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The Journal of Law

The Journal of Law

Journals & Editors

Pub. L. Misc.
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Law & Commentary
Ross E. Davies

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Adam Aft, Alex B. Mitchell, Craig D. Rust, Joshua Cumby, Tom Cummins, Thomas R. DeCesar, Rosanne Rust, Gordon Breuer, Brendan Coffman, Justin Du Mouchel, Daniel Friedheim, Benjamin A. Gianforti, Lauren Girardot, Jeremy Greenberg, Tashina Harris, Emily Christine Kendall, Daniel Klionsky, Megan Marinos, Brian Rock, Daniel Rodriguez, Sarah Nash, John Sandell, Sarah Snider & Matthew Weinstein

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OPENING REMARKS

IN SEARCH OF HELPFUL LEGAL SCHOLARSHIP, PART 1

Ross E. Davies[†]

Like reform and ambiguity and symmetry and many other things,[1] relevance often is in the eye of the beholder. An occasional reminder of that fact can be therapeutic for scholars who aspire to be read, respected, and perhaps even relied upon. Chief Justice John Roberts might have been trying to provide some of that kind of therapy when he recently said,

> Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something. . .[2]

He got a chuckle from his audience – participants in the annual conference of the U.S. Court of Appeals for the Fourth Circuit. But not everyone got the joke, or liked it.[3] That should come as no surprise. He was tweaking people. Some people – including some law professors who write law review articles – do not like to be tweaked.

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

[1] *See, e.g.*, *Christian Legal Soc. v. Martinez*, 130 S.Ct. 2971, 3019 (2010) (Alito, J.); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J.); *U.S. v. Armstrong*, 517 U.S. 456, 472 (1996) (Breyer, J.).

[2] *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN, www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/ at approx. 30:30 (June 25, 2011) ("*Roberts Interview*"); *see also id.* at approx. 46:40.

[3] Well, it seemed like a joke, in part because it was a caricature. There is no such article, at least not on Westlaw. *See* JLR, Westlaw, Feb. 23, 2012 (search for "kant & evidentiary /10 bulgaria & eighteenth /10 centur!" returns zero hits).

The joke was delivered in the 31st minute of a 45-minute interview (conducted by Judge J. Harvie Wilkinson) that touched on a variety of controversial topics and systemic shortcomings relating to the Supreme Court and the legal system of which it is a part. Roberts was good-humored but critical of everyone in the system. There's enough blame to go around, and Roberts is aware of that, as he is of the strengths and successes of that same system, and the credit that is due for them. That much is obvious from the interview taken as a whole. He tweaked himself and his colleagues for "grandstanding" and sometimes "not really being fair to the lawyers" at oral argument, but also praised their collaborative deliberation.[4] He got in a jab at lawyers who complain about a hot bench by pointing out that "very expert counsel" can handle it, but also praised the "extraordinary Supreme Court bar," and then went further to tell a self-deprecating story of one of his own failures as an advocate.[5] He tweaked his own law clerks for wanting a day off on a federal holiday, but he also praised their industry.[6] And so on.

Perhaps law professors should not be offended by a tweaking at the hands of the Chief Justice, but should instead feel honored that they are important enough to merit a tweak.

Besides, in the same interview Roberts made it clear that his lack of interest in articles published in law reviews is based on his judgment that they are not useful to him in his role as a working judge, not on any judgment about their quality as scholarship. This is what he said immediately after the Kantian-Bulgarian-evidence joke:

> . . . which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar. Now I hasten to add that I don't think there is anything wrong with that. If the academy wants to deal with the legal issues at a particularly abstract and philosophical level, that's great and that's their business, but they shouldn't expect that it would be of any particular

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[4] *Compare, e.g.*, *id.* at approx. 43:25 & 33:20, *with id.* at approx. 10:00 & 33:05.

[5] *Id.* at approx. 34:25; *id.* at approx. 35:25; *id.* at approx. 34:40.

[6] *Compare, e.g.*, *Roberts Interview*, note 2 above, at approx. 22:15, *with id.* at approx. 19:15, 37:25; *id.* at 20:10 (joking about his perpetuation of the vague and high office-hours demands he labored under as a clerk for Judge Henry Friendly).

> help or even interest to members of the practicing bar or judges. At the same time, we're not looking for vocational guidance. . . . [B]ut I do think that if the academy is interested in having an influence on the practice of law and the development of law, that they would be wise to sort of stop and think, is this area of research going to be of help to anyone other than other academics. You know, it's their business, but people ask me, what the last law review article I read was, and I have to think very hard before I come up with one.[7]

The Chief Justice knows what he is talking about when it comes to dealing with legal issues at a particularly abstract level. It is a matter that is very close to home. He has found that members of his own Court sometimes deal with legal issues abstractly,[8] and he has been found by some of them to do the same.[9] Indeed, in recent years, intra-Court allegations of abstraction have been fairly common.[10] In addition, members of the Court have recently objected to abstract dealings with legal issues by, among others, Congress, the Solicitor General, and the Supreme Court of Georgia.[11] On the other hand, sometimes the Court prefers "neat abstract issues of law."[12]

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[7] *Roberts Interview*, note 2 above, at approx. 30:55.

[8] *See, e.g.*, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2721, 2729 (2011).

[9] *See, e.g.*, *Abbott v. Abbott*, 130 S.Ct. 1983, 2000-01 (2010) (Stevens, J., dissenting, joined by Thomas and Breyer, JJ.).

[10] *See, e.g.*, notes 8 & 9 above; *U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2338 (2011) (Sotomayor, J., dissenting); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1339 (2011) (Scalia, J., dissenting, joined by Thomas, J.). The Court is aware that inferior courts, too, have discovered abstractions in its work. *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct. 2633, 2643 (2009) ("[O]ther courts considering qualified immunity for strip searches have read [*New Jersey v.*] *T.L.O.* as 'a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other,' *Jenkins* v. *Talladega City Bd. of Ed.*, 115 F.3d 821, 828 (CA11 1997) (en banc), which made it impossible 'to establish clearly the contours of a Fourth Amendment right . . .'").

[11] *See, e.g.*, *James v. U.S.*, 550 U.S. 192, 229-30 (2007) (Scalia, J., dissenting, joined by Stevens and Ginsburg, JJ.); *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577, 2580, 2587 (2010); *Sears v. Upton*, 130 S.Ct. 3259, 3265 (2010) (per curiam).

[12] *See, e.g.*, *Ortiz v. Jordan*, 131 S. Ct. 884, 893 (2011); *see also, e.g.*, *Stanford University v. Roche Molecular Systems, Inc.*, 131 S.Ct. 2188, 2202 (2011) (Breyer, J., dissenting, joined by Ginsburg, J.); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947 (2009).

It would be easy to say there is enough abstraction to go around at the Supreme Court and everyone is getting a share were it not for the fact that a proper measure of the supply of abstraction depends on the application of a proper definition of abstraction. Alas, the Justices are divided on that question.[13] Abstraction, it seems, is like relevance: it is in the eye of the beholder. And each member of the Supreme Court witnesses abstraction with different eyes.[14]

Perhaps academics should be honored to be accused of dealing with legal issues at a particularly abstract level, just as they should be honored to be tweaked. It puts them in good company. The same could be said of dealing with legal issues at a particularly philosophical level, but digging into that topic here would be piling on.[15]

All of which suggests that when Roberts cautioned the academy about dealing with legal issues at a "particularly abstract and philosophical level" he was not decrying everything abstract and philosophical in the work of the academy and the Supreme Court (after all, the latter contains a substantial amount of the former, some of it in opinions signed by the Chief Justice). Instead, he might simply have been adding some vividity to his central, practical concern – that much modern scholarship "isn't of much help to the bar."[16]

On that reading, Roberts's real challenge to legal scholars is to be helpful to the bar, including those members of the bar who are also Justices of the Supreme Court.

As with abstraction, so with helpfulness: the Chief Justice knows what he is talking about when it comes to the challenge of producing

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[13] *Compare, e.g.*, *Sears v. Upton*, 130 S.Ct. 3259, 3265 (2010) (per curiam), *with id.* at 3268 (Scalia, J., dissenting, joined by Thomas, J.); *compare also Bilski v. Kappos*, 130 S.Ct. 3218, 3230-31 (2010) (Kennedy, J., for the Court, joined by Roberts, C.J., and Scalia, Thomas, and Alito, JJ.), *with id.* at 3223, 3235-36 (Stevens, J., concurring in the judgment, joined by Ginsburg, Breyer, and Sotomayor, JJ.).

[14] *Cf. Roberts Interview*, note 2 above, at approx. 46:00 (noting, in the context of a discussion of cameras in courtrooms, that he was "sharing my views and not necessarily all the views of my colleagues").

[15] *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 768-69 (2006); *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3096, 3102 (2010) (Stevens, J., dissenting); Graham v. Florida, 130 S.Ct. 2011, 2056 (2010) (Thomas, J., dissenting).

[16] *Roberts Interview*, note 2 above, at approx. 30:55.

material helpful to the bar. The bar, after all, is a tough audience. No judge who has presided over the production of opinions like those that make up, for example, the Court's criminal sentencing jurisprudence could come away from the experience without a deep appreciation of how hard it is to provide helpful guidance to the bar about complicated and controversial topics. It is in that spirit that academics should hear and humor the Chief Justice, and respond to his helpfulness challenge. If he and his colleagues can be told – not by academics, but by their own lower-court colleagues – that . . .

> *Booker* could have been the simple, logical extension of the Supreme Court's *Apprendi* jurisprudence. Instead, the Court produced a fractured, 124-page decision with two majority opinions and four dissents.[17]

and

> You don't need experience in actually sentencing people in order to totally screw up the law of sentencing. It is telling and painfully obvious that not a single Justice ever had to look a federal defendant in the eye while not knowing what law to apply. . . . Footnote 9 in *Blakely* ("The Federal Guidelines are not before us, and we express no opinion on them.") is the biggest practical joke in the history of American law. . . . The "merits" and "remedial" opinions in *Booker* satisfy George Orwell's definition of "Doublethink."[18]

. . . then surely scholars can endure a Kantian-Bulgarian-evidence joke told about them by a judge. What would the typical law professor rather be, anyway, Kantian or Orwellian?

So, nobody is perfect, reasonable minds sometimes differ, and we can all learn from each other, making the consideration of diverse views a good idea. Anyone who has taken 45 minutes out of her or his busy schedule to watch all of the Roberts interview at the Fourth Circuit Conference knows Roberts knows that.[19]

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[17] *U.S. v. Kandirakis*, 441 F.Supp.2d 282, 286 (D. Mass. 2006) (Young, J.).

[18] Richard G. Kopf, *The Top Ten Things I learned From Apprendi, Blakely, Booker, Rita, Kimbrough, and Gall*, OSJCL AMICI, osjcl.blogspot.com (Jan. 2008).

[19] *See, e.g.*, *Roberts Interview*, note 2 above, at approx. 11:30 (describing the Justices' deliberations in conference).

Secure in the knowledge that both the abstract and the philosophical are safe from rejection by a Supreme Court populated with judges who appreciate some of each, the academy should feel free to invest in producing the best, most helpful abstractions and philosophizations it can. Reassured by the knowledge that the Justices find the achievement of helpfulness to the bar a sometimes difficult task – one in which a bit of help from a scholar or two might be welcome from time to time – the academy should be no less courageous than the Court in striving to be helpful even at the risk of failing.

But how to be academically helpful to the Supreme Court?

Legal scholars should begin by being realistic about two things: credibility and volume.

First, credibility. Briefs signed by people who proclaim their status as scholars and thus implicitly or explicitly claim their arguments merit extra credence because they are scholarly – aka "scholars' briefs" – will not be viewed that way by a knowledgeable Justice. Recent and widely-discussed articles by Professors Richard Fallon and Amanda Frost make it pretty obvious that "many law professors sign onto scholars' briefs . . . without any hesitation" even when such briefs: (1) deal with issues on which the professor is an expert, but cite authorities on which he or she is not an expert; or (2) make reasonable scholarly arguments for or against a position, but leave out legitimate contrary scholarly arguments; or (3) rely on precedents the professor thinks are wrong; or (4) use theories of interpretation that the professor would not use in his or her own work.[20] In other words, a scholars' brief tells the Court what outcome the signing scholars desire, but may or may not tell the Court what those scholars know. Such briefs might well be helpful to the Court, but not because they are reliably scholarly. So, scholars' briefs probably are not the way to present scholars' scholarship to the Court.

[20] Amanda Frost, *In Defense of Scholars' Briefs* at 2-3, papers.ssrn.com/sol3/papers.cfm?abstract_id=1978337 (describing Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1959936). Attention to this phenomenon is not new (*see, e.g.*, David J. Garrow, *A Tale of Two Posners*, 5 GREEN BAG 2D 341 (2002)), but its salience is rising with the rising number of scholars' briefs. *See* Fallon at 1.

Second, volume. There are too many law review articles in the same way there are too many petitions for writs of certiorari. Each one may have its own merits, but it is unrealistic to expect any one person to read all of them, or even to skim each one with sufficient attention to determine whether it merits a closer look and then read the ones that do. There were 7,857 (a not atypical number) filings in the Supreme Court during the 2010 Term.[21] Most Justices spread the burden of reading and analyzing those filings, and making recommendations about what to do with them, over a pool of 30 or so law clerks known as the "cert pool."[22] There was almost certainly an even larger (not atypical) number of law review articles published during the same period. The "Law Journals" website operated by the Washington & Lee University School of Law lists 658 student-edited law journals in the United States. Even if the average journal were to publish just a dozen articles per year, that would still result in more law review articles (7,896) than Supreme Court filings. Add the output of the 338 peer-edited or refereed U.S. journals and the 685 non-U.S. journals listed by Washington & Lee and the total number of articles is, obviously, even higher.[23]

Moreover, in the case of law review articles, the high volume of works is compounded by the high volume of words. Supreme Court Rule 33(g) limits a petition for a writ of certiorari to 9,000 words.[24] Few law reviews have a word limit so low, and some law reviews with higher word limits do not adhere to those limits. For example, the *Harvard Law Review*, which portrays itself as a leader in the campaign against "the growing length of law review articles,"

> strongly prefers articles under 25,000 words in length . . . . The *Review* will not publish articles exceeding 30,000 words –

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[21] *2011 Year-End Report on the Federal Judiciary* at 13 (Dec. 31, 2011).

