,816 career recusals.¹⁰ O’Connor had the largest number overall with 675, but Stephen Breyer had the highest rate, with an average of 42 per year.

In some cases, a speculative explanation of mysterious non-participation may arise from financial disclosure forms, but in most cases only the phrase above surfaces to mark a recusal. Stempel makes note of “the low use and success rate of recusal motions” (1987, 642) within the Supreme Court and Ifill indicates that parties are reluctant to request disqualification for fear of impugning a Justice’s “ability to evaluate issues objectively” (2002, 623). The *Journal of the Supreme Court of the United States*, which publishes the minutes of the Court, records only two recusal motions received by the Court in the last twelve terms, although media reports indicate that several others have been filed in that period.¹¹ This casts into doubt the most likely source, outside of the justices’ papers themselves, for determining when recusal requests are filed.

Nevertheless, certain patterns can be detected in recusal behaviors. The grounds for recusal in 28 U.S.C. § 455(b) provide circumstances where disqualification is required *per se* and are undoubtedly easier to apply than the more flexible, reasonable person standard of § 455(a). Cases directly involving family members or companies in which the justice has investments account for many recusals, according to Court watchers (Mauro 2004). Justices often recuse in their first terms on the bench due to financial holdings that they have not yet distanced themselves from or due to rare §47 conflicts, when cases they may have participated in are heard. Justices may also disqualify themselves from merits decisions in cases heard before their confirmation, reasoning that they should not vote in cases without having fully participated.

¹⁰ Lubet (1996, 659) conducted a Lexis search covering the period from 1992 to May 30, 1995 and found 376 instances in which one or more justices “took no part.” This averages to roughly 125 recusals per term including certiorari petitions and opinions as well as other applications and motions.

¹¹ In the 2003 term, the Journal records receipt of the motion to recuse from the Sierra Club in the *Cheney* case, but contains no indication of the “suggestion of recusal” Michael Newdow filed (Mauro 2004).

The preceding patterns all conform to expected behaviors of justices and are consistent with the recusal standards found in 28 U.S.C. § 455. An additional set of factors that might affect recusal decisions can also be identified. Certain cases may be more or less salient, inducing greater or less circumspection in recusal decisions. Political or legal salience may raise the profile of a case, causing justices to be more circumspect in their recusal behavior, or justices may seek not to recuse so that they can participate in more interesting or consequential cases.

The justices' institutional setting may also produce influences on their recusal behavior. As a collegial court, Supreme Court justices decide cases collectively and a majority is necessary to disturb a lower court ruling or to create binding law for the lower courts. This may lead justices to recuse less readily when they anticipate that a case will divide the remaining justices, particularly since there is no way to replace a disqualified justice. Justices Rehnquist and Scalia in their memos addressing the *Laird*, *Microsoft* and *Cheney* cases each referred to the fear of an equally divided Court, "unable to resolve the significant legal issue presented by the case."¹² The argument evokes the "duty to sit" doctrine, despite evidence that Congress sought to abolish it in 1974. It is important to keep in mind, however, that the "duty to sit" doctrine is a general rule and does not explicitly contemplate outcome prediction.¹³ In other words, even though it is motivated by the possibility that a recusal may result in an evenly-divided Court, no formulation of

¹² 541 U.S. ____, 3 (2004). Justice Ginsburg echoes this language (Ginsburg 2000, 1038). Justices arguing that the possibility of an equally divided Court supports deciding close cases against recusal have not addressed the implicit concern that a justice's suspect participation in a case is more problematic when the practical consequences of participating are to decide the immediate case and legal issues under questionable circumstances.

¹³ During the 2004 term, Chief Justice Rehnquist could not attend oral argument in 12 cases and resolved to vote in these cases on the briefs only if his vote was necessary to avoid a tie (Lane 2004). This decision also does not contemplate outcome prediction, however, and did not concern an allegation of bias or conflict of interest.

the “duty to sit” doctrine proposes that judges should act on their personal prediction of the likelihood that the remaining justices would divide evenly. Thus, if the doctrine has been retained, it should operate just as strongly in unanimous and near-unanimous cases as in close cases.

