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Judicial Recusal: On the Brink of Constitutional Change

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Judicial Recusal: On the Brink of Constitutional Change

Cover Page Note

Thank you to my mother, Maureen, who constantly believes in me and to my mentor, Dr. Amy McKay, who inspires me to be the best political scientist I can be.

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I. INTRODUCTION

Rumors of partiality quickly turned into allegations of bias February when publicized documents showed just how strong the financial ties were between the lobbying groups working against the Patient Protection and Affordable Care Act and the wife of Supreme Court Justice Clarence Thomas. Just how much did Ginny Thomas earn as a lobbyist against President Obama's healthcare bill? The Washington Post obtained a copy of the letter signed by seventy-four House Democrats to Justice Thomas which says Ginny Thomas received $686,589 over a four year span from The Heritage Foundation, a prominent opponent of healthcare reform. Representative Anthony Weiner (D- NY) writes in the letter:

> The appearance of a conflict of interest merits recusal under federal law. From what we have already seen, the line between your impartiality and you and your wife's financial stake in the overturn of healthcare reform is blurred. Your spouse is advertising herself as a lobbyist who has "experience and connections" and appeals to clients who want a particular decision - they want to overturn health care reform.[1]

Recusal, or judicial disqualification, occurs when a judge abstains from a particular legal proceeding because of a personal conflict of interest. Is $686,589 paid by a lobbying group to the wife of a Supreme Court Justice enough of a financial stake to warrant a conflict of interest and ensuing judicial recusal? The answer is yes, but Justice Thomas will not recuse because of the lifetime commissions awarded to Justices – free of recusal mandates and ensuing political consequences. The U.S. Constitution is known for its system of checks and balances, yet there is no check on the recusal power of the Supreme Court.[2] They are themselves solely responsible for judging their ability to be impartial. This presents a constitutional problem and the thesis of this research – Justices partialities are consistently influencing decisions because of lenient recusal standards in the Supreme Court.

All levels of the judicial system and some administrative agencies in the United States apply the concept of recusal, but this paper focuses solely on the Supreme Court and patterns of modern day Supreme Court justices – citing controversial and overlooked recusal affairs to prove that a consistent flaw exists.[3] The methodology employed involves:

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[1] Weiner, Anthony to Clarence Thomas, Washington, D.C., February 9, 2011, in Sonmez, Felicia, "House Democrats say Justice Thomas should recuse himself in health-care case," *The Washington Post*, February 9, 2011, http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html (accessed February 13, 2011).

[2] The first and only instance where a Supreme Court justice was subject to impeachment proceedings was in 1804. The U.S. House of Representatives voted to impeach Samuel Chase, one of the signatories of the Declaration of Independence, on the grounds that his federalist background was influencing his Supreme Court opinions. The Senate acquitted him of all charges. This helped establish the precedent of judicial independence and judicial review. (Dilliard, Irving, "Samuel Chase," In *The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions*, ed. Leon Friedman and Fred L. Israel (New York: Chelsea House, 1969).)

[3] It is necessary to note that of all the cases that have been brought before the high court only a miniscule fraction are surrounded by recusal controversy. This paper studies a slice of that miniscule fraction in contention.

(1) specific case studies chosen by the researcher, examining; a) Justices' professional and personal background; b) ideologies; c) Court make-up and; d) recusal standards at the time; (2) and a random sample via the Supreme Court Database, examining; a) who disqualifies; b) recusant's ideology; c) recusant's reason for disqualifying; d) an ideological comparison of disqualifications.

There is some confusion on the procedure of Supreme Court judicial recusal: what is law and what is precedent? First, there are two laws that govern judicial recusal. Title 28 of the United States Code provides the two standards, Section 144 and Section 455 (not obligatory by legal means) on when Supreme Court Justices should recuse themselves.[4] Section 144 applies exclusively to federal district court judges.[5] Section 455 entitled "Disqualification of Justice, Judge, or Magistrate Judge" covers standards concerning "*any* justice, judge or magistrate judge of the United States."[6] Section 455 (a): "any justice, judge or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his partiality might reasonably be questioned."[7] "Shall" provides Justices a basis against discretion because it indicates a question on recusals instead of a requirement.[8]

Title 28 Section 455 (b) deals with conflicts of interest: (1) where he/she has personal knowledge of the evidence concerning the proceedings or has previously expressed an opinion on the case's outcome (personal bias or prejudice); (2) where he/she has previously served as a lawyer or witness concerning the same case; (3) where he/she has come into contact with the matter while in government employment; (4) where he/she, spouse or child has a financial stake in the outcome of the case; and a prohibition of relationships, down to the third degree.[9] There are many instances in Supreme Court history where Justices have not adhered to these seemingly definitive terms.

Supreme Court recusal "precedent" is an ambiguous term. Routinely Justices agree on recusal standards only partially and long-term agreement is precarious since they have the privilege to change their mind at any moment. Also, agreement comes in small doses since there nine separate interpretations of the five parts of Section 455 – each part being multifaceted in itself. Problems caused by the different interpretations of judicial recusal law are just the tip of the iceberg; precedent is also sensitive to historical developments of the law. The most influential changes to Supreme Court recusal procedure occurred in 1911, 1948, and 1974 and additionally interpreted by Supreme Court justices throughout the Court's history, most recently in 1993.

In 1911 Congress enacted Section 144 of Title 28 U.S.C. enabling litigants to request a judicial disqualification motion, also known as an affidavit, based on a Justice's personal bias or prejudice.[10] Though Congress intended this motion to have a peremptory

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[4] Section 144 is entitled "Bias or Prejudice of Judge" and is extremely similar to Section 455.

[5] Grant Hammond, *Judicial Recusal: Principles, Process and Problems* (Oxford and Portland: Hart Publishing Ltd, 2009), 56.

[6] Ibid., 56.

[7] Ibid., 59.

[8] Ibid., 63.

[9] Third degree relationships are present between individuals with 1/8 (12.5%) of a genetic link and apply to 455(b)(1) through 455(b)(4). Hammond, *Judicial Recusal,* 59.

[10] Though Section 144 applies only to federal district court judges it is important to mention it when studying Supreme Court recusal policy because Section 144 was and can still be interpreted by the Supreme Court – conveying how the Supreme Court views recusal arbitration in relation to lower courts. Hammond, *Judicial Recusal,* 56.

effect, the Supreme Court decided in 1921 that a judge had the power to choose if the application for disqualification and accompanying affidavit were legally "sufficient," – that is to say "sufficient" in the opinion of the judge-in-question.[11]

Congress pushed through further developments in 1948 affecting Section 455. A first modification eliminated the requirement that a party initiate the motion for recusal. A second development was the addition of the word "substantial" in Section 455 (b)(4), "only if the outcome of the proceeding could *substantially* affect the value of the interest."[12] These two changes worked against the peremptory-style changes made in 1911, widening the capacity for judicial discretion pertaining to recusal.

In 1974 the text of U.S.C. Section 455 (a) was changed from "in the opinion of the judge" to " might reasonably be questioned," diminishing the judicial discretion permitted by the 1948 development.[13] The Supreme Court ruled in a 5-4 vote that U.S.C. Title 455 (a)'s language – "*shall* disqualify himself in any proceeding in which his partiality might reasonably be questioned"[14] – refers to when a "reasonable person" would expect a judge to be aware of the questionable partiality, regardless of whether or not the judge himself knew circumstances were questionable.[15] But in the same year, the "duty to sit" criteria was eliminated by Congressional amendments which was aimed at widening the scope for judicial disqualification.[16]

In 1993 the Court formally but not officially acted to better explain their individualized criteria for their own recusals, though minimally.[17] Seven Supreme Court Justices signed the collaboratively written "Statement of Recusal Policy," but are *independently* aiming to uphold the policy within, which is restricted solely to Section 455 (b)(2) concerning his/her or relative's legal association:[18]

> Current participation as lawyer, and not merely past involvement in earlier stages of the litigation, is required [for a Supreme Court Justice's recusal]. A relative's partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific

[11] *Berger v. US* (1921), a World War I espionage case where German American petitioners were accused of espionage and filed a motion for the trial judge's recusal based on statements the judge had allegedly said – for example, "one must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty." When the constitutional question of whether the judge should have recused himself (because he did not) reached the Supreme Court, the Justices decided that the affidavit should have little influence on judicial disqualification. *Berger v. United States*, 255 U.S. 33-34 (1921).