[22] Michael F. Sturley, *Cert Pool*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 155 (2d ed. 2005) (Kermit L. Hall, ed.); Tony Mauro, *The Cert Pool*, BLOG OF LEGAL TIMES, legaltimes.typepad.com/blt/2009/09/sotomayor-joins-the-cert-pool.html (Sept. 21, 2009).

[23] *Law Journals: Submissions and Ranking*, lawlib.wlu.edu/LJ/index.aspx.

[24] "[T]he Court or a Justice may grant leave to file a document in excess of the word limits, but application for such leave is not favored." Sup. Ct. R. 33(d).

> the equivalent of 60 law review pages – except in extraordinary circumstances.[25]

But the third and fourth issues of volume 121 of the *Harvard Law Review* contain a two-part article that is 120,026 words long. And that is only mildly anomalous. The first issue contains a 46,473-word article, the second a 35,166-word article, and the eighth a 33,351-worder.[26] In other words, four law review articles weighing in at a total of nearly a quarter-million words. Nor is volume 121 unique. The latest – volume 125 – opens with a 41,641-worder in its first issue, and subsequent issues feature articles of 52,572, 32,447, and 60,509 words.[27] And the *HLR* is not alone. The latest volume of the *Yale Law Journal*, for example, opens with a 33,692-worder and includes articles of 42,798 and 45,224 words.[28]

So many thousands of law review articles every year, containing so many, many millions of words. How is anyone supposed to figure out which ones are likely to be helpful to a Justice deliberating over one of the roughly 80 cases that the Court decides annually nowadays?[29] Small wonder the Chief Justice throws up his hands, even if he knows there is much good scholarship – some of it helpful – buried here and there in that mountain range of words.

That is one area where the academy certainly can do more to help the Supreme Court. The academy can take Roberts at his word. It can direct his Court's attention to helpful scholarship.

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[25] *Submissions*, HARV. L. REV., www.harvardlawreview.org/submissions.php.

[26] David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb*, 121 HARV. L. REV. 689 & 941 (2008); Martha C. Nussbaum, *Constitutions and Capabilities*, 121 HARV. L. REV. 4 (2007); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 449 (2007); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

[27] Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); Rebecca Tushnet, *Worth a Thousand Words*, 125 HARV. L. REV. 683 (2012); Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012).

[28] Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2 (2011); Oona Hathaway and Scott J. Shapiro, *Outcasting*, 121 YALE L.J. 252 (2011); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012).

[29] *2011 Year-End Report on the Federal Judiciary*, note 21 above, at 13.

Professor Sherrilyn Ifill has already taken a step in that direction. In a blog post responding to Roberts's Kantian-Bulgarian-evidence joke she stands up for the academy and its output:

> [M]ore often than not, published law review articles offer muscular critiques of contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decisionmaking on how law develops in the courtroom. Such scholarship can assist judges in explaining complex legal doctrine, but also in working through the application of that doctrine . . . .

And then, lo and behold, she offers some suggestions!

> Take, for example, the work of my colleague Renee Hutchins, . . . *Tied Up in Knotts: GPS Technology and the Fourth Amendment*, . . . [or] Robert Burn[s'] *What Will We Lose if the Trial Vanishes* . . . [o]r Brandon Garrett's . . . *Eyewitness and Exclusion*. . . . Indeed just a month ago, I remarked to a colleague that if Roberts were to read my 2002 article *Do Appearances Matter?: Supreme Court Recusal Practice in Bush v. Gore*, he would find a detailed prescription of how Supreme Court recusal practice should be reformed and codified . . . .[30]

This is a good start, but something more systematic is called for if the Justices are to receive (a) a steady supply of recommendations of legal scholarship likely to be helpful in deciding the unending stream of cases before them, and (b) recommendations that reflect both the diversity of the academy and its collective expertise.

To that end, professors should organize a cert pool of a sort for law review articles.[31] They have the knowledge: they know scholarship, good and bad. They have the know-how: they know peer review, pure and corrupt. (Peer review of a sort is at the heart of this project.) And they are in position: they have the tenure that frees them to speak truth not only to power, but also to each other.

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[30] *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html (July 1, 2011).

[31] Limiting this proposal to law review articles is merely a matter of starting small, not a rejection of other forms such as books, blogs, and the like.

But rather than giving the Justices stacks of memos evaluating every single law review article (as the clerks in the cert pool do with petitions in every single case), the professors should take a different kind of case-by-case approach. Every time the Court grants a cert. petition or otherwise agrees to hear a case, they should give the Justices a simple, readably short list of those articles most likely to be helpful in deciding that case. Then the Justices or their minions can read the helpful scholarship themselves. Each list should be in the form of (and filed as) an amicus brief – a truly brief "brief of scholarship" rather than a conventional "scholars' brief."

Producing briefs of that sort would be hard. But there are respectable entities that could do it. Two come immediately to mind:

1. The American Association of Law Schools (AALS). It is already "the principle representative of legal education to the federal government."[32] With its heavy faculty involvement and access to law school leadership, it is well-placed to manage what might be a sensitive peer review process for selecting articles to appear in the briefs.

2. *The Journal of Things We Like (Lots)* (*JOTWELL*). It is already in the business of "identify[ing], celebrat[ing], and discuss[ing] the best new legal scholarship."[33] By expanding its coverage to include the best old (as well as new) legal scholarship, and occasionally narrowing its focus to the questions presented in a Supreme Court case, it could produce first rate amicus briefs of scholarship.

In Part 2 of this paper I will either celebrate the launch of an amicus briefs of scholarship program by the AALS or *JOTWELL* or some other worthy entity, or I will outline a plan that might be used by some other fearless and energetic souls.

• • •

In this issue of the *Journal of Law* we present: (1) another set of useful and interesting miscellaneous public documents from *Pub. L. Misc.* editors James Ho and Trevor Morrison; and (2) the inaugural issue of the pleasingly self-explanatory *Journal of Legal Metrics*, edited by Adam Aft, Alex Mitchell, and Craig Rust.

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[32] *About AALS*, aals.org.

[33] *Mission Statement*, JOTWELL, jotwell.com.

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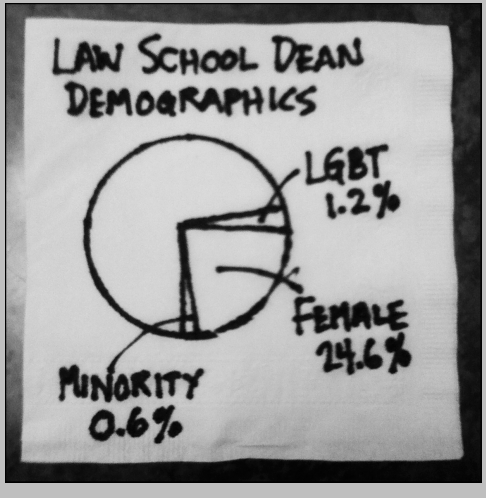

Journal of Legal Metrics

About the cover

Law School Dean Demographics

By Ross E. Davies and Alex B. Mitchell. Source: *The Association of American Law Schools 2010-2011 Directory of Law Teachers* 3-256, 1875-87, 1889-92 (2010) (sections titled "Law Teachers by School at Member Schools," "List II – Minority Law Teachers," and "List III – Gay, Lesbian & Bisexual Community Law Teachers"). According to the *AALS Directory*, 42 of the 171 listed law schools are led by female deans, one school is led by a member of a minority, and two schools are led by members of the gay/lesbian/bisexual/transsexual community. In our experience, the *AALS Directory* is based at least in large part on self-reported and home-institution-reported data.

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AN INTRODUCTION TO THE *JOURNAL OF LEGAL METRICS*

> *When the numbers acquire the significance of language . . . they acquire the power to do all the things which language can do: to become fiction and drama and poetry. . . . And it is not just baseball that these numbers, through a fractured mirror, describe. It is character. It is psychology, it is history, it is power, it is grace, glory, consistency, sacrifice, courage, it is success and failure, it is frustration and bad luck, it is ambition, it is overreaching, it is discipline. And it is victory and defeat, which is all that the idiot subconscious really understands.* – Bill James[1]

Adam Aft, Alex B. Mitchell & Craig D. Rust[†]

For the second time in the past ten years, *Moneyball* is taking the world by storm. Michael Lewis's book first appeared in print in 2003, chronicling the attempt by Billy Beane and the Oakland Athletics to compete for a World Series title on a shoestring budget by finding hidden value in the market for baseball players. Within the past year, Brad Pitt and a host of others brought Lewis's tale to life in the form of a blockbuster movie.

How did Beane and *Moneyball*'s protagonists set out to find this value? As Lewis explains, they embraced the use of statistical analysis in ways that other Major League Baseball franchises did not. Rather than relying on a scout's evaluation of a player's physical characteristics and the industry's prevailing view of what a player with those characteristics could achieve in the game, Beane and company focused their energies on how that player actually performed. This

[1] MICHAEL M. LEWIS, MONEYBALL 67 (2003) (second omission in original).

[†] Co-Editors-in-Chief of the *Journal of Legal Metrics*.

included areas of the game such as defense, which conventional baseball statistics had largely ignored for most of the sport's first century in existence. In the book, John Henry, currently the owner of the Boston Red Sox, compared the financial markets on Wall Street with the market for baseball players:

> People in both fields operate with beliefs and biases. To the extent you can eliminate both and replace them with data, you gain a clear advantage. . . . Many people think they are smarter than others in baseball and that the game on the field is simply what they think it is through their set of images/beliefs. Actual data from the market means more than individual perception/belief. The same is true in baseball.[2]

Similarly, the legal field is not immune to the subjective biases and beliefs of its observers and practitioners. Numbers, data, statistical analysis – these tools can help us objectively evaluate the accuracy of subjectively formed opinions. Notwithstanding the oft-cited "I know it when I see it" jurisprudence of Justice Potter Stewart,[3] we believe that some aspects of the legal world lend themselves to a form of scientific analysis.

In this vein, we humbly introduce the inaugural issue of the *Journal of Legal Metrics*. Our aim is to solicit and publish the efforts of scholars whose work demonstrates the explanatory power of numbers and statistics in the legal context. For example, the journal has partnered with the *Supreme Court Sluggers* project[4] and will serve as the primary forum in which the personal opinion authorship and citation statistics of individual U.S. Supreme Court justices gathered by their researchers will be disseminated. To that end, this issue includes articles introducing the latest trading cards and their associated statistics, featuring Justices Scalia, Goldberg, and Fortas, as well as essays on the Justices Stevens and Scalia cards. The journal also joins forces with *FantasyLaw*,[5] a project devoted to collecting

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[2] *Id.* 90-91.

[3] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[4] Supreme Court Sluggers Home, www.greenbag.org/sluggers/sluggers_home.html.

[5] FantasyLaw Home, www.fantasylaw.org.

data on voting and legislative patterns of senators and representatives of the United States Congress. In this issue, *FantasyLaw* features an article that analyzes the Tea Party's voting behavior in the House of Representatives, as well as a study on politicians who vote with the opposing party and the frequency with which they do so. In addition to voting behavior there is also an essay on the most searched bills in THOMAS.[6] We are also pleased to publish three sets of statistical rankings: Roger Skalbeck's law school website rankings, now in their third year, federal appellate court rankings evaluating which circuits "win" circuit splits most often, compiled by Tom Cummins and Adam Aft, and in its fourth year, Ross Davies's law review circulation numbers.

Data challenges the status quo, requiring reconciliation of subjective beliefs with objective measures, and encouraging reexamination of former truths and assumptions. Whether it is quantifying the impact of Justice Stevens's career on the Court, discerning the impact of the Tea Party on national politics,[7] or reconsidering the way we think about law school statistics,[8] numbers can provide a much-needed alternative prospective. We hope not necessarily to answer the question: "What does the data say?" but rather: "Where is the data in the first place?" Too often commentary surrounding the law is based in opinion, rhetoric, and subjectivity; the foundation of scholarship here is that of numbers and statistics. As once observed by Holmes (Sherlock, not Oliver Wendell), "[i]t is a capital mistake to theorize before you have all the evidence."[9]

# # #

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[6] THOMAS is "the legislative forum from the Library of Congress," thomas.loc.gov/home/thomas.php.

[7] Ian Gallagher and Brian Rock, *Reading The Tea Leaves – An Analysis of Tea Party Behavior Inside and Outside of the House*, 2 J.L. (1 J. LEGAL METRICS) 87 (2012).

[8] *See, e.g.*, Debra Cassens Weiss, *University of Illinois Releases the Real Stats for Its Incoming Law Class*, ABA JOURNAL, Sept. 20, 2011, *available at* www.abajournal.com/news/article/university_of_illinois_releases_the_real_stats_for_its_incoming_law_class.

[9] ARTHUR CONAN DOYLE, SR., A STUDY IN SCARLET: AND, THE SIGN OF FOUR 20 (Wordsworth Editions 2000) (1887).

THE FIRST EVER (MAYBE) ORIGINAL JURISDICTION STANDINGS

David Hatton & Jay Wexler[†]

One of the quirkiest and most interesting provisions in the U.S. Constitution is the so-called Original Jurisdiction Clause of Article III, which says that "In all cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction."[1] Usually (by which we mean almost always, maybe 99.3% of the time), the Supreme Court hears cases under its appellate jurisdiction, which means that it hears a case that has already been heard by lower courts, and its role consists of reviewing the decisions of those courts. But when the Supreme Court exercises its original jurisdiction, it is the first and only court to hear the case. This is very strange, because the Supreme Court is not set up, as is a trial court, to hear evidence and witnesses and make factual determinations and the like; usually the Court confines itself to deciding purely legal issues.