Justices may favor non-recusal in cases likely to be close for strategic reasons. Justices have been shown to engage in outcome prediction in cert voting (Benesh, Brenner and Spaeth 2002; Caldeira, Wright and Zorn 1999) and we can easily extend the expectation to disqualification decisions. Evidence that justices do engage in outcome prediction and act on their predictions in order to participate in closely decided cases would provide significant support to a need for recusal reform, since it seems even more important that justices not sit in cases inappropriately if their participation determines the outcome. However, it also suggests that the reform proposal, allowing review by the rest of the Court, might compound rather than solve the problem.

A separate concern following from the collegial setting of justices’ decision-making relates to the distribution of preferences on the Court. In his *Laird v Tatum* memo, Rehnquist asserted that the litigants requesting his recusal “would much prefer to argue (their) case before a Court none of whose members had expressed the views that I expressed” about the subject matter at issue.¹⁴ Rehnquist’s characterization of the recusal request in *Laird* suggests that justices whose legal philosophies are known and whose votes are more easily predicted might feel targeted for and resist disqualification pressures, formal and informal. The suspicion that recusal pressures may result from knowledge of how a judge is likely to vote on the merits in a case suggests, but does not actually implicate, the “extrajudicial source” doctrine.

The presence of specific grounds for recusal undoubtedly affects the decisions of individual justices (see Stempel 1987, 642 esp. note 202). Despite the lack of record most disqualifications produce, journalists and court-watchers have unearthed many examples of justices promptly declining to participate in cases once a clear conflict comes to their attention and many justices have developed means to keep themselves aware of potential conflicts.¹⁵ However, incorporation of case-specific sources of conflict into a quantitative statistical analysis of recusal decisions awaits close consideration of the papers of the justices themselves.

For the purposes of this analysis, I am only interested in whether extralegal factors influence recusal decisions. To produce unbiased estimates of the relationship between these factors and recusal in a quantitative analysis, I need only assume that the appearance of specific grounds for recusal do not correlate systematically with the predictors in the model. In other words, I must assume that the occurrence of meritorious grounds for recusal due to familial, material and professional associations are random in relation to the extralegal covariates.

The dependent variable for the statistical model is the decision of an individual justice to participate in a case. The first three hypotheses relate to statutory conflicts:

H₁ Justices are more likely to recuse in cases originating in a state within which they have professional or personal ties.

H₂ Justices are more likely to recuse in their initial term on the Court.

H₃ Justices are more likely to recuse in cases that feature a business or corporate party.

¹⁴ *Laird v Tatum*, 409 U.S. 824, 833-834 (1972)

¹⁵ The statement of recusal policy issued by seven justices in 1993 accompanied a procedure devised by the justices for firms employing their children to notify them of any involvement with business before the Court.

As indicated above, the recusal statutes specify that personal and financial relationships are clear grounds for disqualification. These kinds of conflicts have been observed to occur more frequently in cases arising from areas where the justice has ties or early in their tenure. Conflicts are also more likely to arise in cases with corporate parties.

The following hypotheses relate to the influence of salience on the justices:

H₄ Justices are less likely to recuse in cases that feature formal alterations of precedent.

H₅ Justices are less likely to recuse in cases that feature a declaration of unconstitutionality.

Although neither of these outcomes is entirely predictable before the outcome of the case, justices should have some notice that abandonment of a precedent or the overturn of a statute are at stake from the petition.

The last set of hypotheses involves possible strategic or self-interested intracourt influences on justices' behavior.

H₆ Justices are more likely to recuse as the vote margin of the case increases.

H₇ Justices are less likely to recuse as their distance from the Court median increases.

Hypothesis 6 represents the belief that justices will resolve otherwise equivalent recusal decisions against disqualification if they anticipate that the case will divide the other justices. As noted above, even though the motivation to provide a potentially deciding vote evokes the duty to sit, deciding against recusal more frequently in close cases implicates strategic concerns not contemplated by that doctrine.

Hypothesis 7 reflects the suspicion that justices farther from the ideological center of the Court are more likely to resist recusal concerns as objections to their legal attitudes. Rehnquist raised the issue explicitly in his *Laird* memo and the judicially

created doctrine requiring an “extrajudicial source” generalizes the concern that parties will attempt to establish impartiality through judges’ votes and opinions. Scalia’s lengthy critique of media coverage in his *Cheney* memo bears some resemblance to the “hostile media effect” found by political scientists and social psychologists (Dalton, et al. 1992).¹⁶ This is the common perception of partisans that the media is biased against their own point of view or preference. Some scholars believe this phenomenon is related to “disconfirmation bias” (Ditto and Lopez 1992; Edwards and Smith 1996).

