

The Conspiracy of Silence

It has become increasingly commonplace whenever an important issue is before the U.S. Supreme Court for there to be demands that justices recuse themselves. That is to say, justices are called upon to withdraw voluntarily from cases because of bias or the appearance of bias. For example, when President Barack Obama's health care law was before the Supreme Court, calls for recusals came from the right and the left.¹ Justice Elena Kagan was criticized for participating because she had served as the Solicitor General when the legal defenses for the Affordable Care Act, or "Obamacare," were first developed. Justice Kagan insisted that her recusal was unnecessary because she had not done any real work on the case. At her confirmation hearings, she testified, "I attended at least one meeting where the existence of litigation was briefly mentioned, but none where the substantive discussion of the litigation occurred."² However, commentators suggested that her involvement was more extensive than she was letting on. They even hinted that Kagan was deliberately shielding her work on the case so that she would be eligible to participate when she became a justice.³

Meanwhile, Justice Clarence Thomas's participation in the health care dispute was questioned because of the political activities of his spouse. Virginia Thomas, known as "Ginni," has had a long association with conservative causes, working for the Heritage Foundation and more recently for Liberty Central, a nonprofit lobbying group that she founded. These activities have occasionally prompted calls for her husband's recusal, most notably in *Bush v. Gore*, which decided the outcome of the 2000 presidential election.⁴ The trouble with Obamacare derived from a 2010 speech at the Steamboat Institute in which Ginni Thomas stated, "I think we need to

repeal Obamacare.”⁵ Had these comments been made by a sitting justice, there would have been a strong argument for a recusal. However, it was unclear whether Ginni Thomas’s advocacy work implied any prejudgment of the case by her spouse.

Ultimately, both Justices Kagan and Thomas chose to participate in the health care dispute, and the Court voted narrowly to uphold the individual mandate, one of the core provisions of the Affordable Care Act. Consistent with the Court’s customs, neither justice offered any explanation for his or her refusal to sit out of the case, but Chief Justice Roberts devoted his 2011 *Year-End Report on the Federal Judiciary* to the subject of recusals, no doubt in response to the controversy.⁶ Without commenting directly on the merits of Kagan or Thomas’s situation, Roberts offered general reassurances that he “had complete confidence in the capability of my colleagues to determine when recusal is warranted.”⁷

The episode highlighted just how little we know about the recusal process. Despite the large amount of commentary on the subject,⁸ recusals are among the poorest-understood features of judging, particularly on the U.S. Supreme Court.⁹ Exacerbating the problem is the fact that the justices have consistently refused to comment on their behavior. Chief Justice Roberts’s 2011 *Year-End Report* is notable primarily for how unrevealing it is about the justices’ recusal practices. When the justices withdraw from disputes, the most that one can typically expect is a brief statement announcing that a justice “took no part in the consideration or decision of this case.”¹⁰ The justices rarely say more, declining even to make public the names of the cases in which they considered recusing themselves but did not. One commentator described the justices’ reluctance to speak on the matter as a “conspiracy of silence.”¹¹

Yet understanding the recusal process is vitally important. At the most basic level, the participation of justices has the potential to affect who wins cases and who loses. Given the ideological consistency of the justices’ voting records¹² and how closely divided they have become on important issues,¹³ it is reasonable to expect that case dispositions will turn on the recusal of particular justices. In the context of the health care controversy, for example, Justice Kagan’s recusal would have denied the majority the fifth vote that it needed to uphold the constitutionality of the individual mandate. Assuming that none of the other justices changed his or her vote, the Court would have found itself deadlocked, generating no majority opinion to guide the lower courts and leaving the future of the Affordable Care Act uncertain.

Recusals can also affect the Supreme Court’s docket, decreasing the likelihood that the justices will agree to hear cases. By convention, the

justices grant petitions for *certiorari*, accepting cases for review when at least four justices are supportive, a practice known as the Rule of Four.¹⁴ The likelihood of a grant is generally low, but, as several commentators have noted, the likelihood becomes even lower when justices disqualify themselves because then there is a smaller pool of justices from which to find the necessary votes.¹⁵ Indeed, the justices themselves observed in their 1993 *Statement of Recusal Policy* that recusals have “a distorting effect upon the *certiorari* process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.”¹⁶ Petitioners are at a particular disadvantage because, without at least four votes to grant review, lower court opinions are automatically affirmed, which invariably favors the respondents.