[12] Hammond, *Judicial Recusal,* 58.

[13] Stephen Wasby, "Issues in Judicial Recusal," *International Journal of Public Administration*, 19(1), (New York: Marcel Dekker, Inc., 1996), 89.

[14] *Liljeberg v Health Services Acquisition Corp* (1988) revolved around whether a judgment ought to be reversed if it is found out that a judge who decided the case was also unknowingly closely-connected financially to the outcome of the case. Hammond, *Judicial Recusal,* 59.

[15] John Paul Stevens delivered opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

[16] Ibid., 91.

[17] Stephen Wasby, "Issues in Judicial Recusal," *International Journal of Public Administration*, 19(1), (New York: Marcel Dekker, Inc., 1996), 82.

[18] "Statement of Recusal Policy" was signed by Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Thomas, and Ginsburg. David Souter and Harry Blackmun did not sign the agreement. ("Statement of Recusal Policy," Supreme Court of the United States (Nov. 1, 1993) (on file with Hofstra Law Review).

> provisions of Section 455, which require recusal when the judge knows that the relative has "an interest that could be substantially affected by the outcome of the proceeding," Section 455 (b), or when for any reason the judge's "impartiality might reasonably be questioned," Section 455 (a).[19]

The precision of the Statement contributes to diminishing the vague nature of Supreme Court recusal policy while simultaneously broadening a Justice's recusal discretion. Though the Statement furthered recusal clarity at the time, it bears less weight now that only four current Justices endorse it.[20]

The American Bar Association's *Code of Judicial Conduct* and *Model Code of Judicial Conduct* is accredited little to none in regard to recusal policy. Outside of the Supreme Court, 49 of 50 U.S. states espouse moral regulations similar to those in the *Model Code of Judicial Conduct*, pushing for recusal when impropriety, the appearance of impropriety, and the judge's impartiality might reasonably be questioned.[21] Additionally, the 1973 Judicial Conference of the United States, adopted the *Code of Judicial Conduct for United States Judges*, now known as the *Code of Conduct for United States Judges*.[22] The *Code of Conduct* is the federal equivalent of the ABA's *Model Code*, calling for compliance from all judges, but states that "not every violation of the code should lead to disciplinary action" and so lends a hand to the ambiguity of Supreme Court recusal policy.[23]

The most incomprehensible problem with Supreme Court recusal policy is the effect of ideological and strategic choices influencing a Justice's vote, because recusal is the only lawful way to remove an important vote from an evenly matched case.[24] Ideologically, a Justice votes in order to shape the constitution to their way of thinking; by disqualifying themselves, he/she abates their power to do so. Strategically, politics within the Court, i.e. how evenly split the vote is, plays a part in the likelihood of disqualification; predictions of an evenly split vote discourage disqualification. Because the Supreme Court makes its decisions in private, the only way to study these recusal politics of the Supreme Court is to study memoirs and papers written by past Justices, as analyzed in Part II.[25]

In brief, if a Justice is incapacitated or flouting their constitutional pledge, clearly there should be a more convenient route outside of Congressional impeachment that would remove him/her from office. If judges of a lower court are forced to adhere to a

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[19] "Statement of Recusal Policy," Supreme Court of the United States.

[20] The only current Justices signed to the Statement are Roberts, Scalia, Thomas, and Ginsburg. Hammond, *Judicial Recusal,* 66.

[21] Grant Hammond, *Judicial Recusal,* 59.

[22] The Judicial Conference is the principal policy making administration for the U.S. judiciary. U.S. Department of Justice, Judicial Conference of the United States, "Code of Conduct for United States Judges," *Guide to Judiciary Policy*, Vol. 2A, Ch. 2 (Washington, D.C.: Government Printing Office, 1973, revised 2009), 2.

[23] The *Code of Conduct* delves deeper into particular instances of the appearance of a conflict of interest. Ibid., 3.

[24] Davies, "The Reluctant Recusants," 86.

[25] Justice deliberations are private because (1) it protects the Justices from public influence and sentiment and (2) deliberations do not necessarily reflect the final decision and opinion, which may not be written for weeks or months. (Epstein, Lee and Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 7th Ed., Washington, DC: CQ Press (2011), 22.

particularized procedure, recusal or otherwise, the Supreme Court should as well, as they say, lead by example. If a Justice is explicitly breaking recusal policy, as stated in the text of the Congressional amendments, there should be repercussions or at least protocol for those actions. When a Justice or multiple Justices determine a recusal is appropriate, there should be procedures in order to maintain the constitutional purpose and effectiveness of the Supreme Court. Part II of this paper outlines more specific problems/inconsistencies with U.S.C. Title 28 Section 455 and signify that real inconsistencies in Supreme Court recusal policy, and in Part III I'll examine the possibilities of change, if Congress decided to proceed with adjustments to the statute.

II. ANALYSIS

This part is split into two sections. Section one examines specific circumstances, the justice's past, the Supreme Court makeup at the time, recusal standards (formal and informal) at the time, and any other particulars I think necessary to mention. I organize the analysis into categories based on established Congressional grounds for recusal and then arrange contentious cases under the appropriate recusal category. In most cases, because of the distinctiveness of each recusal issue, it so happens that recusal precedent is almost always affected – and so I examine those effects as well.

In section two I use The Supreme Court Database to create a random sample and with that sample I compare the reasons for recusal and the ideology of the recusing justice, per case.[26] Technicalities with the data result in only running a statistical analysis on cases where less than nine judges participated in the vote; further detail in the introduction of Section Two.

SECTION ONE: CASE STUDIES

i. U.S.C. Title 28 Section 455 (a)

Section 455 (a) deals with the appearance of impartiality: "any justice, judge or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his partiality might reasonably be questioned."[27] The language in this section is not comprehensive and fosters the most opportunity within all the sections of the statute for judicial discretion; any type of past and/or current associations with parties or indirect participants in a Supreme Court docketed lawsuit may cause a recusal issue. It is for this reason that past and current associations with parties to a docketed case are, in large part, found to be the most controversial recusal cases. Associations in this sense could mean a friendship with a litigant, professional history with a party, prior work on the case, previously stated bias, or a unique combination of them all.

(1) Current Supreme Court Justice Antonin Scalia declined to recuse himself in the 2004 *Cheney v United States District Court for the District of Columbia* case in which his good friend, then Vice President Cheney, was a party. After the Supreme Court accepted and docketed the case, Justice Scalia accepted an invitation to fly with Cheney on a government plane to go on a hunting trip. The party seeking Justice Scalia's recusal referenced §455 (a) – saying the justice's impartiality in this case "might reasonably be questioned."[28] Justice Scalia responded to the assertion in an issued Memorandum that his friendship with Cheney did not jeopardize his impartiality, that Supreme Court Justices cannot be bribed by plane rides and hunting trips, and finished up by declaring that many Justices make it onto the Supreme Court exactly because of friends in high places.[29] Then Chief Justice William Rehnquist also issued an opinion on the matter – saying each Justice decides for himself whether to recuse in a case; the way in which they come to that decision varies but that

[26] The Supreme Court database is available online at http://scdb.wustl.edu. The lasted version, which I am using, was released February 11, 2011. The Supreme Court Database has a comprehensive set of 200 facts about each case the Supreme Court has judged from 1953 to 2009 and a less comprehensive set of similar facts about cases dating back to 1946.
[27] Grant Hammond, *Judicial Recusal,* 59.
[28] Ibid., 4.
[29] Ibid., 5.

each Justice "strives to abide by the provisions of 28 U.S.C. Section 455, the law enacted by Congress dealing with the subject."[30] This recusal case is important because we see that an irrefutable friendship with a party to a case, no matter how current or strong, is not an irrefutable "appearance of bias." If it were, according to Rehnquist, Scalia would have recused himself based on "the provisions of 28 U.S.C. Section 28 Section 455."