Data and Methods

This study of current patterns of recusal decisions on the Supreme Court is confined to justices sitting on the Rehnquist Court from the 1986 to 2002 term. The participation data are drawn from the Spaeth Original U.S. Supreme Court database, using case citation as the unit of analysis.¹⁷ Justices’ recusals are identified as cases in which the justice is recorded as not participating (Justices’ vote coded as 5). Following the strategy of the *Legal Times* study, I consulted Lexis-Nexis to confirm that the justices coded as not participating in the cases in question were identified with the “did not participate” or “took no part” language.

Converting the unit of analysis from the case to the individual justice, the basic dataset constitutes 16,772 participation choices. Table 1 presents the observation data for each justice, including the number of recusals, recusal decisions and the rate of recusal for each justice in the study. In order to secure covariate data, this study is confined to

¹⁶ 541 U.S. ___, 13-14, 17-19 (2004); Scalia went so far as to label “misleading” a description of Wallace Carline, who hosted the justice and Vice President on their trip, as an “energy industry executive.” Scalia describes Mr. Carline’s occupation as a man who “runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico” (ibid, 2). Of course, criticism directed by commentators at Scalia’s sincere articulation of his reasoning is hardly fair if this is a general effect.

¹⁷ $Analu = 0$ Dec_type $\sim= 3$; one variable was created with docket number as the unit of analysis, described below.

only those cases accepted for review in some capacity, thus the number of recusals recorded is substantially smaller than those discovered by *Legal Times* and Lubet.

[Table 1 about here]

The first set of covariates address statutory conflicts. An indicator variable identifies cases arising from states in which a particular justice had served previously or in which they had practiced law.¹⁸ Another variable is coded to capture a “freshman effect” in the first term served by each justice during the Rehnquist Court.¹⁹ Using the Spaeth Supreme Court database, cases including a litigant identified as a business were coded as such. The Spaeth data set also identifies cases featuring a declaration of unconstitutionality (of federal, state or local enactments as well as regulations) or a formal alteration of precedent. Two variables are included to identify these cases, which may be more salient in a legal or policy sense.²⁰

Critics of the Court’s recusal procedure raise concerns about strategic behavior. To capture one aspect of this concern, a vote margin variable is calculated by aggregating votes to affirm and reverse on the merits excluding the vote of the individual justice and taking the absolute difference between them.²¹ To address the possibility that the relationship between vote margin and recusal is nonlinear, I introduce a term squaring the margin variable.

¹⁸ I also included the Northern District of California as a “home state” for Justice Breyer, as his brother Charles sits as a judge in that district. Because one case citation can include multiple docket numbers for cases originating in different courts, I coded this variable before reducing the dataset to case citation, ensuring that a case consolidating several different actions below will reflect state data from every docket. Note that one justice may have more than one “home states” based on their previous experience.

¹⁹ Rehnquist was not coded as a freshman following his elevation to Chief due to his presence on the Court as an Associate. Alternative codings for freshman effects, including the first two and three years, produced substantively similar results but inferior likelihood ratio tests.

²⁰ Alternative specifications using the *New York Times* measure favored by Epstein and Segal (2000) or the traditional *CQ* list, either in addition to or in place of these variables, produce results substantively very similar to those reported below, but require dropping seven terms due to lack of data beyond 1995.

The ideological positions of the justices relative to the center are measured by calculating the absolute distance of an individual justice from the Court median, relying on the cardinal measures of Supreme Court ideology presented in Martin, Quinn and Epstein (2004). These authors use statistical analysis of a spatial voting model of Supreme Court decision-making to produce ideology scores for each justice in each term as well as identifying probabilistically the likely median for every term in the Rehnquist Court.²² Thus, the ideology scores of each justice and the median are dynamic, changing with every term, and five different justices were identified as the median at least once during this period.²³ The scale of the ideology scores is not meaningful, but realized distances ranged from zero (for the median justice) to 5.314.