More generally, understanding the recusal process is important because it helps us to understand the extent to which the justices, and by extension the federal judicial system, are committed to principles of impartial justice. Federal law requires judges, including Supreme Court justices, to disqualify themselves when their “impartiality might reasonably be questioned.”¹⁷ The federal recusal statute also identifies several categories of behavior in which recusals are required, such as when justices have financial stakes in cases, when they have participated previously in proceedings as counsel, and when they have already expressed opinions on the merits.¹⁸ These guidelines are intended to eliminate bias from judging, fostering a judicial decision-making process that is principled, and thereby building public confidence in courts.¹⁹ However, there is considerable uncertainty about whether the justices actually follow the statutory guidelines. Neither federal law nor the Judicial Conference’s Code of Conduct for United States Judges requires Supreme Court justices to report the reasons for their recusal decisions, nor is there a higher court to review their practices.²⁰ In fact, the federal recusal statute establishes no procedures whatsoever for Supreme Court recusals. For the most part, the justices recuse themselves *sua sponte*. Litigants rarely file recusal motions, perhaps in part because they do not want to offend the justices by suggesting that they are prejudiced,²¹ and responses to these motions are practically nonexistent.²² One commentator characterized the process as “a personal, independent, unreviewable decision by an individual Justice whether to participate in an individual case.”²³

In competition with the federal recusal guidelines are the justices’ other institutional and policy goals. Research has well documented that Supreme Court justices are policy-motivated decision makers who are forward thinking about the consequences of their behavior.²⁴ We know that policy goals influence the justices’ final votes on the merits,²⁵ opinion assignments,²⁶ contents

of majority opinions,²⁷ *certiorari* grants,²⁸ and oral arguments,²⁹ so there is every reason to think that policy considerations also affect justices' decisions about whether to recuse themselves. Sitting out of cases denies justices the opportunity to influence the final votes on the merits and the contents of majority opinions. These policy costs might sometimes be too great for justices, even if they risk damaging the Court's legitimacy by participating.

Justices also have institutional incentives to participate in cases that they must balance against the statutory guidelines. Among these incentives is the need for the justices to decide the cases before them, an institutional responsibility that is compromised when recusals cause the Court to lack a quorum or divide evenly. Justices have stated that this "duty to sit" is meaningful to them and can be at odds with the statutory goal of reducing bias.³⁰ For example, Justice Ruth Bader Ginsburg has remarked that "on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. . . . Because there's no substitute for a Supreme Court justice, it is important that we not lightly recuse ourselves."³¹ Chief Justice Roberts echoed these concerns in his 2011 *Year-End Report*, noting that, unlike lower federal court judges, who "can freely substitute for one another," when a Supreme Court justice withdraws, "the Court must sit without its full membership."³² If the justices are unable to achieve consensus because their membership is down, important questions of federal law go unanswered. When faced with this possibility, the justices might determine that the benefits of recusals are not worth the costs.

Consider, for example, Justice Kagan's situation in the health care case. She certainly could have recused herself because of her work as Solicitor General. Even if there was no actual conflict of interest, the mere appearance of a conflict might have persuaded Justice Kagan to err on the side of caution and to sit the case out, thereby ensuring that the Court's legitimacy would not be threatened by her participation. But what would a recusal have cost her? The Court would have lacked the fifth vote needed to secure the constitutionality of the Affordable Care Act, and Justice Kagan would have missed the opportunity to shape the law in this important area. Surely these opportunities were too great for her, or any justice, to pass up.

Because the justices refuse to comment about their recusal practices, it is unclear whether the justices follow the statutory guidelines or some other criteria. It is also unclear what effects their recusal practices have on law and policy. The purpose of this book is to penetrate the myths surrounding recusals by studying their causes and consequences systematically.

If the justices themselves are unwilling to say much about recusals, then the techniques of empirical legal scholarship might reveal what the justices' words do not. By carefully analyzing their behavior, one can identify when the justices are more likely to sit out of disputes, how their absence changes the composition of the Court, and whether these changes affect case dispositions, opinion content, the Court's institutional efficiency, and the Court's agenda. The inquiry can help us to evaluate some of the common assumptions that people have about the recusal process, shedding light on this important but little-understood dimension of judging. It might also help us to understand why the justices maintain so much secrecy about their practices.