Although the Constitution provides for a few different kinds of cases that the Court can hear in its original jurisdiction, Congress has provided by statute that almost all of these kinds of cases can

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[†] David Hatton is a J.D. Candidate at the Boston University School of Law. Jay Wexler is a Professor of Law at the Boston University School of Law.

[1] U.S. Const., Art. III, sec. 2. For more on the Original Jurisdiction Clause, see JAY WEXLER, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS Chapter 4 (2011).

also be heard by the federal trial courts.[2] As a result, even almost all of the cases that would fall under the Court's original jurisdiction end up being heard in the first instance by a lower court. As it turns out, then, pretty much the only cases that the Supreme Court ever considers in its original jurisdiction are cases in which one state sues another state (or states). For these state versus state cases, the Supreme Court is the only court that has the objectivity necessary to provide for a fair hearing to both states.[3] If Nebraska were to sue Iowa, for instance, over where their border should be drawn, where else would it sue? It wouldn't want to sue in Iowa. And Iowa wouldn't want it to be able to sue in Nebraska. The framers understood this problem, and so they gave the Supreme Court original jurisdiction over these difficult cases to prevent interstate conflict and even war, which at least at the time of the founding, was by no means an impossibility.

Every year the Supreme Court hears somewhere between zero and three of these cases; the cases do not, in other words, make up much of the Court's docket. In the 2010-2011 term, for instance, the Court decided one case, a water rights dispute between Montana and Wyoming.[4] The most notable thing about the opinions in that case was Justice Scalia's attempt to rename the people of Wyoming.[5]

Most original jurisdiction cases involve some type of border or water rights dispute. Some involve tax issues of some sort of another. A few involve interstate pollution issues, like when Missouri sued Illinois at the turn of the 20th century, claiming that Illinois' decision to reverse the flow of the Chicago River had spread disease

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[2] *See* 28 U.S.C. § 1251.

[3] The most comprehensive source of information on these types of cases is JOSEPH F. ZIMMERMAN, INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION (2006).

[4] Montana v. Wyoming, 131 S.Ct. 1765 (2011).

[5] *Id*. at 1779 & n. * (Scalia, J., dissenting) (referring to the people of Wyoming as "Wyomans" and stating that: "The dictionary-approved term is 'Wyomingite,' which is also the name of a type of lava, see Webster's New International Dictionary 2961 (2d ed.1957). I believe the people of Wyoming deserve better.").

downstream to St. Louis (Missouri lost).[6] The most famous recent original jurisdiction case involved New York and New Jersey arguing over who owns Ellis Island. The Court, much to the dismay of many New Yorkers, held for New Jersey.[7]

Although the Supreme Court could, if it wished, hold actual trials in these cases, in which presumably the justices would decide as a group on the thousand nitty-gritty issues of evidence and whatnot that come up during your average trial,[8] it pretty much never does this. Instead it appoints somebody called a "Special Master" – generally some big law firm partner or a past Supreme Court justice or some other member of the elite bar – to sort through the evidence, hold a trial, and issue a report that makes recommendations about what the Court should do. The Court then reviews those recommendations and decides whether to adopt them.[9]

One thing we love about these state versus state cases is how their names (Oklahoma v. Texas, Arizona v. California, etc.) make the cases sound like college football games. Thinking about the cases in this way led us to wonder how well the different states have fared in original jurisdiction cases. We searched (not hard, granted, but a little) to see if anyone had previously compiled a set of Original Jurisdiction Standings, but alas, we found nothing. Presented with this gaping hole in empirical legal scholarship, we did what any self-respecting scholars would do – we[10] hit the books and filled the gap. Specifically, we looked at every original jurisdiction state versus

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[6] Missouri v. Illinois, 200 U.S. 496 (1906).

[7] New Jersey v. New York, 523 U.S. 767 (1998).

[8] It's unclear how this would work. Would each justice have his or her own gavel, or what? *See* Robert A. James, *Instructions in Supreme Court Jury Trials*, 1 GREEN BAG 2D 377, 378 (1998) ("[S]ome might be surprised to learn that there have been Supreme Court jury trials-at least three, in fact. The last reported trial occurred in the eighteenth century, but near-brushes occurred in 1876 and again in 1950.").

[9] For more on Special Masters, see Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction*, 86 MINN. L. REV. 625 (2001).

[10] And by "we" we mean Dave, who actually did all the work; Jay provided little more than haphazard and oft-distracted distant supervision.

state case decided since 1900 (we had to leave some further research to those who follow in our scholarly footsteps) and came up with the win-loss records of each state.

Before we get to the data, a disclaimer. Some of these cases are hard to call, and reasonable minds may differ as to who won and who lost. We simply made the best judgment we could without wiping ourselves out too much.

And now, without any further ado, we present the following two lists – the first is an alphabetical list of all the states with their win-loss records, and the second is a list of all states judged to have participated in five or more cases, in order of their winning percentages. As you'll see, the big winners here are Minnesota and Michigan. The states that have fared the worst are Tennessee and Louisiana. Here is the first list:

State	Record
Alabama	1-2
Alaska	no cases
Arizona	2-6
Arkansas	1-5
California	6-3
Colorado	8-9
Connecticut	0-1
Delaware	3-0
Florida	1-3
Georgia	0-1
Hawaii	no cases
Idaho	2-1
Illinois	3-6
Indiana	1-1
Iowa	2-0
Kansas	4-4
Kentucky	2-4
Louisiana	2-7
Maine	0-1
Maryland	2-1
Massachusetts	3-2
Michigan	6-1
Minnesota	5-0
Mississippi	3-5

State	Record
Missouri	2-4
Montana	1-2
Nebraska	4-2
Nevada	3-2
New Hampshire	1-1
New Jersey	3-3
New Mexico	7-3
New York	7-4
North Carolina	3-1
North Dakota	1-1
Ohio	4-1
Oklahoma	3-4
Oregon	1-1
Pennsylvania	5-3
Rhode Island	1-0
South Carolina	1-1
South Dakota	1-0
Tennessee	0-5
Texas	6-8
Utah	3-0
Vermont	1-2
Virginia	4-4
Washington	1-1
West Virginia	3-5
Wisconsin	5-2
Wyoming	7-5

And here is the second list:

State	Record	Winning %
Minnesota	5-0	100%
Michigan	6-1	86%
Ohio	4-1	80%
Wisconsin	5-2	71%
New Mexico	7-3	70%
California	6-3	67%
Nebraska	6-3	67%
New York	7-4	64%
Pennsylvania	5-3	63%
Massachusetts	3-2	60%
Nevada	3-2	60%
Wyoming	7-5	58%

State	Record	Winning %
Kansas	4-4	50%
New Jersey	3-3	50%
Virginia	4-4	50%
Colorado	8-9	47%
Oklahoma	3-4	43%
Texas	6-8	43%
Mississippi	3-5	38%
Washington	3-5	38%
Illinois	3-6	33%
Kentucky	2-4	33%
Missouri	2-4	33%
Arizona	2-6	25%
Louisiana	2-7	22%
Arkansas	1-5	17%
Tennessee	0-5	0%

There you have it, folks. The first ever, as far as we know, original jurisdiction standings. Of course, there is a lot more that could be done with this data, for those so inclined – like maybe breaking up the analysis into how well states do when they are plaintiffs as opposed to defendants, for example, or devising a board game called "State Versus State" where the goal is to successfully sue as many states as possible to increase your borders, access the most water, and get the most tax revenues. In any event, we are happy to take questions on how we got these numbers if anyone cares, and we are definitely happy to adjust the numbers if it turns out we have mischaracterized a decision or missed a decision or whatever. Until then, enjoy.

# # #

TOP 10 LAW SCHOOL HOME PAGES OF 2011

Seemingly nonobvious details can often separate good Web design from great Web design. You might not appreciate the quality of a well-designed website until you start using it, looking under the hood, putting it through tests.[1]

Roger V. Skalbeck[†]

For the third consecutive year,[2] all ABA-accredited home pages are evaluated based on objective criteria, in attempt to find the best sites. For this study, I look under the hood and put every site through a series of tests, hoping to separate the good from the great. In trying to appreciate well-designed sites, it was not possible to actually use every site, but as Meat Loaf once said, "two out of three ain't bad."[3] For example, the evaluation process is meant to assess elements that make websites easier to use for sighted as well as visually-impaired users. Most elements require no special design skills, sophisticated technology or significant expenses.

Ranking results in this report represent reasonably relevant elements. For this year's survey, twenty-four elements are assessed

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[1] DAN CEDERHOLM WITH ETHAN MARCOTTE, HANDCRAFTED CSS: MORE BULLETPROOF WEB DESIGN, at xiv (2010).

[†] Associate Law Librarian for Electronic Resources & Services, Georgetown Law Library. Thanks to Matthew Zimmerman, Web Application Developer, Georgetown Law Library, for substantial help in automating data collection and improving the evaluation process.

[2] Jason Eiseman & Roger V. Skalbeck, *Top 10 Law School Home Pages of 2010*, 2011 GREEN BAG ALMANAC AND READER 339 (2011); Roger V. Skalbeck, *Top 10 Law School Home Pages of 2009*, 2010 GREEN BAG ALMANAC AND READER 289 (2010).

[3] MEAT LOAF, *Two out of Three Ain't Bad*, on BAT OUT OF HELL (Epic Records 1977).

across three broad categories: Design Patterns & Metadata;[4] Accessibility & Validation;[5] and Marketing & Communications.[6] It is still the case that there is no objective way to account for good taste. For interpreting these results, I do not try to decide if any whole is greater or less than the sum of its parts.

IT IS MORE THAN WHAT YOU CAN SEE

For many people, impressions of a good website may come primarily from what you can see. In this ranking study, the *Marketing & Communications* category is focused on visual elements that can be evaluated without looking at the underlying source code. This category is worth forty-two points, down slightly from forty-four in the previous year. Using this survey's criteria, seventy-six sites achieve a perfect score for these seven elements. This includes nine of the top ten sites, but also includes a site ranked as low as 177 out of 200.

With visual elements, there's no meaningful way to rate them for aesthetic appeal. With each element, a site will have that element or it won't. Nonetheless, there can be a wide degree of artistic creativity in even the smallest elements. Consider the favicon (short for favorites icon), which is a small graphic appearing in the browser's location bar, on browser tabs and in favorites or website bookmarks. More than 85% of law school sites use a favicon, but there's no way to give more points for a better favicon. For 2011, a collection of all favicons captured during site evaluation appears at the end of this article.

LOOKING UNDER THE HOOD

By looking at the details of the ranking results, it should be clear that a good website under this system is built using modern

[4] Elements: Search Form; RSS Autodiscovery; Content Carousel; Embedded Media; Microformats; Dublin Core; and HTML5.

[5] Elements: Headings; Wave Errors; CSS; alt Attribute; Valid Markup; ySlow Score; <u>; <font>; <b> <i>; and .

[6] Elements: Meaningful Page Title; Address; Phone Number; Social Media Link(s); Thumbnail Images; News Headlines; and Favicon.

standards with attention to fairly technical details. This includes caring about coding practices, metadata and error avoidance. Through a systematic capture and analysis of the home page code for each site, it's possible to look beyond reflection graphics and drop shadows to see much more of each site's underlying structure.

This year, sites using the HTML5 doctype again receive a small point bonus, seeking to reward forward-thinking designers. For 2011, the number of sites using the HTML5 doctype has grown from a single site in 2010 to thirteen sites for 2011. At least one person argues that "HTML5 is fundamentally changing the way developers approach the web."[7] New features of HTML5 can help in both desktop browsers as well as on mobile devices, such as the iPhone or Android platforms.

Each year, the number and nature of elements surveyed is adjusted. For 2011, analysis is expanded by checking for some disfavored coding practices. These include the elements: <u>, <font>, , <b> and . Of these, <u>, <font> and are deprecated elements,[8] which means that they've been "outdated by newer constructs."[9]

The tags <b> and , scored together, are not deprecated. Instead, the preferred practice is to use or , which have a greater semantic context and can be easily styled with CSS. With HTML5, it's suggested that <b> and can, in fact, be used semantically,[10] but the one school using these in conjunction with HTML5 seems to use them for presentational display, not semantic meaning.[11]

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[7] Dan Rowinski, *Top 6 Trends In HTML5 In 2011*, ReadWriteWeb (Dec. 6, 2011) www.readwriteweb.com/archives/top_6_trends_in_html5_in_2011.php .

[8] HTML 4.01 Specification, Index of Elements www.w3.org/TR/html4/index/elements.html (last visited Nov. 18, 2011)

[9] HTML 4.01 Specification, W3C Recommendation 24 December 1999 www.w3.org/TR/REC-html40/conform.html#deprecated (last visited Nov. 19, 2011)

[10] Oli Studholme, *The i, b, m, & strong elements*, HTML5 DOCTOR (Mar. 9, 2010), html5doctor.com/i-b-em-strong-element/.

[11] On the New England Law site, several publication titles are coded with tags so they appear in italics, such as "The New York Times" www.nesl.edu/ (last visited Nov. 19, 2011).

ESTABLISHING A BASELINE

An important part of the ranking process is developed through benchmarking design practices, and seeing how they evolve. For this year's study, three site elements were tested and found to be absent from all sites. Thankfully no sites use the oft-derided <blink> element,[12] which has been a disfavored practice for several years. The two remaining elements may gain popularity in 2012.

In June 2011, Google, Bing and Yahoo! announced support for Schema.org, which is meant to "create and support a common vocabulary for structured data markup on web pages."[13] Schema.org includes a set of semantic rules intended to improve the display of search engine results, by incorporating a structured approach to content online. Content types include events, people, places, reviews and dozens of other ideas.[14] This is similar to Microformats,[15] but it seems to have more industry backing.