The appropriate method to analyze this data must address several issues. The dependent variable is dichotomous, but highly unbalanced. Of the more than 16,000 observations, only 196 recusals are observed. Logit, the standard statistical model for dichotomous outcomes, is known to deal poorly with “rare events” or similarly unbalanced data. King and Zeng (2001) identify the bias associated with the rare events data, which plagues many political science problems such as international conflicts and presidential vetoes, and have implemented a correction for the logit model in Stata.²⁴

The standard assumption that observations are identically and independently distributed is inappropriate in this case because the recusal data are produced by a small number of actors. Table 1 demonstrates that the overall rates at which the justices recuse

²¹ Thus, the variable ranges from 0 for cases in which the justice in question would provide the deciding vote to 8 for cases decided unanimously or with only the given justice dissenting.

²² The Martin-Quinn approach (Martin and Quinn 2002) characterizes ideology as posterior probability distributions, rather than point estimates, but for use as variables in a maximum likelihood model, posterior modes are used as “ideology scores.”

²³ Powell, White, Souter, O’Connor and Kennedy

varies considerably, and any systematic causes of recusal behavior must control for underlying individual characteristics. To account for consistencies in the justices' behavior, I adopt a fixed effects approach (Long 1997). In essence, fixed effects models introduce subject-specific indicator variables to account for an underlying propensity of each subject toward the outcome. The primary alternative, random effects, partition the error into individual and unit specific components. Although fixed effects models use one degree of freedom for each subject and can thus be inefficient, they do not require any assumptions about the distribution of subject specific effects, as do random effects models. Also, random effects models are inconsistent if the unit-specific error components are correlated with the covariates, as is likely to be the case with data on individual justices. Fixed effects do not suffer from this problem and since the number of justices contributing vote data is comparatively small (14) and the number of decisions is large, efficiency concerns are minor.

Rather than suppressing the constant and estimating separate intercepts for each justice, one of the justices is designated as a baseline and dummy variables introduced for each of the other justices. Estimates for other coefficients are not affected by the strategy, but choosing a baseline justice permits the other justice-specific coefficients to be compared to that justice, rather than to an arbitrary baseline. Scalia was chosen as the baseline, in part because his behavior is of substantive interest, but more importantly because his rate of recusal is near the center of the fourteen justices in the study.

²⁴ An alternative method for dealing with rare events data, the complementary log-log model, produces almost identical results to those presented (See Long 1997).

Results

Results from a rare events logit model with fixed effects are presented in Table 2. Standard errors are robust and corrected for clustering on the individual justices. As the column of Z-scores demonstrates, all of the substantive variables are significant at conventional levels except for the salience measures. Although the unconditional likelihood of recusing in a given case is very small, the odds ratios reveal that cases with business parties, arriving from a state with which the justice has ties or during the justices' first term can lead the odds of recusal to increase by about one and a half, nearly two, or almost four times, respectively.

[Table 2 about here]

The fixed-effects approach allows us to examine the relative propensity of justices to recuse, controlling for the other covariates in the model. The justice-specific effects presented in Table 2 in order of descending magnitude are estimated adjustments to the intercept for the decisions of each justice with Scalia excluded as a baseline, so positive coefficients indicate that the justice has a higher penchant to recuse than Scalia and negative coefficients reflect the opposite. Scalia's propensity is reflected in the constant, which is negative and significant, although in comparison to an arbitrary zero point. The effects for six justices, Powell, Rehnquist, O'Connor, Souter, Ginsburg and Breyer, are not statistically significant and thus we cannot distinguish their underlying proclivity toward recusal from Scalia's.

However, the justice with the highest number and rate of recusals, Kennedy, falls near the middle of the distribution of individual effects controlling for other factors. By far, the largest positive effects are for Marshall and Brennan. Only one justice is

statistically less inclined to recusal than Scalia: Byron White. Fixed effects are intended to absorb unit-specific tendencies not captured by the other covariates and so it is difficult to make substantive inferences from these coefficients. The lack of significant differences between many of the justices suggests that many recusals are explainable in terms of the covariates. However, the powerful effects estimated for Brennan and especially Marshall might be explained by their efforts to wait out Republican control of the presidency before retirement, inducing random absences due to poor health. Unsurprisingly, no obvious ideological pattern emerges from the fixed effects.

Of more substantive interest, the vote margin and ideological distance are in the anticipated directions variables. Justices are less likely to recuse as the deciding margin in the case decreases and as they grow farther from the ideological center of the Court. The squared vote margin term produces a negative coefficient with an odds ratio just below one. Thus, as the vote margin grows larger, increases in the likelihood of recusal over an evenly divided case decline. Figure 1 presents a graph of the percentage change in the relative risk of recusal for increases in vote margin across its range (0 – 8) with other variables at their median values.