Recusals in American Politics

It may be surprising to learn that only recently has the subject of recusals entered into regular political discourse about the U.S. Supreme Court. Previously, recusals were only an occasional subject of popular or media interest. Figure 1.1 on page 6 traces commentary about recusals in the *New York Times* and the *Wall Street Journal* from 1915 to 2012 and shows that for most of the twentieth century there were hardly any editorials, letters to the editor, or opinion pieces on the subject.³³ The first piece, from 1916, was a letter to the editor of the *New York Times* about Justice James McReynolds's ineligibility to participate in several cases brought under the Sherman Antitrust Act because he had worked on the cases as President Woodrow Wilson's Attorney General. The letter stopped short of taking a position on McReynolds's recusal, but the author did point out that the cases would be heard by "an even numbered court" and that there was "some division among the members of the court" on antitrust issues.³⁴ Because there was a chance that the justices would divide evenly, the author urged the appointment of additional justices to the Court who "could be absolutely depended upon to vote for the prosecution."³⁵

This type of commentary was uncommon prior to the 1970s, but when the subject did arise, it was almost never to demand the recusal of particular justices. Indeed, much behavior that today would be certain to provoke controversy brought little or no coverage. For example, Justice Robert Jackson went vacationing with President Franklin D. Roosevelt while the landmark commerce clause case *Wickard v. Filburn* was before the Court,³⁶ and Justice Byron White went skiing with Attorney General Robert Kennedy and his family while the Court was considering two cases

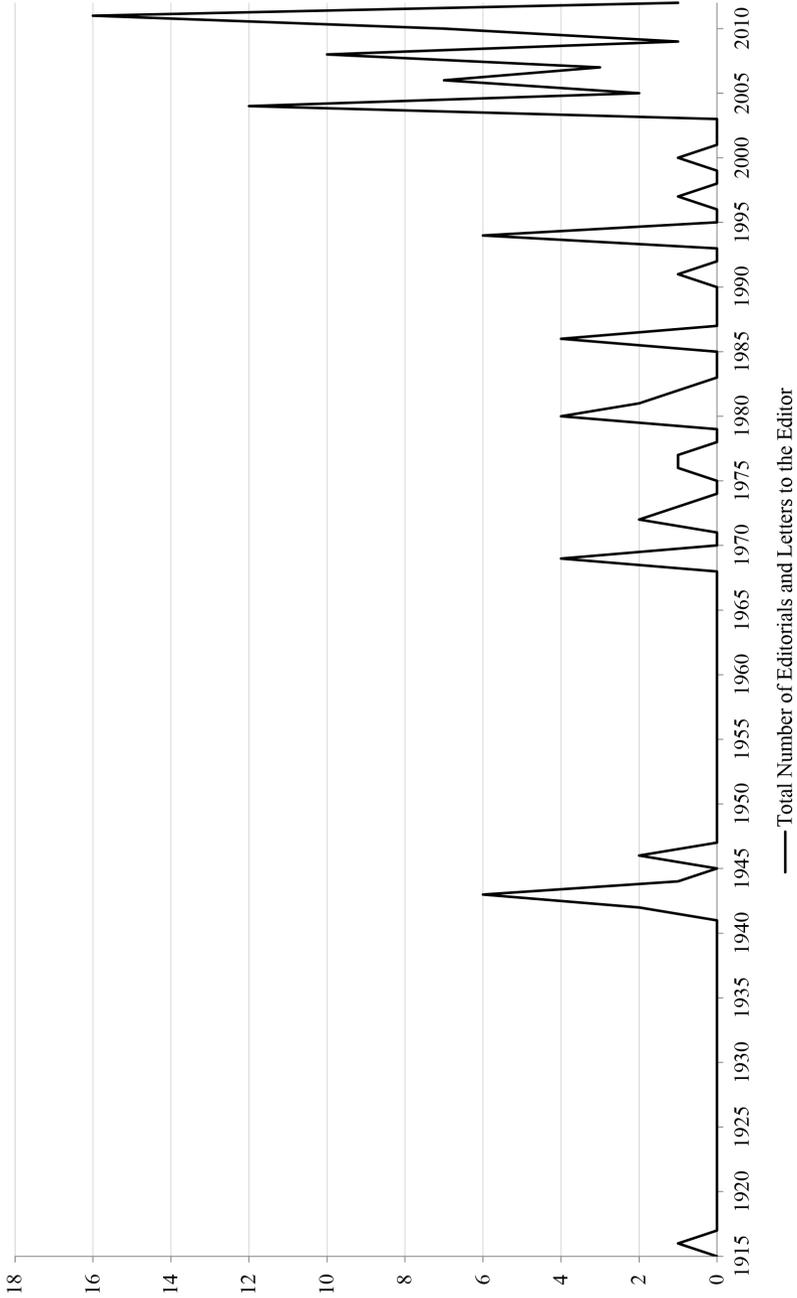


Figure 1.1. Commentary about U.S. Supreme Court Recusals in the *New York Times* and *Wall Street Journal*, 1915–2012.

in which Kennedy was a named party.³⁷ To be sure, these events predated the changes that would come in the early 1970s to the recusal statute and the American Bar Association's ethical guidelines. However, it is notable that these sorts of *ex parte* communications between justices and executive branch officials did not bring demands for reform at the time.