During 2011, Google introduced its Google+ social network. One feature they introduced allows people to add a +1 button to websites for direct connections to this social network.[16] For the 2011 study, no law schools had yet integrated a +1 button. This can be easily explained by the fact that Google+ Pages for Business were not announced until November 7,[17] which is after data collection had concluded.

For the ranking study, points are awarded for links to any social media, so there was no enhancement for Google+, Facebook Connect, or other advanced integration techniques.

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[12] en.wikipedia.org/wiki/Blink_element (last visited Nov. 18, 2011).

[13] Ramanathan Guha, *Introducing schema.org: Search engines come together for a richer web* (Jun. 2, 2011, 10:06 AM), insidesearch.blogspot.com/2011/06/introducing-schemaorg-search-engines.html.

[14] *The Type Hierarchy*, SCHEMA.ORG, schema.org/docs/full.html (last visited Nov. 21, 2011), listing.

[15] microformats.org/about (last visited Dec. 28, 2011).

[16] *Add +1 to your pages to help your site stand out*, www.google.com/webmasters/+1/button/ (last visited Nov. 21, 2011).

[17] Danny Goodwin, *Google+ Pages for Business, Brands Now Rolling Out,* SEARCH ENGINE WATCH (Nov. 7, 2011), searchenginewatch.com/article/2123263/Google-Pages-for-Business-Brands-Now-Rolling-Out.

ACCENT ON ACCESSIBILITY

Three elements were selected specifically to evaluate home page accessibility:

> • [k] alt Attribute: 508 Standards, Section 1194.22, (a) A text equivalent for every non-text element shall be provided (e.g., via "alt", "longdesc", or in element content).[18]
>
> • [i] Wave Errors: A numeric score for a Web Accessibility Report, as scored by the Wave Accessibility Toolbar for Firefox.[19]
>
> • [h] Strict use of HTML headings to organize page content.

A full seventeen schools achieved a perfect score for all three accessibility elements, up from eight schools in 2010.

- Arizona State University [www.law.asu.edu]
- Florida A&M School of Law [law.famu.edu]
- Harvard University [www.law.harvard.edu]
- Northern Illinois University [law.niu.edu/law]
- Southern Methodist University [www.law.smu.edu]
- University of Colorado [www.colorado.edu/Law]
- University of Illinois [www.law.illinois.edu]
- University of Iowa [www.law.uiowa.edu]
- University of Nebraska [law.unl.edu]
- University of New Mexico [lawschool.unm.edu]
- University of Oklahoma [www.law.ou.edu]
- University of Pennsylvania [www.law.upenn.edu]
- University of Texas at Austin [www.utexas.edu/law]
- University of Washington [www.law.washington.edu]
- University of Wisconsin [www.law.wisc.edu]
- Vermont Law School [www.vermontlaw.edu]
- William And Mary School of Law [law.wm.edu]

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[18] This corresponds to test (a) generated with the HiSoftware® Cynthia Says™ - Web Content Accessibility Report, available at: www.cynthiasays.com/ as implemented in the Web Developer Toolbar, *available at* chrispederick.com/work/web-developer/.

[19] WAVE Toolbar, available from http://wave.webaim.org/toolbar, provided by WebAIM: Web Accessibility in Mind.

CORRECTIONS

For the 2010 report, one scoring error was discovered, and there are three additional corrections, as indicated.

Score Correction – University of Oklahoma College of Law:

[a] Search Form: 9 pts.
Revised Score: 78 – Revised Rank: 43

Name and URL Corrections – Charleston School of Law:

The correct URL is: www.charlestonlaw.edu. This was listed as www.charlestonlaw.org, which redirects to the proper .edu URL. The correct site was evaluated for 2010.

Chicago-Kent College of Law, Illinois Institute of Technology:
This school should be properly listed as Chicago-Kent College of Law, Illinois Institute of Technology. The Chicago-Kent part of the name was omitted in 2009 and again in 2010.

Penn State University Dickinson School of Law:
In both 2009 and 2010, this school was improperly listed as Dickinson School of Law, regrettably omitting the Penn State University name. The name change happened in 2000.

Each year, I try diligently to accurately report all data, and I have a copy of all materials on file if there are questions. Inevitably there will be errors. When errors are discovered, apologies will be issued on the spot, and corrections will be published the following year in print.

RANKING PROCESS

This survey includes all United States law schools accredited by the American Bar Association. The site evaluation process includes a combination of human assessment and automated analysis. To improve data validity, the source code for every site was evaluated using computer-based pattern matching to detect things like links to social media, use of HTML tables, and anything with predictable text patterns. Much of this data was evaluated a second time. The goal here is similar to advice sometimes given to bar examiners: "Look for points." With every site checked, I have tried to look for points available under this year's ranking formula.

All evaluation was completed in October and November 2011. All screen shots in the survey were captured on October 31, 2011.

Once again, a perfect score is still 100. There are three elements where extra credit is available, and four elements reduce a site's score, when present.

EVALUATION CRITERIA

Category	Element	Score	Bonus
Design Patterns & Metadata [24 pts.]	[a] Search Form	9	
	[b] RSS Autodiscovery	4	
	[c] Content Carousel	4	
	[d] Embedded Media	3	
	[e] Microformats	3	
	[f] Dublin Core	1	
	[g] HTML5		+3
Accessibility & Validation [34 pts.]	[h] Headings*	8	
	[i] Wave Errors*	8	+1
	[j] CSS*	8	
	[k] alt Attribute	4	
	[l] Valid Markup*	4	+2
	[m] ySlow Score*	2	
	[n] <u>		-0.5
	[o] <font>		-0.5
	[p] <b> <i>		-0.5
	[q]		-0.5
Marketing & Communications [42 pts.]	[r] Meaningful Page Title	10	
	[s] Address	8	
	[t] Phone Number	8	
	[u] Social Media Link(s)	6	
	[v] Thumbnail Images	4	
	[w] News Headlines	3	
	[x] Favicon	3	

* Partial credit available.

DESIGN PATTERNS & METADATA: 24 PTS. POSSIBLE

Search Form [a] 9 pts.

Users can initiate a search using a form on the home page. Home pages with a link to a separate search page get no points.

RSS Autodiscovery [b] 4 pts.

RSS is an easy way to notify users of new content. A single line of code alerts computers to available RSS feeds. Points are awarded if automatic discovery is enabled with an "application/rss+xml" reference in the document header.

Content Carousel [c] 4 pts.

This refers to the display of meaningful content a user can browse in a carousel-like fashion in fixed space on a website. A site feature that simply loads a random image or displays a rotating slide show with no controls or links to other content receives no credit.

Embedded Media [d] 3 pts.

Embedded media, whether audio or video, can be played directly from the home page, in the browser. A page overlay (often called a lightbox) receives points, but a link to a separate page does not.

Microformats [e] 3 pt.

Information such as an address, contact information, or events are marked up using Microformats. Microformats (www.microformats.org) allow site designers to semantically encode data so computers can recognize, read, and extract it. This markup is one aspect of the Semantic Web, and enhanced addresses are good for location-based tools.

Dublin Core [f] 1 pt.

While there is no question about the important role metadata can play on the web, there is some debate about which metadata

scheme to choose. Dublin Core (www.dublincore.org) is a popular metadata standard used to describe content including web pages.

HTML5 [g] +3 bonus pts.

For any home page created with the HTML5 doctype, three bonus points are awarded, in order to reward sites adopting this developing markup language.

ACCESSIBILITY & VALIDATION: 34 PTS. POSSIBLE

Headings [h] 8 pts.

Header tags such as <h1> and <h2> are used to create hierarchical relationships for home page content. Proper headings are important for good search engine optimization and accessibility. An October 2009 study by WebAIM shows that more than 50% of screen reader users navigate page headings as the first way to find content.[20] An earlier study shows that 76% of screen reader users always or often navigate by headings when they are available.[21] Partial use of headings gets half credit here.

Wave Errors [i] 8 pts. +1 bonus pt.

For this element, each site was evaluated for a series of accessibility features using the 'Wave' web accessibility evaluation tool, created by WebAIM.[22] Sites are scored on a scale, based on incidence of errors, with a perfect score receiving one bonus point.

0–5 errors: 8 pts.; 6–10 errors: 6pts.;
11–15 errors: 4 pts.; 16–20 errors: 2 pts.; 20+ errors: 0 pts.

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[20] *Screen Reader User Survey #2 Results*, webaim.org/projects/screenreadersurvey2/ (last visited November 11, 2011).

[21] *Survey of Preferences by Screen Reader Users*, webaim.org/projects/screenreadersurvey/ (last visited November 11, 2011).

[22] Available as a browser add-on and a web-based service that can be run directly online: wave.webaim.org (last visited Nov. 12, 2011).

Cascading Style Sheet (CSS) [j] 8 pts.

Use of Cascading Style Sheets (CSS) is a common best practice in web design, in that it allows you to separate content marked up in HTML from design elements like layout, colors, and typography. Home pages that include limited use of HTML tables for layout receive half the point total.

alt Attribute [k] 4 pts.

The "alt" attribute allows designers to specify alternate text for elements which cannot be displayed.[23] They are also an important accessibility feature for visually impaired users who may not be able to see visual elements. All visual elements on the home page must have an alt attribute, as scored for Section 508 1194.22(a), using the HiSoftware Cynthia Says - Web Content Accessibility Report.[24]

Valid Markup [l] 4 pts. +2 bonus points for W3C validation

Using valid markup can be important for many reasons. Validating a site can be used to prevent errors, future-proof a site, and more.[25] Every home page was checked by the World Wide Web Consortium Validation Service.[26] Sites are scored on a scale, based on incidence of errors. A site receives two bonus points when passing W3C validation.

0–10 errors: 4pts.; 11–20 errors: 3pts.;
21–30 errors: 2pts.; 31–40 errors: 1pt.; 41+ errors: 0 pts.

ySlow Score [m] 2 pts.

Provided on the Yahoo! Developer Network, ySlow is a service that "analyzes web pages and suggests ways to improve their per-

[23] *alt attribute*, WIKIPEDIA, en.wikipedia.org/wiki/Alt_attribute (last visited Nov. 12, 2011).

[24] This fairly unforgiving analysis is done with a system available at: www.cynthiasays.com as implemented in the Web Developer Toolbar, *available at* chrispederick.com/work/web-developer/ (last visited Nov. 12, 2011).

[25] *Why Validate?,* World Wide Web Consortium, validator.w3.org/docs/why.html (last visited Nov. 12, 2011).

[26] validator.w3.org.

formance based on a set of rules for high performance web pages."[27] For this element, the Firefox browser add-on was used with the pre-set collection of 17 rules for Small Sites or Blogs, which are assigned a score between 0 and 100. Based on this score, a maximum of two points are awarded to each law school home page.

95–100: 2 pts.; 91–94: 1 ½ pts.
86–90: 1 pt.; 80–85: ½ pt.; 0–79: 0 pts.

Point deductions for coding conventions

Each site's source code was analyzed programmatically to detect five different coding practices. A half point is deducted for each site using each coding convention, irrespective of how often they are used.

<u> [n] ½ pt. deduction
<font> [o] ½ pt. deduction
<b> / <i> [p] ½ pt. deduction
 [q] ½ pt. deduction

MARKETING & COMMUNICATIONS: 42 PTS. POSSIBLE

Meaningful Page Title [r] 10 pts.

The home page has a meaningful page title. Usability expert Jakob Nielson cites Page Titles with Low Search Engine Visibility as one of his top ten design mistakes.[28] Nielsen also notes that page titles are usually used as the clickable headline on search engine results pages, and also the default entries when users bookmark pages.

Address [s] 8 pts.

A physical address is included in the text of the home page. Finding a physical address quickly is one of the most important things

[27] Yahoo! Yslow tools are available as a browser add-on for several browsers online here: developer.yahoo.com/yslow/ (last visited Nov. 18, 2011).
[28] Jakob Nielsen, *Top Ten Mistakes in Web Design*, JAKOB NIELSEN'S ALERTBOX, www.useit.com/alertbox/9605.html (last visited Nov. 12, 2011).

site visitors are looking for in higher education web sites.[29]

Phone [t] 8 pts.

A phone number is included in the text of the home page. Like addresses, other methods to contact the school are important on the home page.

Social Media Links [u] 6 pts.

Points awarded for any items linked directly to a social media site, including Facebook, Twitter, Flickr, YouTube, iTunes, and even goodreads.

Thumbnail Images [v] 4 pts.

Thumbnail images, reflecting the subject of a linked story or event, can provide quick visual cues of the linked item's content. Pages with thumbnails associated with news stories or similar content links are awarded points. If thumbnail images are associated only with a content carousel, no points are awarded, to avoid double counting.

News Headlines [w] 3 pts.

The home page features headlines about news or events related to the law school.

Favicon [x] 3 pts.

A favorites icon, also known as a favicon, is a small graphic associated with a website. The favicon often appears in the browser location bar, in bookmarks and favorite files, or on browser tabs. The favicon can be an important and valuable branding graphic.

[29] For fun, *see University Website*, xkcd, xkcd.com/773/ (last visited Nov. 12, 2011).