(2) A similar recusal issue was present in the very politicized Supreme Court case related to the Watergate scandal of 1972. *United States v Nixon* reached the Supreme Court in 1974 to decide whether executive privilege could keep Nixon from handing over the incriminating audiotapes to the Special Prosecutor.[31] Of the nine justices on the Court, Richard Nixon appointed four. Of the four Nixon appointments, then Associate Justice William Rehnquist was the only one to recuse himself, citing his past association with the Nixon administration.[32] This may be related to the fact that upon Nixon's election and prior to serving on the Supreme Court, Rehnquist served as Assistant Attorney General of the Office of Legal Counsel. If Rehnquist's past association with the Nixon administration had enough of an impact that his impartiality might be questioned, one has to wonder if the other three Nixon appointees had strong associations with Nixon as well.[33] Then Chief Justice Warren E. Burger, who was at one point on Nixon's list for possible Vice Presidential candidates, was the only other Justice with a questionable recusal because of his friendship with the President. The alleged fact that Burger was originally supposed to vote in favor of Nixon, fuels fire to the recusal issue, but because he steered his vote to the majority makes any recusal problem revolving around *U.S. v Nixon* moderate.[34] The reality is that the different interpretations of recusal statute, like those of Burger's and Rehnquist's, compounds the difficulties surrounding the development of a reliable Supreme Court judicial recusal precedent. Justices alter their interpretations with time, further complicating recusal procedure. Examining *Laird v Tatum* [Section ii. (2)] will be an example of just that complication.

(3) Those pushing for Justice Thomas's recusal in *Florida v. US* site 455 (a), saying that a lobbying firm paying over $650,000 to a Justice's wife is a sufficient amount to claim that his partiality can reasonably be questioned.

In the letter to Clarence Thomas, House Democrats use Section 455 (b) (4) as the rationale for his recusal. Proponents of the Justice's decision to sit use the more specific particularities of Section 455 (b) (4) to defend their point of view:

> Section 455 means ownership of a legal or equitable interest,
> however small, or a relationship as director, adviser, or other

[30] Letter from Chief Justice Rehnquist to Senator Patrick Leahy, Jan 26, 2004, reprinted in "Irrecusable & Unconfirmable," *7 Green Bag 2d*, George Mason University Law and Economics Research Paper Series (2004), 280.
[31] Stanley L. Kutler, *The Wars of Watergate*, (London: W. W. Norton & Company, 1991), 508..
[32] "Rehnquist recused himself in the case, citing his past association with the Nixon Administration." Kutler, *The Wars of Watergate*, 508.
[33] The other three Nixon appointments besides Rehnquist were Warren E. Burger, Harry Blackmun, and Lewis F. Powell. Prior to being appointed, Burger was on the U.S. Court of Appeals for the District of Columbia, Blackmun was on an 8th Circuit Judge and Powell was in private practice.
[34] Kim Isaac Eisler, *A Justice for All: William J. Brennan, Jr., and the decisions that transformed America* (New York: Simon and Schuster, 1993), 251.

> participant in the *affairs* of a party. The prohibition applies 'only if the outcome of the proceeding could *substantially* affect the value of the interest,' but the proviso extends only to a mutual insurance company or a similar *proprietary* interest.[35]

They argue that (1) The Heritage Foundation and Ginny Thomas's previous employment is not a party in *Florida v. U.S.*, (2) the outcome of the case would not substantially affect them, and (3) The Heritage Foundation is not a proprietary interest. However, delving deeper into the context of Section 455 (b) (4) the democrats are wise to mention in their letter the significance that Thomas did not, perhaps purposefully, disclose his wife's earnings.[36] But recusal specifications revolving around Justice-lobbying connections are absence and even if the eight other Justices, seventy-four house democrats, or anyone else of political significance directly petition Clarence Thomas to disqualify himself in *Florida v. US* when it reaches the Supreme Court, the decision remains arbitrarily his.[37]

ii. U.S.C. Title 28 Section 455 (b) (1)

Section 455 (b) (1): where he/she has personal knowledge of case evidence or has previously expressed an opinion on the case's outcome (personal bias or prejudice); and a prohibition of relationships, down to the third degree.[38] Developments in regard to this area of Section 455 are few and far between, however controversy is rampant. The issues revolve around the very fine line between opinion and prejudice. According to the text any type of past and/or current viewpoint could or could not be considered bias depending on the examiners point of view. We will examine some of the comments past and current Justices have made concerning cases that have been argued in the Supreme Court.

(1) Rehnquist's "past association" recusal in *U.S. v Nixon* is attributed to his previous involvement as Assistant Attorney General of the Office of Legal Assistant for President Nixon.[39] Similarly, *Laird v Tatum* (1972) was a case in which Rehnquist had prior associations because of his time as Assistant Attorney General. The Office of Legal Counsel is in charge of providing legal advice to the Executive Branch agencies and the President through written opinions and oral advice. The Assistant Attorney General is in charge of that Office and authorizes the legal advice that is provided.[40] While in this position Rehnquist gave testimony in front of Congress on whether he thought a Department of Defense surveillance scheme on "dissident" civilians critical of the Nixon

[35] Hammond, *Judicial Recual,* 59-60.
[36] Anthony Weiner to Clarence Thomas, Washington, D.C., February 9, 2011, in *The Washington Post*.
[37] There are rare instances in U.S. Supreme Court history where Justices have collectively manipulated their votes in order to diminish the voting power of another. In the 1970s Justice William Douglas suffered a stroke and the other eight Justices met in secret to agree that they would not pass down a 5 – 4 judgment where Douglas was in the majority. (Ross E. Davies, "The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification," *Green Bag 2d*, Vol. 10, no. 1 (Autumn 2006), 88.)
[38] Third degree relationships are present between individuals with 1/8 (12.5%) of a genetic link. (Hammond, *Judicial Recusal*, 59.)
[39] Kutler, *The Wars of Watergate*, 508.
[40] U.S. Department of Justice, "About the Office," http://www.justice.gov/osg/ (Accessed March 9, 2011).

administration and mostly the Vietnam War presented a constitutional issue.[41] He also allegedly was a custodian of some of the digital evidence.[42] His participation in the Supreme Court's decision on the constitutionality of the program was seen as controversial. In a rare instance where a Justice publicly defends their decision to sit, Rehnquist said that his Congressional testimony expressed the position of his client, the government, and not his own.[43] However if we compare this recusal issue area to the *U.S. v Nixon* case, certainly Rehnquist's professional capacity and involvement was similar in both because he held the same professional relationship to both; why then does he only recuse from one of the cases instead of both? Strategic justification is the most likely motive; Rehnquist's vote has no effect in an 8 – 0 vote in *U.S. v Nixon*, whereas his vote bears significant weight when it is the deciding vote in *Laird v. Tatum* (5 – 4).

iii. U.S.C. Title 28 Section 455 (b) (2)

Section 455 (b) (2): where he/she has previously served as a lawyer or witness concerning the same case; and a prohibition of relationships, down to the third degree.[44] The language in this section is actually one of the more defined in all of Section 455. As I stated in the introduction, some Justices interpreted detailed positions for when their relative is affiliated with a case (1993 "Statement of Recusal Policy"), but the Justice's personal affiliation is still open to wide interpretation. Every Justice was previously employed in private legal practice or by the government and it is common that a case they worked on or participated in might reach the Supreme Court. Arbitrary recusal practices in this area of 455 (b) (2) show wide discrepancies among Justices' decisions to participate.