[Figure 1 about here]

The lower likelihood of recusal in cases dividing the remaining justices evenly or by one vote supports the concerns of reform proponents, as it appears that justices resist disqualification when their votes are most likely to determine the outcome of cases. The decline at values above five votes cannot be explained by this effect, however. This pattern might be explained by justices' motives if cases that are decided by wider margins are less controversial and occasion less concern for appearances of partiality, although

the Cheney case, ultimately decided 7-2, provides an obvious counterexample. Another possible explanation depends on the incidences of an unobserved factor: recusal motions. If parties file recusal motions strategically, as judge-made rules on disqualification implicitly assume, they are more likely to be observed as the predicted margin declines. Thus, the parabolic relationship in Figure 1 may result from strategic motion practices of litigants and strategic resistance by justices in close cases. Again, anecdotal evidence suggests otherwise, as recusal requests are said to be very rare.

The estimated relationship between ideological distance from the median and recusal, pictured in Figure 2, is more straightforward.²⁵ Justices further from the Court's center are less likely to recuse, holding other factors constant. Examination of recusal rates and the use of fixed effects discount the possibility that the effects are artifacts of an individual justice's behavior. Also, it is worth noting that the Martin-Quinn method identifies five different justices as the most likely median over the period of study. This relationship, consistent with H₇, suggests that justices whose policy preferences locate them at the ideological extremes of the Court are more resistant to disqualification than more centrist justices.

Conclusions

The results of this analysis hold much to confirm the conventional wisdom that predictable commonsense and statutory factors substantially influence the recusal decisions of Supreme Court justices. Cases originating in a state where a justice has served or practiced law or featuring a business litigant are significantly more likely to occasion a recusal. Justices are also more likely to recuse in their first term, all else equal. Justices also appear not to concern themselves with indicators of case salience, treating

cases altering precedent or featuring declarations of unconstitutionality as all other cases. However, substantial evidence of strategic or self-regarding behavior also surfaces. Justices are less likely to recuse when they might anticipate that the case will be decided by a close margin or if they are ideologically removed from the Court median.

The consequences of these findings for the most popular reform proposal are two-fold. The evidence supports the impression that justices at or near an ideological extreme are resistant to potential conflicts of interest, suggesting that a problem of partiality or bias may exist. However, permitting the full Court to review denied recusal motions might cause more problems than it solves if the justices engage in outcome prediction. Justices who decline to recuse in close cases when their votes will matter to the outcome may also use the opportunity to remove their colleagues from a case in an interested fashion. Also, contrary as the conclusion may be, justices who decline to recuse when the case will be close may benefit the Court by avoiding split vote cases.

At the very least, reform proponents should consider the possible consequences of any new procedure before seeking to impose it upon the Court. Another factor worth considering is that recusals are rare phenomena, although that itself might be due to some improper resistance to the practice. Also, the number of recusals affecting petitions, reflected in the *Legal Times* survey, is substantially greater than those affecting argued cases. Lubet (1996) discusses at length the not insignificant consequences of recusals for petitions. The evidence presented here provides some support for those who believe that the unreviewable discretion of justices with regard to recusal is a cognizable problem, but undermines the factual basis for the most prominent reform proposal.

²⁵ Adding a quadratic term did not significantly affect the results and the term was not significant.