Instead, as in the McReynolds letter, commentators tended to oppose recusals because of the administrative problems that they caused. These tendencies are illustrated in Figure 1.2 on page 8, which traces the tone of media commentary about recusals in the *New York Times* and the *Wall Street Journal* from 1915 to 2012. The figure shows that prior to the 1970s, the subject of recusals received sustained attention only in the 1940s, and that the tone of this commentary was primarily opposed to recusals. A review of these articles reveals that the authors were concerned that recusals would reduce the Court's efficiency by causing the justices to divide evenly or lack a quorum, concerns that were not without some foundation.³⁸ In one important antitrust case, the Court lacked a quorum because four of the justices had recused themselves, postponing the matter indefinitely "until such time as there is a quorum of Justices qualified to sit in it."³⁹ Commentators criticized the Court for bringing about "certain unnecessary delays of justice."⁴⁰ After considering proposals to reduce the Court's quorum to five,⁴¹ Congress finally authorized the Second Circuit to act as the court of last resort.⁴²

The tone of the commentary began to change in the 1970s at the time of Judge Clement Haynsworth's unsuccessful bid for the Supreme Court. As a circuit court judge, Haynsworth had declined to recuse himself from several cases in which he had a financial interest, and the revelations brought a series of opinion pieces that were critical of his participation because of the potential damage to public confidence in the judiciary. "It is of utmost importance that litigants and the public maintain complete confidence in the impartiality of the judiciary," wrote a letter writer to the *New York Times*.⁴³ Another letter writer agreed: "If the judge is confirmed and takes his seat, the Court itself will function for years in an atmosphere of legitimate doubt."⁴⁴ Unlike previous commentary, which almost uniformly opposed recusals, the coverage of Haynsworth was mixed, with more commentary favoring his recusal than not.

During this same period, the recusal practices of the sitting justices also began to receive more regular media scrutiny, much of it negative. Perhaps most prominently, Justice William Rehnquist was criticized for failing to recuse himself from three cases that he had worked on, or commented