(1) Before joining the Supreme Court in 1967 Thurgood Marshall was Solicitor General for President Lyndon B. Johnson and because of this, Marshall recused himself from about 40 percent of the cases in his first term.[45] Despite this strict rational his most referenced and critically revered recusals were those related to the National Association for the Advancement of Colored People (NAACP). Marshall's involvement with the NAACP began in 1934 and he won his first of 29 Supreme Court cases in 1940, the same year he was nominated to NAACP Chief Counsel – a position he held until an appointment to the United States Court of Appeals for the 2nd Circuit in 1961.[46] These decades of involvement

[41] Jeffrey Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit," *Buffalo Law Review*, vol. 57, (Buffalo Law Review, 2009) http://www.buffalolawreview.org/past_issues/57_3/Stempel%20Web%2057_3.pdf (accessed March 30, 2011), 853.

[42] Arthur John Keeffe, "Current Legal Literature: By What Standards Shall They Be Judged?" *American Bar Association Journal*, 60 A.B.A.J. (1974), http://heinonline.org/HOL/Page?handle=hein.journals/abaj60&div=275&g_sent=1&collection=journals (accessed March 31, 2011), 1582.

[43] Wasby, "Issues in Judicial Recusal," 90.

[44] Hammond, *Judicial Recusal*, 59.

[45] A rational like this falls under the recusal umbrella of Section 455 (b) (3). (Adam Liptak, "When a Justice and a Case Are Too Close," *The New York Times*, August 24, 2010, http://www.nytimes.com/2010/07/25/weekinreview/25liptak.html (accessed March 12, 2011).)

[46] Mark Tushnet, "A Tribute to Justice Thurgood Marshall," *Stanford Law Review*, vol. 44 (Summer, 1992): 1277-1299, http://www.jstor.org/stable/1229060 (accessed 14 April 2011), 1277.

as Chief Counsel were the basis for his routine recusal in NAACP cases.[47] After his retirement in 1991 and passing in 1993, his Supreme Court records were opened to the public revealing a letter of memorandum he sent to the other Justices asking for advisement on his past and current recusal policy in relation to the NAACP.[48]

> His past practice had been, he said, to "routinely disqualify myself from all cases in which the NAACP has participated as a party or as an intervener." Enough time had passed, however, since he had left the NAACP, "that continued adherence to this self-imposed blanket disqualification rule is no longer necessary." And so he planned "in the future not to recuse myself in cases in which the NAACP is a party or an intervener, unless the circumstances of an individual case persuade me, as with all cases, to do otherwise."[49]

Not only did the eight other Justices condone the changes he proposed in his memorandum, Justice John Paul Stevens was "delighted."[50] The four conservative Justices supported Marshall's decision, proving that recusals cannot be based staunchly on strategic behavior, because a conservative's strategy is pushing liberals to recuse, maximizing the scope for a conservative decision. This proves how judicious Justices can be when preparing to recuse, but it depends on the Justice.

iv. U.S.C. Title 28 Section 455 (b) (3)

Section 455 (b) (3): where he/she has come into contact with the matter while in government employment; and a prohibition of relationships, down to the third degree.[51] This subsection of text refers almost exclusively to a Justice's previous government employment and recusing when government associated material is brought before the Supreme Court. Some examples would include Associate Justice William Rehnquist (previously Assistant Attorney General), Associate Justice Thurgood Marshall (previously Solicitor General), Chief Justice John Marshall (previously Secretary of State), Chief Justice Roger Taney (previously Secretary of the Treasury), Associate Justice John McKinley (previously U.S. Senator), Chief Justice Charles Hughes (previously Secretary of State) and many more.[52]

(1) Current Associate Justice Elena Kagan exemplifies when a Justice practices routine recusals in relation to prior legal association. As the 112th Supreme Court Justice, Kagan came to the Court directly from her position as Solicitor General (SG) under the Obama

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[47] Thurgood Marshall College, "About Thurgood Marshall," *University of California San Diego*, http://marshall.ucsd.edu/about/thurgood-marshall.html (accessed April 1, 2011).

[48] Records are kept at the Library of Congress. Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, *in* Papers of Harry A. Blackmun, Library of Conress, Manuscript Division, box 1405, folder 14, *reprinted in* Davies, "The Reluctant Recusants," 93-107.

[49] Justice Thurgood Marshall quoted *in* Davies, "The Reluctant Recusants," 81.

[50] Ibid., 82.

[51] Hammond, *Judicial Recusal*, 59.

[52] A brief biography is provided for each Justice on the Federal Judicial Center website. Federal Judicial Center, "History of the Federal Judiciary," http://www.fjc.gov/servlet/nGetCourt?cid=0&order=c&ctype=sc&instate=na (accessed March 8, 2011).

administration, appointed by him in January 2009.[53] The SG is in charge of representing the United States' position in lawsuits that reach the Supreme Court docket.[54] He/she advises the executive branch and supervises litigation (including *amicus* filing and oral arguments) in the Supreme Court and lower federal courts. He/she also indirectly assists with docket selection by submitting opinions of the U.S. government to cases where it is not a party.[55] Though Kagan's time as SG was short, she played a vital role in many cases that will be argued in the 2010 – 2011 term. That pre-judicial role fueled speculation into how she would choose to practice recusal, especially in comparison to the last SG appointed to the Supreme Court, Thurgood Marshall, examined earlier in this analysis. For the 2010 – 2011 term, Kagan is recusing herself from 25 out of 51 cases because she either assisted writing a brief or she was actively participating in a case while it was litigated in lower courts, according to the *Washington Post*.[56] The reputable SCOTUSblog.com also attributes the recusals to her filing a brief at the invitation of the Court of the U.S. government's opinion, signing certiorari grants (memos she signed saying the U.S. government would not be involved), and recusing in cases where the United States is the petitioner.[57] Because of the substantial amount of recusals in her first term some attorneys are going as far as holding out on applying for certiorari, so that they can be sure Kagan will sit the case.[58] As prudent as Justice Kagan's stance on Supreme Court recusal policy may be, her recusals are still largely unpredictable because of the arbitrary nature of the policy, for example, her past as SG is not stopping her from ruling on the Patient Protection and Affordable Care Act.

v. U.S.C. Title 28 Section 455 (b) (4)

Section 455 (b) (4): where he/she, spouse or child has a financial stake in the outcome of the case; and a prohibition of relationships, down to the third degree.[59] By now, the recusal issue most familiar with Section 455 (b) (4) is Clarence Thomas's financial tie, and possible bias, related to *Florida v. U.S.* Similarly, another 455(b)(4) recusal controversy revolves around Justice Scalia and the gender bias class action lawsuit against Wal-Mart. The recusal issue is whether or not Justice Scalia will participate in the case when his son's law firm is representing Wal-Mart.[60]

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[53] Paul Kane and Robert Barnes, " Senate confirms Elena Kagan's nomination to Supreme Court," *The Washington Post*, August 6, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/05/AR2010080505247.html (accessed March 8, 2011).

[54] U.S. Department of Justice, "About the Office."

[55] The Solicitor General would submit a petition for the Supreme Court to hear whichever case and the Court accepts about 70 percent to 80 percent of the cases the federal government petitions for. (Epstein, Lee and Walker, *Constitutional Law for a Changing America*, 19.)

[56] Robert Barnes, "Kagan's recusals take her out of action in many of the Supreme Court's cases," *The Washington Post*, October 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303890_2.html?sid=ST2010100303908 (accessed April 4, 2011).

[57] Tom Goldstein, "An update on recusal," *SCOTUSBlog.com*, October 3, 2010, http://www.scotusblog.com/2010/10/an-update-on-recusal/ (accessed April 7, 2011).

[58] Stephen R. Shapiro, legal director of the American Civil Liberties Union in Barnes, "Kagan's recusals," *The Washington Post*, October 4, 2010.

[59] Hammond, *Judicial Recusal*," 59.

[60] "The Court's Recusal Problem," *The New York Times*, March 16, 2011, New York edition, A30.