#1 University of Washington School of Law

[www.law.washington.edu]

Total: 98.5

Design Patterns & Metadata: 23; Accessibility & Validation: 29.5

Marketing & Communications: 42; Bonus: 4

Elements: [a] [b] [c] [e] [h] [i] [j] [k] [l] [m¼] [r] [s] [t] [u] [v] [w] [x] Bonus: [g],[i]

#2 Sandra Day O'Connor College of Law, Arizona State University
[www.law.asu.edu]
Total: 93.5
Design Patterns & Metadata: 13; Accessibility & Validation: 32.5
Marketing & Communications: 42; Bonus: 6
Elements: [a] [c] [h] [i] [j] [k] [l] [m¼] [r] [s] [t] [u] [v] [w] [x] Bonus: [g] [i] [l]

#3 Florida Coastal School of Law

[www.fcsl.edu]

Total: 93

Design Patterns & Metadata: 17; Accessibility & Validation: 34

Marketing & Communications: 42

Elements: [a] [b] [c] [h] [i] [j] [k] [l] [m] [r] [s] [t] [u] [v] [w] [x]

#4 University of New Mexico School of Law

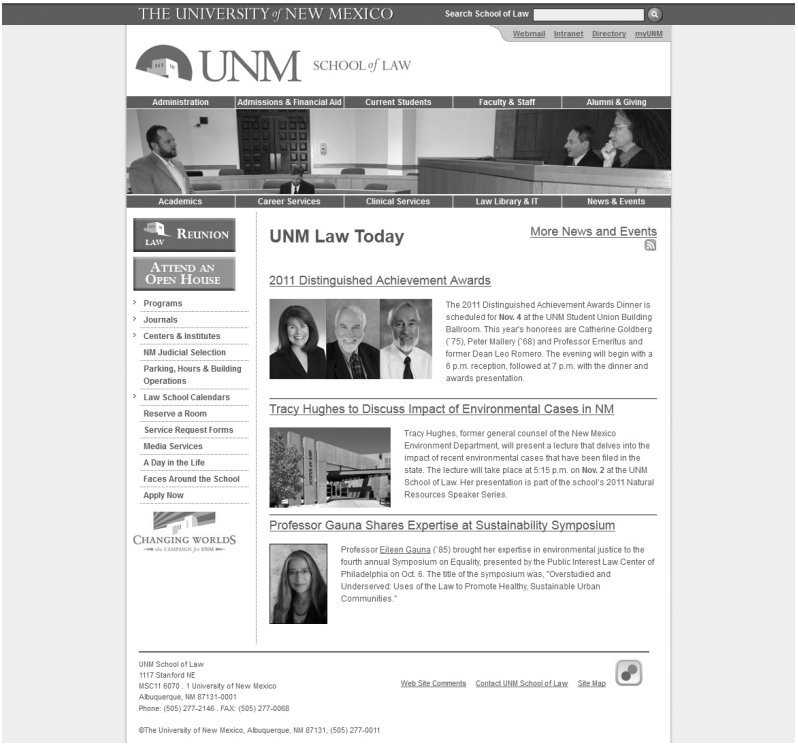
[lawschool.unm.edu]

Total: 92

Design Patterns & Metadata: 13; Accessibility & Validation: 34

Marketing & Communications: 42; Bonus: 3

Elements: [a] [b] [h] [i] [j] [k] [l] [m] [r] [s] [t] [u] [v] [w] [x] Bonus: [i] [l]



#4 (tie) Wake Forest University School of Law

[law.wfu.edu]

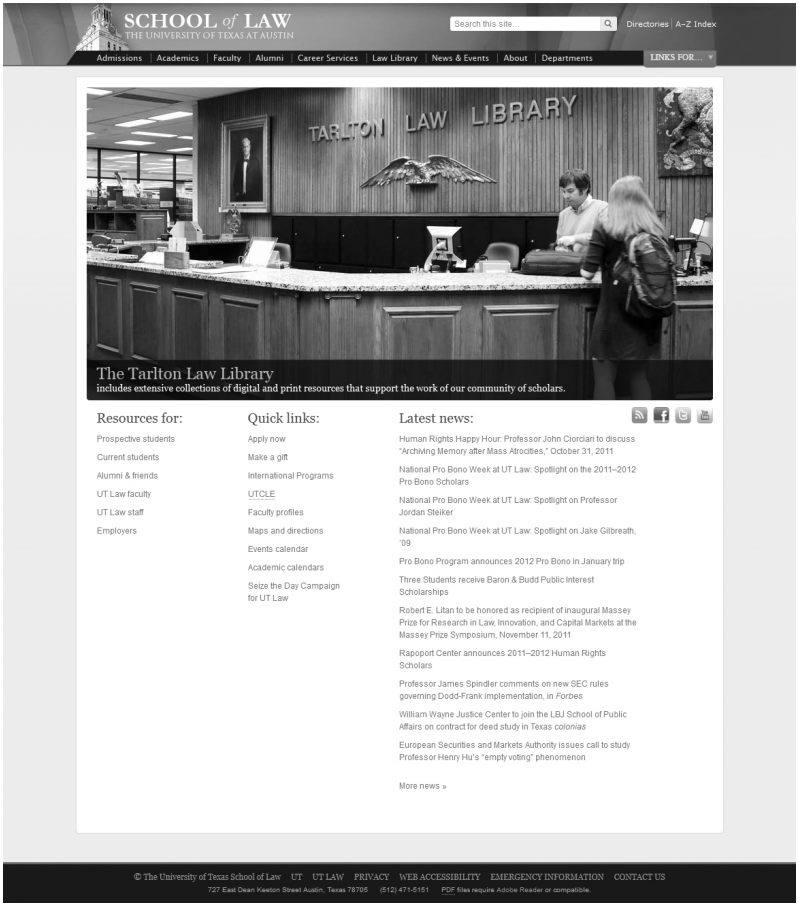
Total: 92

Design Patterns & Metadata: 20; Accessibility & Validation: 27

Marketing & Communications: 42; Bonus: 3

Elements: [a] [b] [c] [d] [h] [i¾] [j] [l] [m½] [r] [s] [t] [u] [v] [w] [x] Bonus: [g]

#4 (tie) University of Texas at Austin School of Law
[www.utexas.edu/law]
Total: 92
Design Patterns & Metadata: 16; Accessibility & Validation: 33
Marketing & Communications: 38; Bonus: 4
Elements: [a] [b] [e] [f] [h] [i] [j] [k] [l¾] [m] [r] [s] [t] [u] [w] [x] Bonus: [g] [i]



#7 S.J.Quinney College of Law, The University of Utah

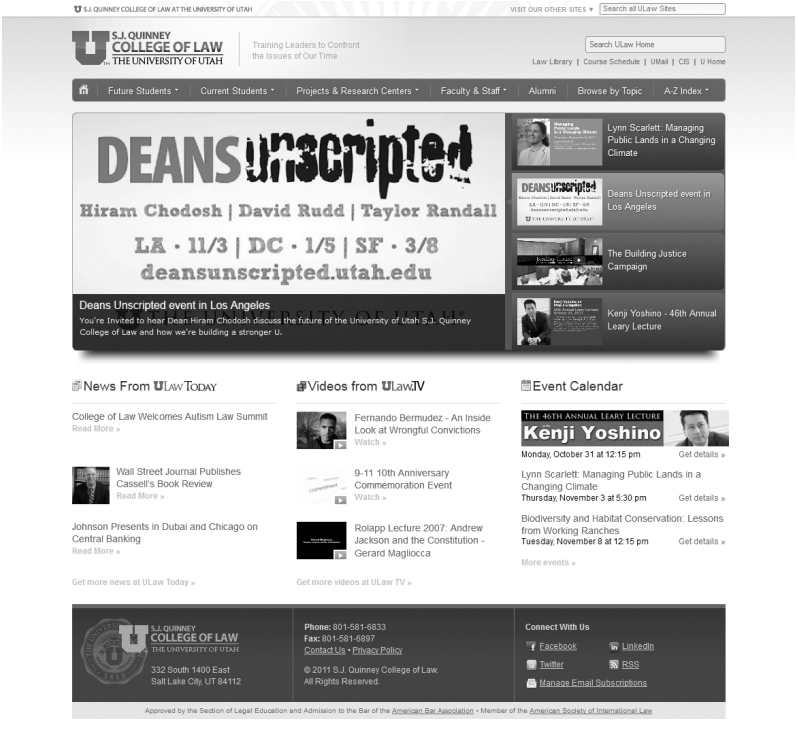
[www.law.utah.edu]

Total: 91.5

Design Patterns & Metadata: 13; Accessibility & Validation: 31.5

Marketing & Communications: 42; Bonus: 5

Elements: [a] [c] [h] [i¾] [j] [k] [l] [m¾] [r] [s] [t] [u] [v] [w] [x] Bonus: [g] [l]



#8 Thomas M. Cooley Law School

[www.cooley.edu]

Total: 91

Design Patterns & Metadata: 16; Accessibility & Validation: 30

Marketing & Communications: 42; Bonus: 3

Elements: [a] [c] [d] [f] [h] [i] [j] [l] [m½] [r] [s] [t] [u] [v] [w] [x] Bonus: [g]

#8 (tie) University of Nebraska College of Law

[law.unl.edu]

Total: 91

Design Patterns & Metadata: 16; Accessibility & Validation: 32

Marketing & Communications: 42; Bonus: 1

Elements: [a] [c] [d] [h] [i] [j] [k] [l] [r] [s] [t] [u] [v] [w] [x] Bonus: [i]

#10 George Mason University School of Law
[www.law.gmu.edu]
Total: 90.5
Design Patterns & Metadata: 20; Accessibility & Validation: 27.5
Marketing & Communications: 42; Bonus: 1
Elements: [a] [b] [c] [d] [h] [i] [j] [l¾] [m¼] [r] [s] [t] [u] [v] [w] [x] Bonus: [i]

TABULATION

Key
R = Rank
S = Score
B = Bonus points
* = partial credit possible

Design Patterns & Metadata [24 pts.]

[a] Search Form 9
[b] RSS Autodiscovery.....4
[c] Content Carousel.....4
[d] Embedded Media.....3
[e] Microformats.....3
[f] Dublin Core 1
[g] HTML5 ..... +3

Accessibility & Validation [34 pts.]

[h] Headings* 8
[i] Wave Errors* 8
[j] CSS* 8
[k] alt Attribute..... 4
[l] Valid Markup* 4
[m] ySlow Score* 2
[n] <u> ..... -.5
[o] <font> ..... -.5
[p] <b> <i> ..... -.5
[q] ..... -.5

Marketing & Communications [42 pts.]

[r] Meaningful Page Title 10
[s] Address 8
[t] Phone Number 8
[u] Social Media Link(s)..... 6
[v] Thumbnail Images 4
[w] News Headlines 3
[x] Favicon 3

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
1	98½	Univ. of Washington [www.law.washington.edu]	x	x	x		x		x	x	x	x	x	¼					x	x	x	x	x	x	x	g,j
2	93½	Arizona State Univ. [www.law.asu.edu]	x		x				x	x	x	x	x	¼					x	x	x	x	x	x	x	g,j ,l
3	93	Florida Coastal Sch. of Law [www.fcsl.edu]	x	x	x				x	x	x	x	x	x					x	x	x	x	x	x	x	
4	92	Univ. of New Mexico [lawschool.unm.edu]	x	x					x	x	x	x	x	x					x	x	x	x	x	x	x	i,l
	92	Wake Forest Univ. [law.wfu.edu]	x	x	x	x			x	¾	x		x	½					x	x	x	x	x	x	x	g
	92	Univ. of Texas at Austin [www.utexas.edu/law]	x	x			x	x	x	x	x	x	¼	x					x	x	x	x		x	x	g,j
7	91½	Univ. of Utah [www.law.utah.edu]	x		x				x	¾	x	x	x	¾					x	x	x	x	x	x	x	g,j
8	91	Thomas M. Cooley Law Sch. [www.cooley.edu]	x		x	x		x	x	x	x		x	½					x	x	x	x	x	x	x	g
	91	Univ. of Nebraska [law.unl.edu]	x		x	x			x	x	x	x	x						x	x	x	x	x	x	x	i
10	90½	George Mason Univ. [www.law.gmu.edu]	x	x	x	x			x	x	x		¾	¼					x	x	x	x	x	x	x	i
11	90	Univ. of Illinois [www.law.illinois.edu]	x	x	x				x	x	x	x	x	x					x	x	x	x		x	x	i
12	89½	Elon Univ. [www.elon.edu/e-web/law]	x		x	x			x	x	x	x	¾	¼					x	x	x	x	x	x	x	
13	89	Univ. of Southern California [law.usc.edu]	x	x	x		x		x	x	x	x	½						x	x	x	x	x	x		
	89	Thomas Jefferson Sch. of Law [www.tjsl.edu]	x	x	x			x	x	x	x		x						x	x	x	x	x	x	x	i
15	88½	American Univ. [www.wcl.american.edu]	x	x		x	x		x	x	x		x	¾					x	x	x	x		x	x	l
	88½	New England Sch. of Law [www.nesl.edu]	x	x	x				x	¾	x		¾	x			x		x	x	x	x	x	x	x	g
	88½	Michigan State Univ. Coll. of Law [www.law.msu.edu]	x		x		x		x	x	x		x	½			x		x	x	x	x	x	x	x	l
	88½	Southern Methodist Univ. [www.law.smu.edu]	x	x	x				x	x	x	x	x	¾					x	x		x	x	x	x	g,j
19	87½	Pepperdine Univ. [law.pepperdine.edu]	x	x	x				x	x	x		x	¼					x	x	x	x	x	x	x	
	87½	Univ. of Colorado [www.colorado.edu/Law]	x	x	x			x	x	x	x	x	½	½				x	x	x	x	x		x	x	i
	87½	Univ. of Maine [mainelaw.maine.edu]	x		x	x	x		x	x	x	x	x	¼					x	x	x		x	x	x	
22	87	William Mitchell Coll. of Law [www.wmitchell.edu]	x	x	x				x	x	x		x						x	x	x	x	x	x	x	