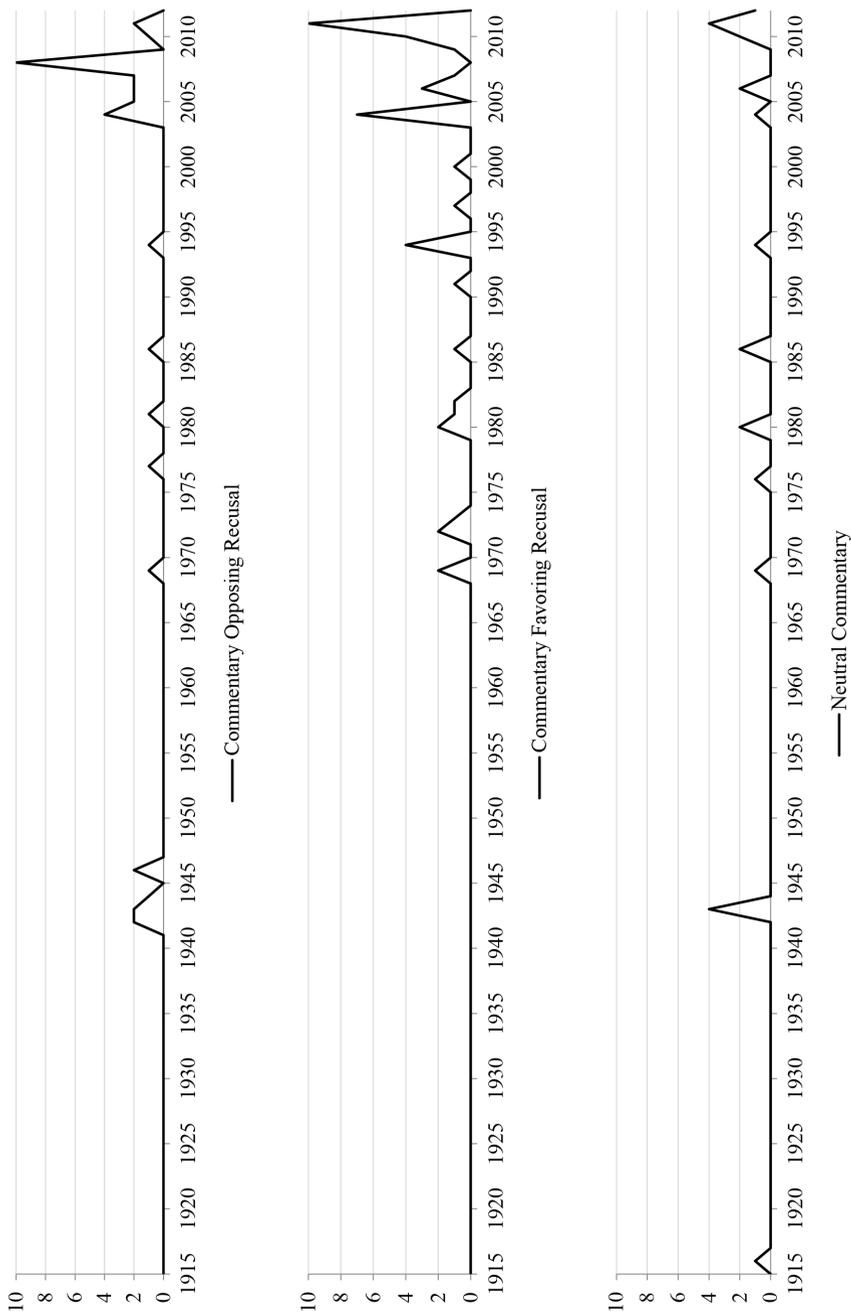


Figure 1.2. Tone of Commentary about Recusals in the *New York Times* and *Wall Street Journal*, 1915–2012.

about, as an Assistant Attorney General in the Nixon administration.⁴⁵ All three of the cases were decided by narrow 5-4 margins, with Rehnquist casting the deciding votes. Among them was *Laird v. Tatum*, which challenged the Army's surveillance of antiwar protesters.⁴⁶ Because Rehnquist had testified before Congress about the surveillance program as an Assistant Attorney General in the Nixon administration, the respondents challenged his participation in the case and filed a motion requesting that he recuse himself. In response, Rehnquist took the unprecedented step of defending his participation at length in a memorandum, insisting that he had not worked directly on the case and that "it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution."⁴⁷ Yet commentators remained skeptical of Rehnquist's motives, especially because he had chosen to recuse himself from several other cases in which his votes had been less decisive. "The results may be coincidental," wrote one letter writer to the *New York Times*, "but they raise grave questions, not merely about his judgment, but about his integrity."⁴⁸

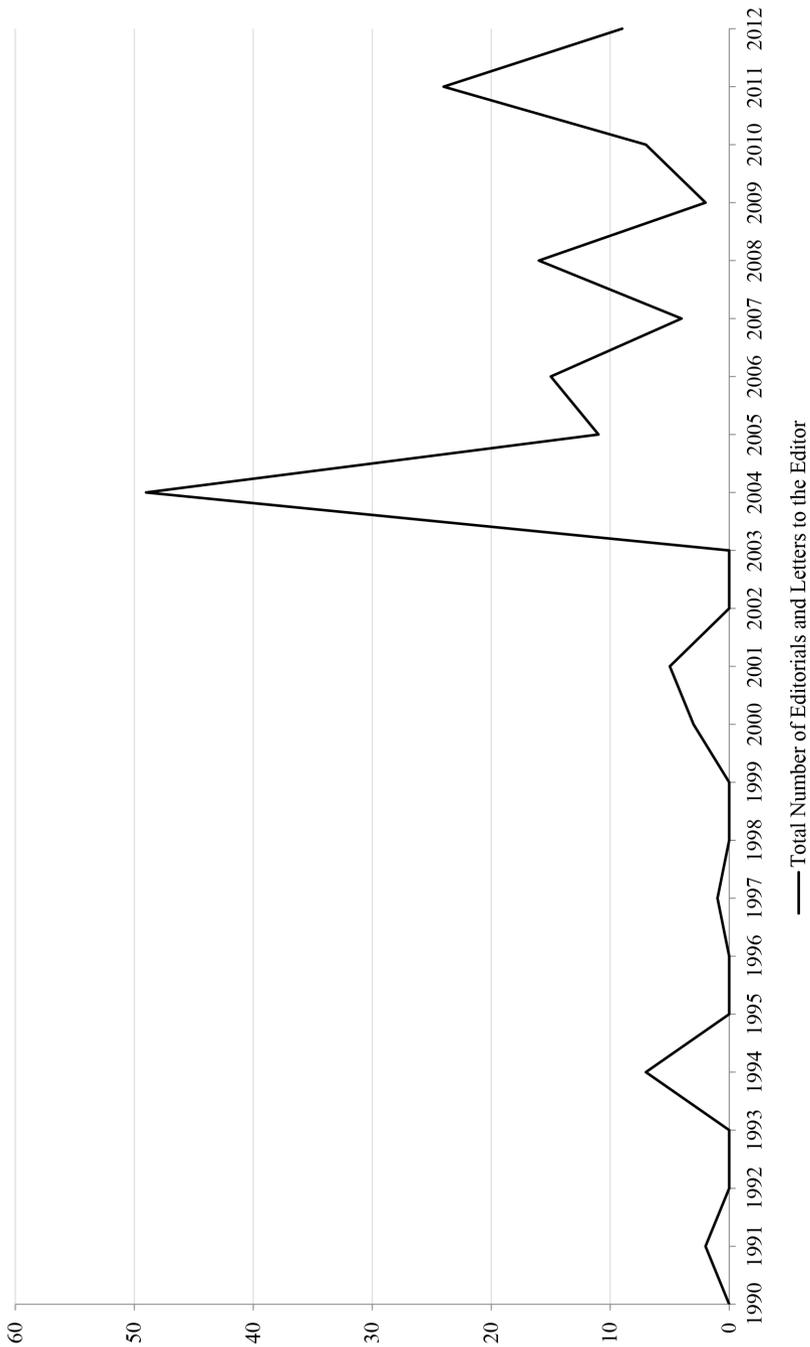
Soon afterward, in 1972, the American Bar Association developed a new Judicial Code of Conduct, which required judges to disqualify themselves from cases in which their "impartiality might reasonably be questioned." The ABA Code was widely adopted in most states and the District of Columbia, and in 1973 the Judicial Conference of the United States applied it to most federal judges, excluding Supreme Court justices.⁴⁹ The Code also became the foundation for the 1974 revisions to the federal recusal statute, which more precisely defined the circumstances in which federal judges should recuse themselves.⁵⁰ Unlike the Judicial Code of Conduct, the newly revised federal recusal statute did apply to Supreme Court justices.