(1) For example, current Chief Justice Roberts used to own stock in Pfizer Inc., a New York-based drug maker. Even though his stock was worth no more than $15,000, practically pennies compared to Ginny Thomas's earnings from The Heritage Foundation, he routinely recused himself from lawsuits involving the company. Where it gets tricky is when we examine the financial stakes Justices previously had with a party to a case. In this example, Justice Roberts' recusal regimen changed when he sold his Pfizer stock holdings on August 31, 2010. Now he is to sit on two Pfizer Inc. cases this term, according to a docket entry from September 2011.[61] The short time – only a few months – between Roberts selling his company stock and then judging the Supreme Court case is not substantial enough to shed the appearance of bias. In the same way that Justices like Elena Kagan and Thurgood Marshall recuse from cases they have associations with, recusal policy related to financial investments should be heavily exhibited as well, even six months or perhaps years after the fact – enough to remove the appearance that Justice Roberts may be bias.

vi. Analyzing memoirs of past Justices

(1) One memoir tells of a letter written October 20, 1975 by then Associate Justice Byron White (in office 1962 – 1993). It was delivered to seven of the eight other Justices – those seven having been present at a private meeting which excluded the eighth, William Douglas. The year before Douglas had suffered a serious stroke and the eight other Justices thought he was no longer competent, at least in the interim, to serve as a judge.[62] In the letter White indicated the participants met on October 17 and discussed and came to the decision that (1) "the Court [would] not assign the writing of any opinions to Mr. Justice Douglas," and (2) "they would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority."[63] Conceptually, the Justices, commandeering Congress's authority to impeach and remove judges, wanted Douglas to recuse himself and made the decision for him.[64] This is a good example of ideological and strategic behavior, proving that a threat to the system has the power to make all judges work strategically together to advocate an ideological position they all believe in.

SECTION TWO: DATA ANALYSIS

As stated previously, section two utilizes data from The Supreme Court Database, which organizes hundreds of facts about tens of thousands of cases dating all the way back to 1946.[65] Focusing on cases with only five, six, seven, or eight votes left over 2,000 cases in the data set and a random sample of forty cases was gathered from that set.[66] The data

[61] Brent Kendall, "Chief Justice Roberts sells Pfizer shares," *The Wall Street Journal*, September 28, 2010, http://online.wsj.com/article/SB10001424052748703882404575520133227381308.html (accessed April 5, 2010).
[62] Davies, "The Reluctant Recusants," 88.)
[63] Letter of October 20, 1975, reprinted in Dennis J. Hutchinson, *The Man Who Once Was Whizzer White*, (New York: Free Press, 1998), 463-65.
[64] Davies, "The Reluctant Recusants," 89.
[65] The Supreme Court database's latest version, February 11, 2011, is used in this section and is available online at http://scdb.wustl.edu.
[66] Supreme Court Database random sample of 40 cases where the number of votes is less than nine. Forty cases instead of a higher or lower amount for (1) brevity, being this paper has limits of its own, and (2)

looks at cases where a Justice did not participate in order to: (1) concentrate on less-controversial recusals; and (2) determine the more common grounds for recusal. Graphs and explanations conclude how often controversy surrounds Supreme Court recusals and why Supreme Court cases do not always have all nine Justices.

The following table supplies the primary information regarding the forty randomly selected Supreme Court cases in which there were less than nine votes. The table identifies a case number (which I assigned), lexis citation, date of decision, name, number of votes, recusant (with L or C – "Liberal" or "Conservative" ideological direction) and reason for nonparticipation, if obtainable.[67] All the information in the table is self-explanatory except for the "reason" column. [68] The explanations in the "reasons" column state either one of the five subsections of United States Code Title 28 Section 455, "per curiam," or "no info," all clarified below for convenience.[69]

Reference List:

§455 (a) – Justice disqualified himself in a proceeding where his partiality was reasonably questioned

§455 (b)(1) – Justice had personal knowledge of the evidence concerning the proceedings or previously expressed an opinion on the case's outcome

§455 (b)(2) – Justice had previously served as a lawyer or witness concerning the same case

§455 (b)(3) – Justice had come into contact with the matter while in government employment

§455 (b)(4) – Justice, spouse or child had a financial stake in the outcome of the case

per curiam – means that the court released an opinion on the case as a single entity with the participating and nonparticipating Justices acting anonymously.

T/R – meaning "technical recusal;" that the nonparticipating Justice was not present for oral arguments, therefore decided not to participate in the decision

N/A – meaning "not applicable." This means that all the Justices were voting, none recusing, therefore there were only eight Justices on the Supreme Court when the case was being decided.

J/D – meaning "jurisdictional dissent;" when the Justice disagrees with the Court's assertion or denial of jurisdiction. In The

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because much of the case data in the Database and through other research methods on these forty cases lacks information pertaining to the specific grounds for non-participation. More detail on certain cases is provided in this paper's endnotes.

[67] For brevity's sake I used the shortened case names for the table. The lexis citation is the U.S. Reporter Citation (usCite). The date of decision is defined as the day, month and year that the Supreme Court released its decision. The recusant(s) is the Justice that did not participate (I researched this independent of the Supreme Court Database). The ideologies of the recusants was determined using Martin-Quinn scores. Martin, Andrew and Kevin Quinn, "The Ideological History of the Supreme Court, 1937 – 2007," http://www.targetpointconsulting.com/scotusscores-labels.html (accessed September 15, 2011).

[68] The reasons for nonparticipation were obtained by me through research and my analysis thereof.

[69] Section 455 (a) and (b) include prohibition of relationships, down to the third degree.

Supreme Court Database these are counted as nonparticipations.[7071]

no info – meaning "no information." I was unable to find information related to a reason why the Justice did not participate – either I found nothing or I found that they recused for unspecific reasons.[72]

[70] The Supreme Court Database, "Online Code Book," http://scdb.wustl.edu/documentation.php?var=vote

[71] The phrase jurisdictional dissent comes from the idea of justiciable, meaning the Supreme Court's power is limited to "cases" and "controversies." Characteristics that make a case nonjusticiable are advisory opinions, collusive suits , mootness, ripeness, and political questions. A Justice would write a jurisdictional dissent if he/she thought one of these characteristics applied to a Supreme Court docketed case. (Epstein, Lee and Walker, *Constitutional Law for a Changing America*, 93-6.)

[72] The reason why The Supreme Court Database does not have information on explanations for nonparticipation is because Supreme Court Justices are not required to disclose that information. Instead, at the end of the opinion it will simply say, for example in *U.S. v Nixon* (1974), "Mr. Justice Rehnquist took no part in the consideration or decision of these cases." If this is the only information I can find on the recusal, then I will use "no info" under the "reason" column.