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
23	86	Lewis and Clark Law Sch. [law.lclark.edu]	x				x		x	x	x		x	x					x	x	x	x	x	x	x	l
24	85½	Univ. of Arkansas at Little Rock [www.law.ualr.edu]	x	x		x			x	x	x		x	¼					x	x	x	x		x	x	ga
	85½	Univ. of Houston [www.law.uh.edu]	x	x				x	x	x	x		x	¾					x	x	x	x	x	x	x	
26	85	Univ. of Tennessee [www.law.utk.edu]	x		x				x	x	x	x	x	x					x	x	x	x		x	x	
	85	Vermont Law Sch. [www.vermontlaw.edu]	x	x	x				x	x	x	x		¼			x		x	x	x	x	x	x		i
28	84½	George Washington Univ. [www.law.gwu.edu]	x		x			x	x	x	x	x	¾	¼					x	x	x	x		x		
	84½	John Marshall Law Sch. [www.jmls.edu]	x	x	x		x		x	¾	x			¼					x	x	x	x	x	x	x	
	84½	Univ. of Chicago [www.law.uchicago.edu]	x	x	x				x	½	x		x	¾					x	x	x	x	x	x	x	
	84½	Univ. of Pittsburgh [www.law.pitt.edu]	x	x	x				x	¾	x		¾	¼					x	x	x	x	x	x	x	
	84½	Appalachian Sch. of Law [www.asl.edu]	x		x				x	x	x	x	x	¼					x	x	x	x	x	x		
33	84	Columbia Univ. [www.law.columbia.edu]	x	x	x				x	x	x			½					x	x	x	x	x	x	x	
	84	Roger Williams Univ. [law.rwu.edu]	x		x				x	x	½	x	x	½					x	x	x	x	x	x	x	
35	83½	Univ. of Hawaii [www.law.hawaii.edu]	x	x	x				x	x	½			¾					x	x	x	x	x	x	x	ga
36	83	Univ. of Miami [www.law.miami.edu]	x		x	x			x	x	x			x			x	x	x	x	x	x	x	x	x	
	83	Washburn Univ. [www.washburnlaw.edu]	x	x					x	x	x		½	x					x	x	x	x	x	x	x	
	83	Western New England Coll. [www1.law.wnec.edu]	x	x	x		x	x		x	x		¾	½					x	x	x	x	x	x	x	
	83	Univ. of North Dakota [law.und.edu]	x		x	x			x	¾	x		x						x	x	x	x		x	x	ga
	83	Univ. of Oklahoma [www.law.ou.edu]	x						x	x	x	x	x	½					x	x	x	x		x	x	i,l
41	82	Univ. of Denver [www.law.du.edu]	x	x			x		x	¾	x		½	¼			x		x	x	x	x	x	x	x	
	82	Regent Univ. [www.regent.edu/acad/schlaw]	x	x	x				x	¾	x			½					x	x	x	x	x	x	x	
43	81	Wayne State Univ. [www.law.wayne.edu]	x		x		x		x		x		¾	½					x	x	x	x	x	x	x	ga
44	80½	Univ. of Tulsa [www.law.utulsa.edu]	x			x			x	x	x		½	¼					x	x	x	x	x	x	x	
45	80	Nova Southeastern Univ. [www.nsulaw.nova.edu]	x		x				x	¾	x		¾						x	x	x	x	x	x	x	
	80	Indiana Univ. - Bloomington [www.law.indiana.edu]	x			x			x	x	x		½						x	x	x	x	x	x	x	
	80	Indiana Univ. - Indianapolis [indylaw.indiana.edu]	x						x	x	x		x	¼			x		x	x	x	x	x	x	x	
	80	Univ. of New Hampshire Sch. of Law [law.unh.edu]	x	x	x				x	x	½			½					x	x	x	x	x	x	x	
49	79½	Washington Univ. [www.wulaw.wustl.edu]	x		x				x	x	x		x	½			x		x	x	x	x		x	x	
	79½	Univ. of Virginia [www.law.virginia.edu]	x	x	x					x	x		¾	¾					x	x	x	x	x	x	x	
	79½	City Univ. of New York [www.law.cuny.edu]	x	x	x				x	x			¾	¾					x	x	x	x	x	x	x	
	79½	Charlotte Sch. of Law [www.charlottelaw.org]	x						½	x	x	x	x	½			x		x	x	x	x	x	x	x	
53	79	Univ. of California at Berkeley [www.law.berkeley.edu]	x		x				x	¾	x			x					x	x	x	x	x	x	x	
	79	Depaul Univ. [www.law.depaul.edu]	x		x				x	x	x		¾	½					x	x	x	x		x	x	
	79	Marquette Univ. [law.marquette.edu]	x		x				x	x	½		x						x	x	x	x	x	x	x	
56	78½	St. Louis Univ. [law.slu.edu]	x		x	x			x	x	½			¼					x	x	x	x	x	x	x	
	78½	Washington and Lee Univ. [law.wlu.edu]	x	x	x	x				x	x			¼					x	x	x	x	x	x	x	
58	78	Univ. of San Diego [www.sandiego.edu/law]	x						x	¾	x		x	½					x	x	x	x	x	x	x	
	78	Ohio Northern Univ. [www.law.onu.edu]	x						x	¾	x		¾	x					x	x	x	x	x	x	x	
	78	Univ. of Richmond [law.richmond.edu]	x		x	x				x	x		¾	½					x	x	x	x	x	x	x	
	78	Whittier Coll. [www.law.whittier.edu]	x		x				x	¾	x		x						x	x	x	x	x	x		
	78	Yeshiva Univ. [www.cardozo.yu.edu]	x		x	x			x	¾	x			½					x	x	x	x	x	x		
	78	Univ. of La Verne [law.laverne.edu]	x	x	x				x	x	x		x	½					x	x	x			x	x	

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
64	77½	Univ. of Missouri-Kansas City [www.law.umkc.edu]	x		x				x	¾	x		x	¼					x	x	x	x		x	x	
65	77	Stetson Univ. [www.law.stetson.edu]	x		x	x			x	¾	x		¾	½					x	x	x	x			x	
	77	Univ. of Notre Dame [law.nd.edu]	x		x				x	x	x		¾	¾			x		x	x	x		x	x	x	
	77	Univ. of Iowa [www.law.uiowa.edu]	x						x	x	x	x	x	½					x	x		x	x	x	x	i
	77	Univ. of Pennsylvania [www.law.upenn.edu]	x	x	x		x		x	x		x	x	x					x	x		x		x	x	i
69	76½	Univ. of Maryland [www.law.umaryland.edu]	x		x				x	¾	x		½	¾					x	x	x	x		x	x	
	76½	Hofstra Univ. [law.hofstra.edu]	x		x				½	x	x		¼	¾					x	x	x	x	x		x	
71	76	Univ. of Arkansas, Fayetteville [law.uark.edu]	x						x	x	x		¾	x					x	x	x	x		x		pg
	76	Ohio State Univ. [moritzlaw.osu.edu]	x						x	x	½	x		½					x	x	x	x	x	x	x	
	76	William And Mary Sch. of Law [law.wm.edu]	x						x	x	x	x	¼	½					x	x		x	x	x	x	i
	76	Florida A&M Sch. of Law [law.famu.edu]			x				x	x	x	x	¾	½					x	x	x	x	x	x		i
76	75½	Univ. of California at Davis [www.law.ucdavis.edu]	x		x		x		x	x	x		x	¾					x	x		x		x	x	
	75½	Loyola Univ.-New Orleans [law.loyno.edu]	x						x	x	x		¾	¼					x	x	x	x	x		x	
	75½	Brooklyn Law Sch. [www.brooklaw.edu]	x		x				x	x	x		¼				x		x	x	x		x	x	x	
	75½	Syracuse Univ. [www.law.syr.edu]	x		x				x	x	x		x	¼					x	x		x	x	x	x	
	75½	Univ. of Wyoming [www.uwyo.edu/law/]	x			x			x	x	x	x	x	½			x		x	x	x				x	l
81	75	Univ. of Georgia [www.law.uga.edu]	x	x	x				x	¾	½		x						x	x	x		x	x	x	
	75	Southern Illinois Univ.-Carbondale [www.law.siu.edu]	x		x				x	½	x	x	x	½					x	x	x		x	x		
	75	Northwestern Univ. [www.law.northwestern.edu]	x		x			x	x	¾	½		¼	½		x	x		x	x	x	x	x	x	x	
	75	New York Law Sch. [www.nyls.edu]	x		x		x		x		x		¼	½		x	x		x	x	x	x	x	x	x	
85	74½	Drake Univ. [www.law.drake.edu]	x	x						x	x		¼	½			x		x	x	x	x	x	x	x	
	74½	Univ. of Wisconsin [www.law.wisc.edu]			x				x	x	x	x	¾	½			x		x	x	x		x	x	x	i
87	74	Univ. of Cincinnati [www.law.uc.edu]	x						x	x	x		X	½					x	x	x		x	x	x	
	74	Northeastern Univ. [www.northeastern.edu/law]	x							¾	x	x	¾	x					x	x	x	x	x	x	x	
	74	Southwestern Univ. [www.swlaw.edu]	x		x				x	x			¼						x	x	x	x	x	x	x	
	74	Santa Clara Univ. [law.scu.edu]	x		x				½	x	x		½	½					x	x	x	x		x	x	
	74	Yale Univ. [www.law.yale.edu]	x			x			x	x	x		¼						x	x	x		x	x	x	i
	74	Hamline Univ. [law.hamline.edu]	x		x	x			x	x	½			¼			x		x	x	x	x			x	
	74	Villanova Univ. [www.law.villanova.edu]	x		x				x	x	x		¼						x	x	x		x	x	x	
93	73½	Widener Univ. [law.widener.edu]	x		x					x	x		½	¼					x	x	x	x	x	x	x	
	73½	Univ. of Detroit Mercy [www.law.udmercy.edu]	x						x	¾	½		¾	x	x				x	x	x	x	x	x	x	
	73½	Rutgers Univ.-Newark [www.law.newark.rutgers.edu]	x	x				x	x	x			¼	¼					x	x	x	x	x	x	x	
	73½	Gonzaga Univ. [www.law.gonzaga.edu]	x						x	x	½		¼	¾					x	x	x	x	x	x	x	
	73½	Widener Univ.-Harrisburg [law.widener.edu]	x		x					x	x		½	¼					x	x	x	x	x	x	x	
98	73	Mercer Univ. [www.law.mercer.edu]	x			x			x	¾	x	x	x	½					x	x		x		x	x	
	73	Capital Univ. [www.law.capital.edu]	x		x				x	x	x		¾						x	x	x		x	x		
	73	Northern Illinois Univ. [law.niu.edu/law]	x		x				x	x	x	x	x	½					x			x	x	x	x	i
	73	Western State Sch. of Law [www.wsulaw.edu]	x						x	¾	x			¼			x		x	x	x	x	x	x	x	
	73	Drexel Univ. [www.earlemacklaw.drexel.edu]	x		x				x	¾	½								x	x	x	x	x	x	x	
103	72½	Univ. of Kansas [www.law.ku.edu]	x	x					x	x	x		½	½			x			x	x	x	x	x	x	i
	72½	State Univ. of New York At Buffalo [www.law.buffalo.edu]	x			x		x	x	x				¾					x	x	x	x	x	x	x	

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
	72	Univ. of California-Hastings [www.uchastings.edu]	x			x			x	x	x		x	½					x	x		x		x	x	i
	72	Emory Univ. [www.law.emory.edu]	x	x	x		x	x	x	x	x		½	x		x	x		x	x				x	x	
	72	Oklahoma City Univ. [law.okcu.edu]	x	x	x	x				¾	x			¼			x		x	x	x	x		x	x	
105	72	Univ. of South Dakota [www.usd.edu/law]	x		x		x		x	x	½		x							x	x	x	x	x	x	
	72	Vanderbilt Univ. [law.vanderbilt.edu]	x		x				x	¼	x		½	x		x	x		x	x	x	x		x	x	
	72	St. Mary's Univ. [www.stmarytx.edu/law]	x		x				x		x			½					x	x	x	x	x	x	x	
	72	West Virginia Univ. [law.wvu.edu]	x		x				x	x	x		¼	¼			x		x	x		x	x	x	x	
	71½	Harvard Univ. [www.law.harvard.edu]	x	x	x				x	x	x	x	x	¾					x				x	x	x	i
112	71½	New York Univ. [www.law.nyu.edu]	x		x				x	¾	x			¼					x	x	x		x	x	x	
	71½	Univ. of Memphis [www.memphis.edu/law]	x					x		x		x	x	¾					x	x	x	x	x	x	x	l
115	71	Albany Law Sch. of Union Univ. [www.albanylaw.edu]	x			x				¾	x		½	½					x	x	x	x	x	x	x	
	70½	Univ. of Florida [www.law.ufl.edu]	x		x				x	¾	x		x	¾					x	x		x		x	x	
116	70½	Univ. of Akron [www.uakron.edu/law]	x	x	x				x	¾				¾					x	x	x	x		x	x	
	70½	Liberty Univ. [law.liberty.edu]	x		x				x	x	x			¾					x	x	x			x	x	
119	70	Howard Univ. [www.law.howard.edu]	x						x	¾	½		¾	x		x	x		x	x	x	x	x	x		
120	69½	Univ. of Missouri-Columbia [www.law.missouri.edu]	x		x					x	x		x	¾					x	x	x	x		x		
121	69	Northern Kentucky Univ. [chaselaw.nku.edu]	x							x	x			x					x	x	x	x	x	x	x	
	69	Georgia State Univ. [law.gsu.edu]	x	x	x				x	½	x									x	x	x	x	x	x	
123	68½	Univ. of North Carolina [www.law.unc.edu]	x		x				x	½				¾					x	x	x	x	x	x	x	
	68½	Univ. of St. Thomas Sch. of Law [www.stthomas.edu/law]	x		x				x	½	x						x		x	x	x		x	x	x	
	68	Univ. of San Francisco [www.usfca.edu/law]	x		x	x				¼	x								x	x	x	x	x	x	x	
125	68	Brigham Young Univ. [www.law2.byu.edu]	x	x	x					½	½			¾				x	x	x	x	x	x	x	x	
	68	Quinnipiac Univ. Sch. of Law [law.quinnipiac.edu]	x		x					x	x	x		x					x	x	x		x	x		
	67½	Univ. of Connecticut [www.law.uconn.edu]	x						x	x		x	¾				x		x	x	x		x	x	x	
128	67½	Tulane Univ. [www.law.tulane.edu]	x		x		x		x		½		¼	¼					x	x	x	x		x	x	
	67½	Seton Hall Univ. [law.shu.edu]	x						x	¾	x		¼	¼		x	x		x	x	x		x	x	x	
	67½	North Carolina Central Univ. [law.nccu.edu]	x		x	x			x		x			¾					x	x	x	x		x		
	67	Chicago-Kent Coll. of Law, IIT [www.kentlaw.edu]	x	x						x			x	¼			x		x	x	x	x	x	x	x	
132	67	Univ. of Oregon [www.law.uoregon.edu]	x						x	x			½	x					x	x	x	x		x	x	
	67	William S. Boyd Sch. of Law [www.law.unlv.edu]	x						x		x								x	x	x	x	x	x	x	
135	66½	Seattle Univ. [www.law.seattleu.edu]	x						x	x	x		x	¾					x			x	x	x	x	l
	66	Univ. of Alabama [www.law.ua.edu]	x	x					½	x	x		½	½					x	x		x		x	x	
136	66	Loyola Univ.-Chicago [www.luc.edu/law]	x		x				x	x	x								x	x	x				x	
	66	Valparaiso Univ. [www.valpo.edu/law]	x		x				½	x			x	¾			x		x	x	x		x	x	x	
139	65½	Pace Univ. [www.law.pace.edu]	x		x					x	x	x	x	¼						x	x	x		x	x	
	65½	Dwayne O. Andreas Sch. of Law [www.barry.edu/law]	x						x	x	½		¾	¼					x	x	x		x		x	
	65	Suffolk Univ. [www.law.suffolk.edu]	x			x			x	¼				½					x	x	x	x	x	x	x	
141	65	Univ. of Mississippi [www.olemiss.edu/depts/law_school]	x		x				x	½	x			¼		x			x	x	x			x	x	
	65	Willamette Univ. [www.willamette.edu/wucl]	x		x	x			x		x		¼	¼			x		x	x	x			x	x	
	65	Texas Southern Univ. [www.tsulaw.edu]	x							x			x	x					x	x	x	x	x	x	x	
145	64½	Catholic Univ. of America [www.law.edu]	x				x		x	¾	½		¼	¼		x	x		x	x		x	x	x	x	