These reforms took place in the context of the deepening Watergate crisis, in which the subject of ethics in government was of growing national concern. Yet after 1974, media commentary about recusals remained episodic, if somewhat more frequent and negative in tone. The subject came up most commonly during confirmation hearings, such as when Rehnquist was nominated to be Chief Justice in 1986.⁵¹ More recently, both Justices Stephen Breyer and Samuel Alito received criticism at their hearings for their failures as lower court judges to recuse themselves from cases in which they had financial interests. For Breyer, it was his investments in Lloyd's of London,⁵² while for Alito scrutiny came from his ownership of Vanguard mutual funds.⁵³ Chief Justice Roberts also faced questions at the time of his

confirmation hearings for meeting with President George W. Bush about his potential nomination to the Supreme Court while he was deciding *Hamdan v. Rumsfeld*,⁵⁴ a case that concerned the Bush administration's use of military commissions at Guantanamo Bay.⁵⁵

The turning point for coverage about Supreme Court recusals was January 2004, when Justice Antonin Scalia went duck hunting with the sitting Vice President, Dick Cheney, shortly after the Supreme Court agreed to decide a case in which Cheney was a named party. According to Justice Scalia, he “never hunted in the same blind with the Vice President,” and he and the Vice President were never in an “intimate setting.”⁵⁶ But critics were not satisfied, and over the next few months more media attention was devoted to the subject of recusals than at any time previously.⁵⁷ “Justice Antonin Scalia has shown surprisingly poor judgment in going on a social trip with Vice President Cheney while Mr. Cheney is a party in a case before the Supreme Court,” a letter writer commented to the *Washington Post*.⁵⁸ Scalia was failing his “obligation to the institution of the court” by creating doubt about the “propriety or neutrality of the justices’ jurisprudence.” The controversy became so great that Justice Scalia issued a memorandum explaining his decision to participate in the case, maintaining that no conflict of interest was created by his relationship with the Vice President. “A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling,” he wrote.⁵⁹ Justice Scalia dismissed the possibility that his trip with the Vice President, which had included a ride on a government plane, had compromised his impartiality or established any sort of *quid pro quo* arrangement. “If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the nation is in deeper trouble than I had imagined.”⁶⁰

After the Scalia debacle, popular attention to the subject of recusals skyrocketed. Figure 1.3 documents changes in the amount of commentary about recusals in six major newspapers from 1990 to 2012.⁶¹ The trends show that prior to 2004, there were never more than a handful of opinion pieces about recusals per year, with most years seeing no commentary, but since 2004 media coverage has become more sustained. While no year has approached the 2004 levels, every year has seen at least some commentary about the subject, with the next-largest spike coming in 2011, shortly before the Supreme Court was to consider the constitutionality of the Affordable Care Act. It would be fair to say, then, that the past decade has witnessed a transformation in media coverage of recusals. Where once the commentary was relatively rare and tended to oppose recusals, today attention to recusals



Note: The six newspapers were the *New York Times*, *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, *Chicago Tribune*, and *St. Louis Post-Dispatch*. Commentary includes editorials, letters to the editor, and opinion pieces.