Table 2.1: 40 Instances of Supreme Court Justice Nonparticipation

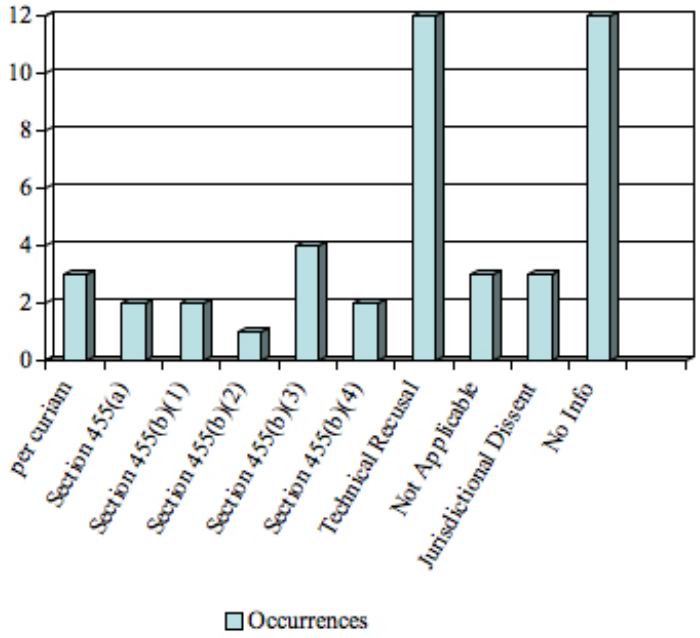
Case Number	Lexis (L.) Citation	Case Name	Date of Decision	Number of votes	Recusant(s)	Reason
1	1981 U.S. L. 19	NORTHWEST AIRLINES v. TRANS. WORKERS UNION	1981-Apr-20	8	Blackmun(L)	§455 (b)(2)[i]
2	1982 U.S. L. 146	U.S. v. HOLLYWOOD MOTOR CAR CO.	1982-Jun-28	6	unknown	per curiam
3	1982 U.S. L. 6	FIDELITY FEDERAL S & L v. DE LA CUESTA	1982-Jun-28	8	Powell(C)	no info
4	1982 U.S. L. 163	IMMIGRATION & NATURALIZATION SERV. v. MIRANDA	1982-Nov-08	8	Unknown	per curiam
5	1983 U.S. L. 29	AMER PAPER INST. v. AMER ELECTRIC POWER SERV.	1983-May-16	8	Powell(C)	no info
6	1983 U.S. L. 117	NORFOLK R. & HOUS. AUTH. v. C & P TELEPHONE OF VA	1983-Nov-01	8	Powell(C)	§455 (b)(3)[ii]
7	1984 U.S. L. 64	B. OF ED.,PARIS UNION SCHOOL DIST. NO. 95 v. VAIL	1984-Apr-23	8	Marshall(L)	§455 (b)(1)[iii]
8	1984 U.S. L. 124	RUCKELSHAUS, ADMIN, U.S. EPA v. MONSANTO	1984-Jun-26	8	White(L)	no info
9	1984 U.S. L. 94	HAWAII HOUSING AUTH. v. MIDKIFF	1984-May-30	8	Marshall(L)	§455 (b)(1)[iv]
10	1985 U.S. L. 5	COMMODITY FUTURES TRADING COMM. v. WEINTRAUB	1985-Apr-29	8	Powell(C)	no info
11	1985 U.S. L. 72	BENNETT v. NEW JERSEY	1985-Mar-19	8	Powell(C)	§455 (b)(3)[v]
12	1985 U.S. L. 73	BENNETT v. KENTUCKY DEPT OF ED.	1985-Mar-19	8	Powell(C)	§455 (b)(3)[vi]
13	1985 U.S. L. 1524	B. OF ED. OF OKLAHOMA CITY v. NAT. GAY TASK FORCE	1985-Mar-26	8	Powell(C)	§455 (b)(3)[vii]
14	1986 U.S. L. 101	AETNA LIFE INSURANCE CO. v. LAVOIE	1986-Apr-22	8	Stevens(L)	no info

15	1986 U.S. L. 1	PACIFIC GAS & ELECTRIC CO. v. PUBLIC UTILITIES OF CA	1986-Feb-25	8	Blackmun(L)	no info
16	1986 U.S. L. 87	BOWEN v. AMERICAN HOSPITAL ASS.	1986-Jun-09	8	Rehnquist(C)	§455 (b)(4)[viii]
17	1986 U.S. L. 88	BOWEN v. MI ACADEMY OF FAMILY PHYSICIANS	1986-Jun-09	8	Rehnquist(C)	no info
18	1987 U.S. L. 5190	MULLINS COAL OF VA v. WORKERS' C.P., U.S. LABOR DEPT	1987-Dec-14	8	N/A	N/A[ix]
19	1987 U.S. L. 4815	CARPENTER et al. v. U.S.	1987-Nov-16	8	N/A	N/A[x]
20	1988 U.S. L. 938	ETSI PIPELINE PROJECT v. MO	1988-Feb-23	8	Kennedy(C)	T/R
21	1988 U.S. L. 946	BOWEN v. GALBREATH	1988-Feb-24	8	Kennedy(C)	T/R
22	1988 U.S. L. 942	U.S. v. THOMAS ROBINSON, JR.	1988-Feb-24	8	Kennedy(C)	T/R
23	1988 U.S. L. 2863	CITY OF LAKEWOOD v. PLAIN DEALER PUBLISHING	1988-Jun-17	7	Kennedy(C) and Rehnquist(C)	T/R (Kennedy), no info (Rehnquist)
24	1988 U.S. L. 2882	PIERCE v. UNDERWOOD	1988-Jun-27	8	Kennedy(C)	T/R
25	1988 U.S. L. 3030	COMMUNICATIONS WORKERS OF AM. v. BECK	1988-Jun-29	8	Kennedy(C)	T/R
26	1989 U.S. L. 1738	AMERADA HESS v. N.J. TAXATION DIV.	1989-Apr-03	8	O'Connor(C)	no info
27	1991 U.S. L. 7061	SOUTHWEST MARINE, INC. v. GIZONI	1991-Dec-04	8	Thomas(C)	T/R
28	1991 U.S. L. 7262	HUNTER & JORDAN v. BRYANT, JR.	1991-Dec-16	7	Thomas (C) and unknown	T/R (Thomas), per curiam (unknown)
29	1991 U.S. L. 2815	FORD MOTOR CR. CO. v. FL. DEPT OF REV	1991-May-20	8	O'Connor(C)	no info
30	1991 U.S. L. 6501	ZATKO v. CALIFORNIA	1991-Nov-04	8	Thomas(C)	T/R

31	1992 U.S. L. 4537	LUCAS v. SOUTH CAROLINA COASTAL COUNCIL	1992-Jun-29	8	Souter(L)	J/D
32	1994 U.S. L. 3779	MORGAN STANLEY v. PACIFIC MUTUAL LIFE INSUR.	1994-May-23	8	O'Connor(C)	§455 (a)[xi]
33	1998 U.S. L. 4002	AT&T v. CENTRAL OFF. TELEPHONE	1998-Jun-15	8	O'Connor(C)	§455 (a)[xii]
34	1999 U.S. L. 4200	MARYLAND v. DYSON	1999-Jun-21	7	Breyer(L) and Stevens(L)	J/Ds (both)
35	2003 U.S. L. 8965	RAYTHEON COMPANY v. HERNANDEZ	2003-Dec-02	7	Souter (L) and Breyer(L)	no info (both)
36	2006 U.S. L. 1818	OREGON v. GUZEK	2006-Feb-22	8	Alito(C)	T/R
37	2006 U.S. L. 4675	HOUSE v. BELL, WARDEN	2006-Jun-12	8	Alito(C)	T/R
38	2006 U.S. L. 2496	U.S. v. GRUBBS	2006-Mar-21	8	Alito(C)	T/R
39	2010 U.S. L. 4971	STOP THE BEACH RENOUR v. FL DEPT OF ENV PROT.	2010-Jun-17	8	Stevens(L)	§455 (b)(4)[xiii]
40	2010 U.S. L. 5540	DEMARCUS ALI SEARS v. UPTON	2010-Jun-29	7	N/A	N/A[xiv]

After examining Table 2.1 I simply compiled the recusal data that serves this paper's main purpose – the reasons for nonparticipation – into Figure 2.1.[73]

Figure 2.1: Reasons for Nonparticipation



The most common occurrence is "no information," due to the difficulty encountered when trying to find the exact reason for recusal. The next common occurrence are "technical recusals," due to the high number of cases the Court hears relative to the amount of time the Court spends in transition between Justices. The next common occurrence is Section 455 (b) (3), but at a substantially less common occurring rate. Immediately this tells us that nonparticipation in the Supreme Court takes place less often because of recusal statute and more often because of technicalities with the Court system.

Technical recusals, along with no information, not applicable, jurisdictional dissent, and per curiam, are not the focus of this paper but studying the rate at which they occur explains a lot about how The Supreme Court Database calculates its data on number of votes. A pool of 2,000 or so case decisions with under nine votes over the past half a century does not automatically mean every nonparticipation was because of a conflict of interest. In terms of ideologies of recusants, the table shows that 25 recusants were conservative, 12 were liberal and 8 were no information. Of those recusals, seven (28 percent) of the conservative and four (25 percent) of the liberal were attributed to a recusal statute. This proves that both ideologies recuse for formal reasons at similar rates, meaning that the problems with a lack of recusal are systemic and not associated with just one side of the political spectrum. However, as previously established throughout this paper, Supreme Court recusal policy is not obligatory, so the Database also does not take into account cases that perhaps should but did not have less than nine votes because a conflict of interest or appearance of bias.