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
	64½	Univ. of Louisville [www.law.louisville.edu]	x		x				x	x	x		x	¾					x			x		x	x	
	64½	Univ. of Michigan [www.law.umich.edu]	x		x	x			x	¾				¼					x	x		x	x	x	x	
	64½	Univ. of Minnesota [www.law.umn.edu]	x	x					x	¾				x			x		x	x	x		x	x	x	
149	63½	Rutgers Univ.-Camden [camlaw.rutgers.edu]	x						x	x			½	¼					x	x	x		x	x	x	
150	63	Univ. of Kentucky [www.law.uky.edu]	x		x				x					¼			x		x	x	x	x	x	x	x	
151	62½	Univ. of California at Los Angeles [www.law.ucla.edu]	x		x				½	x							x		x	x	x	x		x	x	
	62½	Cornell Univ. [www.lawschool.cornell.edu]	x		x				x	x	x						x		x			x	x	x	x	
153	62	Loyola Law Sch. Los Angeles [www.lls.edu]	x							x	½	x	x	¾			x		x	x	x			x	x	
	62	McGeorge Sch. of Law [www.mcgeorge.edu]	x						½	¼	x		½	½					x	x	x		x	x	x	
155	61½	Fordham Univ. [law.fordham.edu]	x							x		x		¾			x	x	x	x	x	x	x		x	i
	61½	South Texas Coll. of Law [www.stcl.edu]	x							¾			¾	¾					x	x	x	x	x	x	x	
157	60½	Georgetown Univ. [www.law.georgetown.edu]	x	x						x				¾					x	x	x	x		x	x	
	60½	Cleveland-Marshall Coll. of Law [www.law.csuohio.edu]	x		x				x		x			¾					x	x		x		x	x	
159	60	Case Western Reserve Univ. [law.case.edu]	x	x		x				¼				¼			x		x	x	x	x	x	x	x	
	60	Univ. of Toledo [www.law.utoledo.edu]	x			x				x	x		x	¾		x			x	x		x		x		
	60	Chapman Univ. Sch. of Law [www.chapman.edu/law]	x							x			¼	½		x	x		x	x	x	x	x	x	x	
162	59½	Univ. of Baltimore [law.ubalt.edu]	x							x	x		x	¾					x	x	x			x		
	59½	Creighton Univ. [www.creighton.edu/law]	x						½		½			¼					x	x	x	x	x	x	x	
164	59	Univ. of Arizona [www.law.arizona.edu]	x							x	x		¾	½					x	x		x		x	x	
	59	Phoenix Sch. of Law [www.phoenixlaw.edu]	x		x						½			¼			x		x	x	x	x	x	x	x	
166	58	Florida State Univ. [www.law.fsu.edu]	x							¾			¾	x					x	x	x	x		x	x	
	58	Boston Univ. [www.bu.edu/law]	x							¾	½		x	½					x	x		x	x	x	x	
	58	Mississippi Coll. [law.mc.edu]	x		x				x		½		¼	¼			x		x	x	x	x				
169	57½	Boston Coll. [www.bc.edu/schools/law]	x						x	x	x		x	¼					x				x	x	x	
	57½	Penn State Univ. Dickinson Sch. of Law [www.dsl.psu.edu]	x	x	x					¾			½	½				x	x	x				x	x	
	57½	Univ. of South Carolina [usclaw.sc.edu]	x					x		x		x		x			x		x	x	x		x		x	i
172	57	Samford Univ. [cumberland.samford.edu]	x							x	x			x					x	x	x				x	i
173	56½	Texas Tech Univ. [www.law.ttu.edu]	x		x				x	¾		x		¼		x	x		x			x	x	x	x	
	56½	Florida International Sch. of Law [law.fiu.edu]	x		x				x	¾	½			¾					x	x				x	x	
175	56	Stanford Univ. [www.law.stanford.edu]	x		x				x	x	x								x			x			x	
	56	Touro Coll. [www.tourolaw.edu]	x		x						x			¼	x		x	x	x	x	x		x	x	x	
177	55½	Univ. of Montana [www.umt.edu/law]				x		x	x	x			¼	x	x				x	x	x		x		x	
	55½	Baylor Univ. [www.baylor.edu/law]	x		x									¾			x	x	x	x	x	x	x	x	x	
179	54½	Duke Univ. [www.law.duke.edu]	x		x				x	x	x		¼	¼					x					x	x	
180	54	Louisiana State Univ. [www.law.lsu.edu]	x							x				x			x	x	x	x	x		x	x	x	
	54	Duquesne Univ. [www.law.duq.edu]	x						x	x	½	x		½					x				x	x	x	
	54	St. Thomas Univ. [www.stu.edu/law]	x							x				¾				x	x	x	x		x	x	x	
183	53½	California Western Sch. of Law [www.cwsl.edu]	x		x									x			x		x	x	x	x	x	x		
184	49	Charleston Sch. of Law [www.charlestonlaw.org]	x						x	x	½		½	½					x				x	x		
185	48½	Univ. of Idaho [www.law.uidaho.edu]	x		x					½	x			¼					x			x	x		x	
186	48	Campbell Univ. [law.campbell.edu]		x	x				x				½	½					x	x	x			x		

R	S	School [URL]	a	b	c	d	e	f	h	i	j	k	l	m	n	o	p	q	r	s	t	u	v	w	x	B
	48	Texas Wesleyan Univ. [www.law.txwes.edu]								x		x	¾	¾		x				x	x	x	x	x	x	
188	47	Faulkner Univ. [www.faulkner.edu/jsl/]	x		x					½				¾			x		x	x	x			x		
189	46	Inter American Univ. of Puerto Rico [www.derecho.inter.edu]	x							¼			½	x		x	x		x	x	x			x	x	
190	45	St. John's Univ. [www.stjohns.edu/academics/graduate/law]	x		x				x	¾	x		x											x	x	
191	43½	Golden Gate Univ. [www.ggu.edu/school_of_law]	x							x	x		½	¼					x					x	x	
192	41½	Univ. of Dayton [www.law.udayton.edu]	x						x	¼	x		¼	¼					x						x	
	41½	Temple Univ. [www.law.temple.edu]	x						½	¾				½		x				x	x			x	x	
194	41	Ave Maria Univ. Sch. of Law [www.avemarialaw.edu]								½			¼	¼			x		x	x	x		x	x	x	
195	36½	John Marshall Law Sch. - Atlanta [www.johnmarshall.edu]			x					¾				x		x	x	x	x			x	x	x	x	
196	35½	The Judge Advocate General's Sch. [www.jagcnet.army.mil]	x							½	x			x		x	x	x			x			x	x	
197	33½	Pontifical Catholic Univ. of P.R. [www.pucpr.edu]										x	¾	¼					x		x		x	x		
198	30	District of Columbia [www.law.udc.edu]												½					x	x	x			x		
199	29½	Southern Univ. [www.sulc.edu]			x									x	x	x			x	x			x	x		
200	25	Univ. of Puerto Rico [www.law.upr.edu]								½	x								x					x		

LAW SCHOOL FAVICONS – 2011

# # #

TOPS IN THOMAS

THROUGH THE AUGUST RECESS OF THE 112TH CONGRESS

Andrew Weber[†]

THOMAS was launched seventeen years ago in January of 1995 at the start of the 104th Congress. The Library of Congress was directed as part of a bipartisan effort to make federal legislative information freely available to the public.[1] THOMAS has become a popular government source of legislative information.

Bill text is searchable from the 101st (1989) through the current Congress. The Bill Summary & Status information covers the 93rd (1973) through the current Congress and includes sponsor(s); co-sponsor(s); official, short and popular titles; floor/executive actions; detailed legislative history; Congressional Record page references; bill summary; committees of referral; reporting and origin; subcommittees of referral; amendment descriptions; and subjects.[2]

[†] Legislative Information Systems Manager for the Law Library of Congress. This article is a modified version of the original publication from In Custodia Legis at blogs.loc.gov/law/2011/08/tops-in-thomas-at-the-august-recess-of-the-112th-congress/. If you like learning what people are searching, subscribe to the THOMAS: Top Ten Legislative Items feed by RSS, email, or follow @THOMASdotgov on Twitter. It can be rather fascinating to review the Top Ten and come across a bill from a previous Congress and analyze why it is there to understand the possibly anomaly.

[1] *See* the original THOMAS press release, The Speaker of the House and the Librarian of Congress Announce Online Public Access to Congressional Information, www.loc.gov/today/pr/1995/95-002.html (vis. Nov. 28, 2011) and a screenshot of the first homepage, blogs.loc.gov/law/2011/11/the-thomas-starting-point-pic-of-the-week/ (vis. Nov. 28, 2011).

[2] While a simple search of the Bill Summary & Status data is available from the

THOMAS also includes the ability to search multiple Congresses, Public Laws by number, access to House and Senate roll call votes, the ability to search the Congressional Record from the 101st (1989), search Committee Reports from the 104th (1995), search Presidential Nominations from the 100th (1987), and search treaty information from the 90th (1967).

The frequency with which legislation is searched for on THOMAS gives one indication about the interest in particular legislation. To determine the THOMAS Top Ten, each week a member of the THOMAS team receives a spreadsheet with our metric data from the previous week. The data is from the previous seven days based on the legislative items searched in the database. Then a member of the team applies a macro to the data that populates the top ten list, and the list is verified for accuracy. The new data page is created by another member of the THOMAS team and then published on THOMAS.

Every Top Ten has a date based URL that can be used to view previous lists. The lists URLs are constructed with the year, month, and date at the end (for example, thomas.loc.gov/home/topten/topten_20111127.html). This can be used if you want to compare legislation over time or follow how a highly searched for piece of legislation trended.

The August 2011 recess was the perfect time to provide an update on the legislative items that had been the most popular since the 112th Congress began in January of 2011. Back in April, only a few months into the 112th Congress, I reported that of the top twenty at that time, only eight were from the 112th Congress, several related to health care, and most became public laws.[3]

As of this writing, a few months later, twelve of the top twenty are from the current 112th Congress, crowding out a few items from the previous 111th Congress.

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homepage of THOMAS.gov, the advanced search is available at thomas.loc.gov/home/LegislativeData.php.

[3] *See* blogs.loc.gov/law/2011/04/tops-in-thomas-for-the-first-three-months-of-the-112th-congress/ (vis. Oct. 30, 2011).

1. H.R. 1 [112th]: Full-Year Continuing Appropriations Act, 2011 – *Latest Major Action:* Passed House, returned to the Senate Calendar.
2. H.R. 1473 [112th]: Department of Defense and Full-Year Continuing Appropriations Act, 2011 – *Latest Major Action:* Became Public Law No: 112-10.
3. H.R. 3590 [111th]: Patient Protection and Affordable Care Act – *Latest Major Action:* Became Public Law No: 111-148.
4. H.R. 1363 [112th]: Further Additional Continuing Appropriations Amendments, 2011 – *Latest Major Action:* Became Public Law No: 112-8.
5. H.R. 4173 [111th]: Dodd-Frank Wall Street Reform and Consumer Protection Act – *Latest Major Action:* Became Public Law No: 111-203.
6. S. 627 [112th]: Budget Control Act of 2011 – *Latest Major Action:* Passed House.
7. H.R. 3 [112th]: No Taxpayer Funding for Abortion Act – *Latest Major Action:* Read the second time. Placed on Senate Legislative Calendar under General Orders. Calendar No. 40.
8. H.R. 1540 [112th]: National Defense Authorization Act for Fiscal Year 2012 – *Latest Major Action:* Passed House, read twice in Senate, and referred to the Committee on Armed Services.
9. H.R. 2 [112th]: Repealing the Job-Killing Health Care Law Act – *Latest Major Action:* Passed House, read twice in the Senate.
10. H.R. 3082 [111th]: Continuing Appropriations and Surface Transportation Extensions Act, 2011 – *Latest Major Action:* Became Public Law No: 111-322.
11. H.R. 3200 [111th]: America's Affordable Health Choices Act of 2009 – *Latest Major Action:* 10/14/2009 Placed on the Union Calendar, Calendar No. 168 (note: H.R. 3590 became the primary health care bill during the 111th Congress, and this bill died when the 111th Congress ended).