Figure 1.3. Commentary about U.S. Supreme Court Recusals in Six Major Newspapers, 1990–2012.

has become more sustained and politicized, with commentators about as likely to support recusals as they are to oppose them.

Yet despite all of the attention to the issue, we still understand very little about the justices' recusal practices. Indeed, the most notable aspect of Justice Scalia's memorandum was not his refusal to disqualify himself, but the fact that he wrote the memorandum at all. As discussed above, Supreme Court justices hardly ever explain their recusal decisions. Their "conspiracy of silence" stands in stark contrast to the lengths that the justices take to explain their decisions on the merits. Outside of the recusal context, the justices seem to understand that written opinions can help to enhance the Court's legitimacy by making their decision making appear principled.⁶² Because the justices are unelected and not directly accountable to the public for their decisions, it benefits the institution for the justices to maintain this perception.⁶³ Even when their decisions are motivated by politics, the justices can build confidence in the institution by offering reasons for their decisions that will withstand public scrutiny.⁶⁴

It is puzzling, then, that the justices refuse to defend their recusal practices. The silence has persisted, even after Scalia's duck hunting incident and despite the recent recusal controversies on the Roberts Court. It begs the question: Why *don't* the justices explain their recusal decisions? While it is not unusual for the justices to be silent about administrative matters—they also do not explain their *certiorari* decisions—a lack of transparency about recusals risks opening up the justices unnecessarily to charges of bias. Chief Justice Roberts was criticized for his 2011 *Year-End Report* because he refused to break the code of silence. "A chief justice looking out for the historical legacy of the court should encourage [an] associate justice to be publicly transparent about such an important ethical question," wrote Eric Segall for the *Los Angeles Times*. "He should not defend her silence, even by implication."⁶⁵ These comments echo concerns that have been around for decades.⁶⁶

Candor would seem only to benefit the justices. By explaining their justifications in writing, the justices could preempt charges of bias by putting out in the open their potential conflicts of interest and describing the principles that they use to evaluate them. Creating a written record would enable the justices to codify their practices, making it easier for them to determine when recusals are warranted.⁶⁷ The justices might even find that they withdraw from cases less frequently by reaching consensus about when disqualification is necessary, thereby reducing the number of cases in which their membership is down. If the justices will not accept these benefits of transparency, then there must be a reason.

Plan for the Book

This book explores these questions through an intensive examination of recusal practices on the U.S. Supreme Court, evaluating both the consequences of recusals as well as the motivations of justices who are making recusal decisions. To preview the book's conclusions, I find that recusals advance certain judicial goals but frustrate others, giving the justices good reasons to be wary of recusing themselves from cases too easily. The primary benefits of recusals are to maintain the integrity of judicial proceedings and to preserve public confidence in the Supreme Court. Recusals function as a type of legitimacy-conferring behavior that contributes to the perception that the justices are principled decision makers, and justices have incentives to maintain this perception in order to preserve their legitimacy and the public's trust.

However, for the justices there is a tradeoff between adhering strictly to the ethics rules and achieving their other institutional and policy goals. There are times when the costs of disqualification are too great, even when recusals might technically be warranted. For example, the Court might be at risk of dividing evenly, or cases might be doctrinally important and would benefit from the participation of a full Court. There might also be cases in which the justices feel that their participation is necessary to advance their policy goals. In these circumstances, the justices have incentives to deemphasize the statutory recusal guidelines to advance these other objectives. They also have incentives to maintain silence about their recusal behavior so that they can engage in these tradeoffs more easily. It does not necessarily benefit the justices to have a written record that codifies their practices too rigidly, obligating them to withdraw from future cases regardless of the institutional and policy needs. Nor does it serve the justices for the public to be aware of the balancing act that is occurring behind the scenes. The Court prefers instead to keep quiet, defending ethical controversies only when public confidence in the Court appears to be in jeopardy. On these rare occasions, the justices break their silence and speak out.