[73] The occurrences in Figure 2.1 add up to 44 instead of 40 because in Case Numbers 23, 28, 34, and 35 there are two recusants, causing the number of reasons in the data set to be 44.

III. DISCUSSION

After careful analysis of specific recusal cases, inconsistencies between procedure and execution of United States Code 28 Section 455 are evident. While the policy's text is clearly written and the Justices swear themselves to it, their interpretations of the text are of real consequence. As former Supreme Court Justice William Rehnquist declared during the *Cheney v United States District Court for the District of Columbia* recusal controversy about Associate Justice Antonin Scalia, "there is no formal procedure for Court review of the decision of a Justice in an individual case. This is because it has long been settled that each Justice must decide such a question for himself."[74] If that wasn't explicit enough for recusal critics, Rehnquist's involvement in *Laird v. Tatum* is – giving testimony before Congress on the constitutionality of an executive program and then eventually reviewing the same program's constitutionality before the Supreme Court. Controversies like these surrounding Supreme Court recusal policy are certainly not a new trend.

Many Supreme Court recusal disputes are politically charged, especially in a polarized climate like today. However, proponents on both sides of the political spectrum will still take notice to impropriety when evaluating nominees. The 1969 Senate rejection of Associate Justice Abe Fortas to the Chief Justice seat is evidence that the legislature is trying to keep a check on the Supreme Court's power – deciding to reject the Fortas' nomination for many different reasons and eventually leading to him stepping down from Associate Justice.[75] Similarly in 1969, President Nixon attempted to nominate Clement Haynsworth to the Supreme Court who also was rejected by the Senate, conceivably for previously judging cases where he held a financial interest.[76] [77] Instances like these are ways in which the legislature reminds the Supreme Court that bad judicial behavior has its consequences; but this check on the Supreme Court only occurs during nominations – no Justice has ever been removed from office. However, impeachment might be more likely for Justice Thomas's recusal case if the media paid as much attention to it as it did for

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[74] Letter from Senators Patrick Leahy & Joseph I. Lieberman to Chief Justice William Rehnquist, Jan 22, 2004, reprinted *in* "Irrecusable & Unconfirmable," *7 Green Bag 2d*, 277-9.

[75] Controversy surrounding Abe Fortas: First, it was public knowledge that Fortas had consulted President Johnson on executive affairs numerous times during Fortas' time as Associate Justice. Second, Fortas had received $15,000 for speaking at American University on different occasions – money raised for the university by corporations that might presumably argue in front of the Supreme Court one day. Third, it was also discovered in 1969 that Fortas signed a contract with a wealthy investor, agreeing to trade legal advice in exchange for lifetime yearly payments of $20,000. After he failed to gain the Chief Justice seat it became clear that Fortas would probably face impeachment and consequently he resigned from the Supreme Court. Amanda Frost, "Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal," *University of Kansas Law Review*, Vol. 53, 2005, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=53+Kan.+L.+Rev.+531&srctype=smi&srcid=3B15&key=ce89252e73d52fa0da84cbffb3e6167f (accessed April 12, 2011), 545. Laura Kalman, *Abe Fortas: a biography* (Binghamton, New York: Yale University Press, 1990), 352, 362, 374.

[76] Grant Hammond, *Judicial Recusal*, 65.

[77] Historians claim that Nixon's nomination of Clement Haynsworth was rejected by Democrats as payback for Conservatives rejecting Fortas. Historians also claim that Johnson's nomination of Fortas was rejected because Conservatives did not like the left turn the Court was taking. (David Kaplan, "The Reagan Court – Child of Lyndon Johnson," *The New York Times*, September 4, 1989, http://query.nytimes.com/gst/fullpage.html?res=950DE1DE1731F937A3575AC0A96F948260 (accessed March 20, 2011).)

Fortas – $686,589 is significantly more than the $15,000 Fortas received from associated parties.

In *Cheney v United States District Court for the District of Columbia* we concluded that the "appearance" of bias is a very loosely defined and heavily interpreted term. Associate Justice Scalia traveling and socializing with Dick Cheney, who was a party to a Supreme Court docketed case, does not signify an appearance of bias. According to Scalia, friendships with parties to a case do not indicate possible nepotism or the "appearance" thereof. Then Chief Justice Rehnquist also responded to the controversy, which fueled the fire, saying that every Justice strives to adhere to U.S.C. 28 and though the process may be different for each Justice, the recusal goals are the same; basically, the law exists but is extremely malleable to the Justice's wants and needs – what seems a recusal goal for one is likely to be different for another. Former Associate Justice Thurgood Marshall recused himself, more often than not, from NAACP cases between the time when he was nominated to the Supreme Court in 1967 until 1984, twenty-three years after leaving his post as NAACP Chief Counsel. Looking back in time and being able to reference the 1984 memorandum, even Marshall's decision to end his "self-imposed blanket disqualification rule"[78] that year was occasionally renounced where "the circumstances of an individual case persuade me, as with all cases, to do otherwise."[79] This helps us understand how dependent recusals are on a Justice's rationale at a given point in time.

Although the text of Congressionally mandated judicial recusal policy seems descriptive it's clear that much of it depends on (1) Supreme Court interpretation, (2) individual Justices' interpretations (in the instance that their recusal is the one in question), (3) the political climate, (4) the particular "place" a Justice might be in their judicial mindset and constitutionally interpretive development, (5) ideological motivations, and (6) strategic motivations.

In regards to the first dependent variable, Supreme Court interpretation, the Court's ruling in *Liljeberg v Health Services Acquisition Corp* (1988) is a good example. The Supreme Court's ruling that a judgment ought to be reversed if the sitting judge who decided the case was also, even unknowingly, connected financially to the outcome of the case.[80] In the ruling the Supreme Court interpreted Section 455 (a)'s language – "might reasonably be questioned"[81] to mean when a "reasonable person" would expect a recusal.[82] This ambiguous "reasonable person" test could be seen as an expansive or contractive adjustment to recusal policy. It is all up to interpretation just as Section 455 (b)(4), "if the outcome of the proceeding could *substantially* affect the value of the interest," is all up for interpretation.[83] Ginny Thomas's $686,589 involvement against the Affordable Care Act

[78] Marshall's reference to his so-called "blanket disqualification" since 1984 is made in error because he actually did participate in NAACP Supreme Court cases between 1967 and 1984. He actively participated in *Milliken v. Bradley* (1974) and *Meek v. Pitenger* (1975), both involving the NAACP as the plaintiff. (Davies, "The Reluctant Recusants," 84-5.)

[79] Ibid., 81.

[80] This case revolved around a federal judge in Louisiana, but is noted in this paper specifically because the opinion, written by Justice Stephens, institutes a new judicial recusal norm in regards to U.S.C. Title 28. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

[81] Hammond, *Judicial Recusal*, 59.

[82] Stevens, John Paul, delivered opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

[83] Hammond, *Judicial Recusal*, 58.

is extremely substantial because a reasonable person making average per capita income would reasonably question her husband's bias.

In regards to the second dependent variable, individual Supreme Court Justice interpretations, Associate Justice Elena Kagan provides a good example compared to her counterparts. She is more disciplined in her recusal policy than other Justices, making the task of overturning lower court decisions more difficult especially on those where a split vote is predicted.[84] The difference is how she interprets the policy compared to another, plus before she was appointed she indicated her recusal from at least eleven cases – those in which she represented the U.S. government in her previous job as Solicitor General.[85]

In regards to the third dependent variable, political climate, Associate Justice Kagan's recusal habits are also of interest. The relevance is intensified when combined with Associate Justice Thomas's recusal habits. Many people are calling for Thomas to recuse himself when the Affordable Care Act inevitably reaches the Supreme Court judicature. The same is being said about Kagan. The state lawsuits against the healthcare bill began while Kagan was still Solicitor General, Kagan gave insight into the constitutionality of the bill during her Senate hearings and Kagan practically said how she would vote if she was to participate.[86] Much of the reasoning behind Thomas and Kagan's refusal to recuse is prompted by the political climate clouding the case itself.