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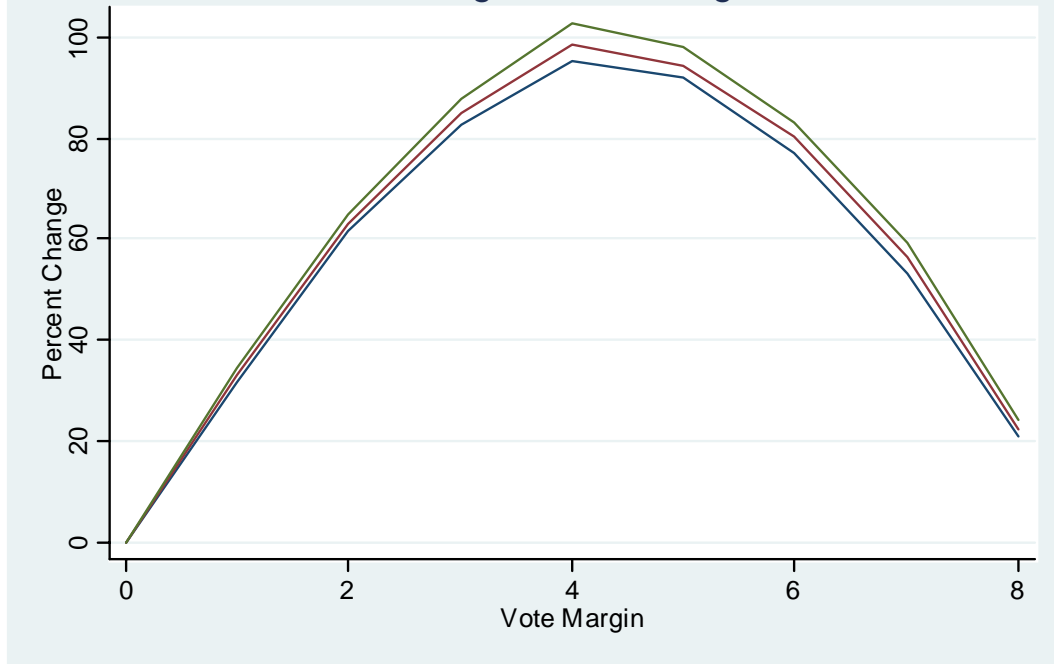
Table 1: Recusal Data for Justices on the Rehnquist Court (1986 – 2003)

<i>Justice</i>	<i>Recusals</i>	<i>Decisions</i>	<i>Recusal Rate</i>
Ginsburg	2	907	0.00221
Rehnquist	5	1,870	0.00267
White	4	964	0.00415
Marshall	4	725	0.00552
Powell	1	160	0.00625
Stevens	12	1,870	0.00642
Scalia	14	1,871	0.00748
Blackmun	8	1,059	0.00755
Brennan	5	597	0.00838
Breyer	8	811	0.00986
Souter	16	1,271	0.0126
O'Connor	29	1,874	0.0155
Thomas	21	1,143	0.0184
Kennedy	67	1,687	0.0397

Table 2: Rare Events Logit Model of Supreme Court Justices' Recusal Decisions				
<i>Variable</i>	β	(SE)	Z	Odds Ratio E(β)
Home State	0.660	(0.251)	2.63	1.935
Freshman Term	1.353	(0.190)	7.13	3.870
Business-Corporate Party	0.362	(0.164)	2.21	1.436
Declaration of Unconstitutionality	-0.129	(0.324)	-0.40	--
Formal Alteration of Precedent	0.300	(0.464)	0.65	--
Vote Margin in Case	0.322	(0.124)	2.60	1.380
Vote Margin Squared	-0.037	(0.013)	-2.84	0.963
Ideological Distance from Median	-0.981	(0.245)	-4.00	0.375
Constant	-4.429	(0.475)	-9.33	--
<i>Justice-specific effects</i>				
Brennan	3.267	(0.965)	3.38	26.22
White	-1.266	(0.633)	-2.00	0.28
Marshall	3.783	(1.113)	3.40	43.93
Blackmun	0.854	(0.520)	1.64	2.35
Powell	-0.597	(1.074)	-0.56	--
Rehnquist	-0.684	(0.539)	-1.27	--
Stevens	1.012	(0.446)	2.27	2.75
O'Connor	-0.230	(0.429)	-0.54	--
Kennedy	0.691	(0.363)	1.90	2.00
Souter	0.021	(0.389)	0.05	--
Thomas	2.13	(0.520)	4.10	8.42
Ginsburg	-1.332	(1.051)	-1.27	--
Breyer	0.455	(0.460)	0.99	--

Z-scores above $|1.65|$ are significant at $\alpha = .05$, $|2.33|$ at $\alpha = .01$, and $|3.09|$ at $\alpha = .001$ using a one-tailed test.

Figure 1: Percent Change in Relative Risk of Recusal for Change in Vote Margin



Percent Change in Relative Risk = $100 * \left[\left(\frac{P(Y = 1) | X}{P(Y = 1) | 0} \right) - 1 \right]$ where $P(Y = 1)$ is the probability of observing a recusal. Bands are the estimated effect and a 95 % confidence interval.

Figure 2: Percent Change in Relative Risk of Recusal for Change in Ideological Distance from the Court Median