By focusing on recusals, then, one can gain insights into broader questions about how the justices balance their concerns about institutional legitimacy against their roles as national policy makers. In fact, studying recusals might be among the best ways to understand the justices' use of legitimacy-conferring behaviors and symbols because, in most other circumstances, the justices do not have discretion about how and when to deploy them. Many of the other legitimacy-conferring symbols of the judiciary,

such as the justices' robes and the other ceremonial trappings of the office, are passive institutional features. When the justices decide to withdraw from cases, they are making a deliberate choice to prioritize ethical rules—and the legitimacy of the institution—above other goals.⁶⁸

In Chapter 2, I describe the competing statutory, institutional, and policy motivations that have an impact on the justices' recusal decisions, beginning with the requirements of the recusal statute, which establishes the presumption that the justices will recuse themselves whenever their "impartiality might reasonably be questioned."⁶⁹ To ignore the statute would be to put the Court in direct confrontation with Congress and perhaps threaten the Court's legitimacy by making the justices seem unprincipled, but to follow the statute too closely would make it harder for the justices to decide cases and controversies, which they are also obligated to do. The justices honor this institutional responsibility through their continued reliance on the "duty to sit" doctrine, which maintains that the justices should resolve any uncertainty about a recusal decision in favor of participation, particularly if the Court is at risk of dividing evenly or lacking a quorum. Additionally, the justices take into account the public policy consequences of withdrawing from cases. Justices have incentives to shape legal policy consistent with the expectations of their appointing presidents and their own judicial philosophies, and recusals can threaten these goals if the justices' absence will move legal policy in other directions.

Then, in Chapter 3, I develop a theoretical framework to explain how the justices are likely to balance these incentives, and I use an augmented version of the Supreme Court Database to test a number of hypotheses that are derived from the framework. Perhaps most notably, I find that the justices are more likely to participate in cases that advance their policy goals. Justices who are close to the center of the Court, and thus more likely to be swing votes, are more likely to participate, as are the justices at the ideological extremes of the Court, whose views might otherwise be unrepresented. Additionally, I find that the justices still apply the "duty to sit" doctrine because they tend to participate in divisive cases. Together, these findings indicate that the justices may not be fully compliant with the ethical guidelines. Yet my research also suggests that the justices do not simply ignore the recusal statute either. In cases in which one would expect the justices to have ethical conflicts, such as when business interests are before the Court, the justices are more likely to recuse themselves. The justices are also more likely to withdraw from cases when they own stock in the companies appearing before them. Consistent with my theory, then,

it appears that the justices are selective in their conformance with ethical rules, balancing multiple goals when making recusal decisions.

In the second half of the book, I investigate the consequences of recusals for law and policy. In Chapter 4, I examine how recusals have influenced the ideological content of the legal policies that the Court produces, and I find that, ordinarily, recusals do not change case outcomes unless a justice who is usually a part of the majority coalition withdraws from a case. However, recusals do influence the ideology of opinion coalitions. The recusal of conservative justices shifts the median ideology of majority coalitions to the left, while the recusal of liberal justices shifts the median to the right. Substantively, this finding means that recusals affect the contents of majority opinions and thus the scope of the precedents that the Court establishes.

I find less evidence that recusal behavior has some of the other adverse consequences that commentators have put forward. In Chapter 5, I examine the impact of recusals on the justices' administrative efficiency, public attitudes about the Court, bargaining activity, and the Court's docket, and I find that in each of these areas the influence of recusals has been small. It is unusual for recusals to cause the Court to divide evenly, and the impact on bargaining activity is limited as well. While a 4-4 vote does sometimes occur, it is primarily when a member of the majority coalition withdraws, and only if a case is otherwise close. Additionally, I find little evidence that recent recusal controversies have caused public support for the Court to decline, not even when Justice Scalia brought so much negative publicity to the Court after his refusal to withdraw from the *Cheney* case.⁷⁰ Finally, after examining Justice Harry Blackmun's docket sheets, I conclude that recusals affect the outcomes of *certiorari* votes only in exceptional cases.

All of these findings complicate the evaluation of proposals for reforming the recusal process, which I take up in Chapter 6. On the one hand, my conclusions reinforce the concerns of those who see a conspiracy in the justices' silence about their recusal practices. My research suggests that, as some have feared, the justices are not withdrawing from cases as often as they could be. The justices' critics might well be justified in demanding procedural reforms to ensure that the justices are accountable to the ethical guidelines. These reforms might include establishing procedures for reviewing the recusal decisions of particular justices, either by the Court as a whole or by an external panel, or mandating that the justices defend their recusal decisions in writing.

Yet, on the other hand, my research suggests that reforms might not be needed because recusals do not routinely have substantial consequences

for law and policy. Moreover, increasing the Court's accountability is not without costs. The same discretion that permits the justices to avoid disqualifying themselves for policy reasons also lets them participate in cases when necessary to serve the public's interest. For example, the justices might anticipate that they are at risk of dividing evenly or that the legal ramifications of a case are so important that it merits the consideration of the full Court. It is not unreasonable for the justices to take these types of institutional concerns into account, particularly when the arguments in favor of recusal are not clear. Reforms that are too aggressive could impair the justices' ability to fulfill their institutional responsibility to decide the cases before them.