For the fourth dependent variable, two cases studied in Part II are good examples – Justice Rehnquist (less restrained in recusals than Kagan) in *Laird v. Tatum* (1972) and *U.S. v Nixon* (1974). Rehnquist divulged not recusing himself in *Laird v. Tatum* because his prior involvement as Assistant Attorney General on the government's behalf was professional and not personal opinion. In *U.S. v Nixon*, Rehnquist's only explicative reason for recusing himself was a "past association." However, advising the Nixon administration as Assistant Attorney General in a surveillance program is also "past association."

In regards to the last two variables, ideological and strategic motivations, Justices naturally want to ideologically guide the development of the Constitution according to their beliefs – the principle reason they were nominated in the first place. In order to do that successfully, strategy is involved. Manipulating votes and imposing opinions on each other is effective but the most successful way is through recusal and knowing not to disqualify when there's a close vote versus greater voting arrangements.

Finding a solution that tries to tackle every single inconsistency in Supreme Court recusal policy is a daunting task. If the policy is tightened to the effect of prompting more judicial recusals, it's more than possible that parties to a case would take advantage of it. If Justices recuse themselves more often, the constitutional significance of having nine versus six voting on monumental cases, such as President Obama's healthcare bill, would greatly diminish, in which case the Founding Fathers' purpose of the Supreme Court would be nonexistent. The following suggestions examine similar problems.

One suggestion is a "Justice in waiting," most likely a retired Justice or one confirmed and awaiting a seat on the Court. Thirty-nine states and the District of Columbia

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[84] Barnes, "Kagan's recusals," *The Washington Post*, October 4, 2010.

[85] "Kagan and ObamaCare," *Wall Street Journal*, July 13, 2010, http://online.wsj.com/article/SB10001424052748704288204575363112109060620.html (accessed April 4, 2011).

[86] "Kagan and ObamaCare," *Wall Street Journal*, July 13, 2010.

have a similar procedure for its high courts, guaranteeing a full court hears each case.[87] However this would cause bureaucratic problems with staff and possibly open up the floodgates for continuously inconsistent voting and internal deliberations.

A less drastic change is adopting American Bar Association Codes specific to Section 455. For example, 455 (b) (2) could define the disqualification of a Justice being:

> When the judge knows that a lawyer in a proceeding is affiliated with a law firm in which a relative of the judge is a partner or has an ownership interest in the law firm.

This describes the instances and appearances for recusal more narrowly than the current Title 28 text, calling for recusal regardless of the degree of affiliation and/or ownership.[88] A procedure like this calls for recusals in Scalia – Wal-Mart-type controversies.

A simpler adjustment could be a personal statement written by the Justice in question on his decision to sit the case. The statement would address the rational of those who submitted the motion to recuse, developing recusal precedent for the future. Representatives Chris Murphy and Anthony Weiner are working on a bill based on it.[89]

Any policy that encourages more frequent recusals also challenges the constitutionality of the court – the purpose of having a consistent nine votes to create balance between constitutional opinions.[90] The constitutionality of judicial review depends on the input of nine Justices and when less than nine Justices vote, that judicial consensus is questioned.

Former Chief Justice Rehnquist gave the best response regarding a Justice's decision to sit on a case where there's questionable partiality; that before a Justice is appointed to the Supreme Court they are likely to have voiced statements, comments, or opinions on any matter of subjects and when one day those subjects come before the Court, to appear ignorant on the matter "would be evidence of lack of qualification, not lack of bias."[91] No matter how controversial the statements, comments, or opinions on any matter may be, in the end, it would still be up to the Justice himself on whether to recuse himself/herself or not. There are many cases where the line between conflict of interest and impartiality of Supreme Court Justices is blurred. Justices are themselves solely responsible for judging their ability to be impartial but if Congress is moved to change the policy, their power of the Court's jurisdiction and number of Justices can influence a great deal.[92] However, policy implementation in Congress is an entirely different beast.

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[87] Barnes, "Kagan's recusals," *The Washington Post*, October 4, 2010.
[88] Abramson, "The Judge's Relative is Affiliated With Counsel of Record," 1200.
[89] "The Court's Recusal Problem," *The New York Times*, March 16, 2011.
[90] Erwin Griswold and Ernest Gellhorn, "200 cases in which justices recused themselves," *The Washington Post*, October 18, 1988, http://pqasb.pqarchiver.com/washingtonpost/access/73637849.html?FMT=ABS&FMTS=ABS:FT&date=Oct+18%2C+1988&author=Erwin+N.+Griswold%3BErnest+Gellhorn&pub=The+Washington+Post+%28pre-1997+Fulltext%29&edition=&startpage=a.25&desc=200+Cases+in+Which+Justices+Recused+Themselves (accessed March 25, 2011).
[91] Wasby, "Issues in Judicial Recusal," 91.
[92] Epstein, Lee and Walker, *Constitutional Law for a Changing America*, 62.

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ENDNOTES:

[i] Before joining the Supreme Court, Justice Blackmun worked for Dorsey & Whitney, LLP, a law firm representing Northwest Airlines. "Dorsey History," *Dorsey & Whitney, LLP*., http://www.dorsey.com/about/history/ (accessed April 12, 2011).

[ii] City of Norfolk were making improvements to schools, streets and parks, and Justice Powell's past employment with the Richmond School Board presented a conflict of interest.

[iii] Justice Marshall was the lawyer who won the infamous *Brown v. Board of Education*, therefore his bias was already apparent when *Board of Education v. Vail* was placed on the Supreme Court docket.

[iv] Before joining the Supreme Court, Justice Marshall was a lawyer to a case fighting for equality in publicly-financed housing projects; Sweatt v Painter 339 U.S. 629 (1950).

[v] Case revolved around funds from Elementary and Secondary Education Act of 1965, which presented a conflict of interest because of Justice Powell's history with Richmond School Board.

[vi] Ibid.

[vii] National School Boards Association submitted amicus curiae, which presented a conflict of interest because of Justice Powell's history with Richmond School Board.

[viii] Justice Rehnquist did not participate because his son-in-law's firm works for American Hospital Association. Al Kamen, "Court Strikes Down 'Baby Doe' Rules; Administration Rebuffed on Mandating Care of Handicapped Infants," *The Washington Post*, June 10, 1986.
[ix] The period between Justice Lewis's retirement and Justice Kennedy's nomination lasted from June 1987 to Feb 1988, therefore the Court only had eight Justices sitting at that time.
[x] Ibid.
[xi] The Alzheimers Study Group which Justice O'Connor joined included a Morgan Stanley special advisor; "Sandra Day O'Connor, Bob Kerrey, and Other Head Alzheimers Study Group," *Alzheimer's Weekly*, December 2, 2007, http://www.alzheimersweekly.com/content/sandra-day-oconnor-bob-kerrey-and-others-head-alzheimers-study-group (accessed April 8, 2011).
[xii] John O'Connor, husband of Justice O'Connor, worked for Fennemore Craig law firm, which represents AT&T. Also O'Connor used attorneys from this firm to help her prepare for confirmation hearings. "Fennemore Craig Celebrates 125 Years of Legal Service," *Fennemore Craig Attorneys*, http://www.fclaw.com/about/history.cfm (accessed April 11, 2011).
[xiii] Justice Stevens owns property in Florida that may have been within the renourishment zone, creating a conflict of interest. Treanor, William "Steven's Recusal Makes Difference in Florida Property Ruling," *The National Law Journal LegalTimes*, June 17, 2010, http://legaltimes.typepad.com/blt/2010/06/stop-the-beach-the-difference-a-recusal-can-make-.html (accessed April 15, 2011).
[xiv] Stevens retired on June 29, 2010.