12. H.R. 2560 [112th]: Cut, Cap, and Balance Act of 2011— *Latest Major Action:* Passed House, Motion to table the motion to proceed to the bill agreed to in Senate by Yea-Nay Vote. 51 - 46.
13. H.R. 4853 [111th]: Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 — *Latest Major Action:* Became Public Law No: 111-312.
14. S. 223 [112th]: FAA Air Transportation Modernization and Safety Improvement Act — *Latest Major Action:* Passed Senate with amendments by Yea-Nay Vote. 87 - 8.
15. H.R. 4646 [111th]: Debt Free America Act — *Latest Major Action:* 2/23/2010 Referred to House Committee on Ways and Means, in addition to the Committees on the Budget, Rules, and Appropriations.
16. H.R. 1380 [112th]: New Alternative Transportation to Give Americans Solutions Act of 2011 — *Latest Major Action:* 4/6/2011 Referred to House Subcommittee on Energy and Power.
17. H.R. 4 [112th]: Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 — *Latest Major Action:* Became Public Law No: 112-9.
18. H.R. 4872 [111th]: Health Care and Education Reconciliation Act of 2010 — *Latest Major Action:* Became Public Law No: 111-152.
19. H.R. 25 [112th]: Fair Tax Act of 2011 — *Latest Major Action:* 1/5/2011 Referred to the House Committee on Ways and Means.
20. H.R. 1 [111th]: American Recovery and Reinvestment Act of 2009 — *Latest Major Action:* Became Public Law No: 111-5.

There were eight items that were in the top twenty in April of 2011 that dropped out: H.R. 514 [112th]: FISA Sunsets Extension Act of 2011; H.R. 6523 [111th]: Ike Skelton National Defense Authorization Act for Fiscal Year 2011; S. 1435 [111th]: Human-

Animal Hybrid Prohibition Act of 2009; H.R. 2751 [111th]: FDA Food Safety Modernization Act; H.R. 3081 [111th]: Continuing Appropriations Act, 2011; H.R. 662 [112th]: Surface Transportation Extension Act of 2011; H.R. 3962 [111th]: Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010; and H.R. 658 [112th]: FAA Air Transportation Modernization and Safety Improvement Act.

Reviewing what tops THOMAS over time can be fascinating and can provide insight into what the national constituency deems most important on Capitol Hill. There are frequently bills that top the list that you would expect, given the amount of press they generate and receive in the conversations of the day. The Health Care Bill, H.R. 3590 [111th], was one of the most controversial and decisive bills in recent memory so it makes sense to see it as the third most viewed piece of legislation on THOMAS, even after its passage. It also follows that the Stimulus Package, H.R. 1 [111th], is still on the list as it has been a very high profile bill that became a symbol in the debate over how to bolster and recuperate the economy. Sometimes an anomaly creeps in and with a little research you can determine that a bill was mentioned a high traffic internet website, blog, or twitter account.[4] From the public's general interest to a specific industry's interest in legislation, the tops in THOMAS provides an interesting measure of interest.

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[4] For example, the Debt Free American Act, in THOMAS at hdl.loc.gov/loc.uscongress/legislation.111hr4646 appeared on Snopes at www.snopes.com/politics/taxes/debtfree.asp. Note that in this case, Debt Free America Act, H.R. 4646 [111th], died in committee in the previous Congress, yet has been searched for more than the Stimulus Package.

APPELLATE REVIEW

Tom Cummins & Adam Aft[†]

Twenty-eight percent. When reviewing the judgments of the United States Courts of Appeals last term via full opinion, the Supreme Court affirmed the judgment below in just 28 percent of the cases.[1] The Court affirmed the judgment of the Ninth Circuit, that notorious Ninth, 21 percent of the time.[2] And the Court affirmed the Fifth and Sixth Circuits even less frequently, a mere 20 and 17 percent, respectively.[3] Only one circuit, the First, posted an affirmance rate greater than 50 percent.[4] The "general consensus seems to be that [these affirmance] rates, while 'imperfect,' offer a 'reasonable approach to evaluating judicial quality.'"[5] The general consensus is wrong. That is, although ubiquitous,[6] these statistics do not provide a particularly useful measure of federal appellate court performance. The Court reviews about one tenth of one percent of the judgments of the circuit courts.[7] And these cases

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[1] *See Stat Pack for October Term 2010*, SCOTUSBLOG (June 28, 2011), sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf ("SCOTUSblog Stat Pack").

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1154 (2011) (quoting Frank B. Cross & Stephanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1403 (2009)).

[6] *See* Hansford, *supra* note 5, at 1156 (collecting sources demonstrating that "[l]eading Supreme Court commentators, the popular press, and legal journals use reversal rates." (footnotes omitted)).

[7] *See* Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Ap-*

are not selected at random; rather, a robust body of research suggests that the Court has a "decided propensity"[8] to grant certiorari in cases that it intends to reverse.[9]

With this brief essay, we offer an improved metric of appellate review – one which measures circuit court performance by compiling data on the Court's resolution of circuit splits. A "circuit split," as articulated by Supreme Court Rule 10, exists when "a federal court of appeals has decided a case in conflict with the decision of another federal court of appeals."[10] Thus, rather than simply calculating how frequently the Court affirms the judgment below (what we term the "primary review" affirmance rate), we examine how frequently the Court approves of a court of appeals' judgment on the particular issue that has caused the split. We term our metric the "parallel review" affirmance rate, as the Court is evaluating not only the particular decision on which the writ of certiorari was issued, but also the parallel, conflicting decisions on the issue that are evaluated by the Court in resolving the circuit split.

Although our data is new, taken from the Court's most recent complete term, our method is not. In *Measuring the Effects of Specialization with Circuit Split Resolutions*,[11] Eric Hansford used the same general approach to measure circuit court "specialization" (that is, whether a circuit is particularly proficient in applying a type of law that makes up a disproportionate share of its docket).[12] Compiling

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peals, LANDSLIDE, Jan.-Feb. 2010, at 8 (collecting statistics).

[8] Thomas Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA. L. REV. 323, 327 (1994) ("The 'decided propensity' of the Supreme Court, statistically speaking, is to grant a writ of certiorari in cases it intends to reverse.").

[9] *See* RICHARD FALLON *et al.*, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469 (6th ed. 2009) (collecting sources).

[10] SUP. CT. R. 10(a).

[11] 63 STAN. L. REV. 1145 (2011).

[12] *See also* John Summers & Michael Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Court of Appeals Decisions*, 80 U.S.L.W. 393 (Sept. 27, 2011) (collecting data on the circuit split affirmance rates from 2005-2010), www.hangley.com/ufiles/summers_toward_a_better_understanding_of_ussc_decisions.pdf.

circuit split performance statistics from the 2005-2008 terms, he demonstrated that "partial specialization" led to a court's "relative advantage in deciding that kind of case."[13] Our aim is far simpler. We seek only to provide a superior performance criterion than currently offered by the primary review statistics. Not only does evaluating decisions on parallel review compare performance on legal questions of a certain degree of difficulty (those unsettled questions that divide the federal courts of appeals), it also compares performance on the same legal questions. We do not suggest, of course, that our metric is the only standard by which to review appellate performance.[14] Rather, it is a marginally improved metric, and one that reveals some surprising statistics.

In contrast to the dismal affirmance rates observed on primary review, for example, we found that on parallel review, the average affirmance rate more than doubles, from 28 to 64 percent.[15] This is not to suggest that statistical error exists in the primary review data – it merely illustrates how under-inclusive the primary review data is regarding the Supreme Court's evaluation of circuit court performance. And, although an average affirmance rate over 50 percent may seem counter-intuitive, we suggest that the mistaken intuition comes from the ubiquity of the primary review statistics, not any inherent feature of appellate review. Circuit splits, of course, are seldom evenly divided; fewer than a third of the decisions in our data set, for example, involved even splits.[16] As most splits do not divide the circuits evenly, all other things being equal, one would expect that most appellate courts identify the law and apply it correctly most of the time. Our statistics bear this out: the "majority approach"[17] to the split issue was affirmed 90 percent of the time.[18]

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[13] *Id*.

[14] *See infra* text accompanying note 28.

[15] *See infra* app. tbl. 1.

[16] *See infra* app. tbl. 3.

[17] For example, the eight circuits in an eight-to-two circuit split. *See, e.g.*, *Abbott v. United States*, 131 S. Ct. 18, 24 n.2 (2010). We also included even splits as the majority approach being affirmed.

[18] *See infra* app. tbl. 1.

In sum, once data regarding decisions on parallel review are added to the decisions under primary review, a more accurate – and much different – view of federal appellate court performance emerges.

The individual circuits, with one exception,[19] likewise all had higher rates of affirmance by the Court than the primary review statistics suggest. On primary review, only one circuit has an affirmance rate higher than 50 percent.[20] When parallel review data is incorporated, in contrast, two-thirds of the circuits have an affirmance rate higher than 50 percent.[21] The Fifth Circuit, which was affirmed only 20 percent of the time on primary review (resulting in the second lowest affirmance rate), was vindicated 79 percent of the time on parallel review (resulting in the third highest affirmance rate).[22] The Ninth was not an outlier, as one might expect based on its reputation, but rather posted an affirmance rate of 60 percent, well within the heartland of the overall parallel review affirmance rate.[23] Our observations from the 2010 term, moreover, were consistent with the observations from the 2005-2008 terms.[24] In light of the more than five hundred cases in the combined data sets, we are confident that these findings are not statistically anomalous.

Similarly surprising are the margins by which the Court resolved the circuit splits. In addition to counting how the circuits fared in the circuit split resolutions, we also compiled data on how the Court voted (from a unanimous opinion to a five-to-four decision), anticipating that if an issue divided the circuits, it likely it would divide the Court as well. To our knowledge, we were the first to do so. Unexpectedly, the questions that divided the circuits did not particularly divide the Court. None resulted in five-to-four deci-

[19] The First Circuit is the lone exception. It posted a perfect one-for-one on primary review, leading all courts in this performance criterion. On parallel review, it went six-for-seven, resulting in an 86 percent affirmance rate (and placing second according to this performance criterion).

[20] *See supra* text accompanying note 4.

[21] *See infra* app. tbl. 1.

[22] *Id.*

[23] *Id.*

[24] Hansford, *supra* note 5, at 1165 tbl. 1. *See also* Summers & Newman, *supra* note 12, tbl. 1.

sions.[25] Indeed, two-thirds of the circuit splits were resolved by either unanimous judgment or by an eight-to-one decision.[26] Before taking a closer look at the data and offering tentative conclusions, however, a few caveats and notes on our methods are in order.

I. IN THE YELLOW WOOD

For our purposes we need not resolve the metaphysical quandary of the virtue of justness derived solely from ordinal prioritization. It is enough to say that for scorekeeping, the Supreme Court is not right because it is necessarily correct on the law, of course; rather, it is right because it is last.[27] As the body vested with the final authority to review the decisions of the courts of appeals, its interpretation is supreme to that of those courts.

Likewise, although we believe that parallel review offers an improved review of appellate performance, in that it shows how well the circuits perform relative to their peers, we do not suggest that our work offers a comprehensive assessment of the performance of these courts. Indeed, we do not even purport to offer a comprehensive evaluation of the Court's assessment of these courts' performance. Evaluating the rate of summary reversals, for example, would provide a qualitatively different type of assessment – how often the courts of appeals are getting the answers to relatively straightforward questions correct.[28] We do not undertake this evaluation. Rather, we focus on how often courts of appeals are getting the harder, unsettled, questions correct – questions on which federal courts of appeals have reached conflicting conclusions.

At this point, the reader may wonder why the focus is on the

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[25] *See infra* app. tbls. 2-3.

[26] *See infra* app. tbl. 2.

[27] As Justice Jackson once observed, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

[28] The reader interested in this road not taken is directed to the somewhat dated, but still very fine, article by Richard Posner, *Is the Ninth Circuit too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000), which evaluates circuit court performance according to rates of summary reversal.

courts, rather than the individual judges.[29] In this context, we conclude, "the most logical unit of analysis is the court,"[30] not the individual judges that comprise the court.[31] "What matters is not the expertise of the opinion writer," Hansford cogently observes, "but of the collective panel. . . . The court – not the judge – makes the final decision."[32] No one circuit court judge can unilaterally resolve a case.[33] With these caveats, we turn to our methods.

II. THE ROAD TAKEN

During the October Term 2010, the Court produced seventy-five full opinions on the merits.[34] Our circuit split data collection began with the Supreme Court Database,[35] which identified twenty-five cases in which certiorari was granted on the basis of a federal court conflict or a conflict between state and federal courts. After reviewing these twenty-five decisions, five decisions were eliminated from our data set because the Court's decision did not explicitly reference, or referenced but did not resolve, a circuit split.[36] As an example of the former type, *Williamson v. Mazda*[37] was

[29] The reader interested in one of the roads not taken is directed to Frank B. Cross & Stephanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009), which evaluates circuit court judges, rather than circuit courts.

[30] Hansford, *supra* note 5, at 1150.

[31] *But see* Carol J. Williams, *U.S. Supreme Court Looks Over 9th Circuit's Shoulder*, L.A. TIMES, June 29, 2009, *available at* articles.latimes.com/2009/jun/29/local/me-9th-scotus29 (last visited Jan. 3, 2012) ("Samaha, a former law clerk for Justice John Paul Stevens, said it was common knowledge that decisions made by panels including certain liberal judges get closer scrutiny than others. 'Is it really a circuit being profiled, in a sense, or really a smaller set of judges who set off alarm bells?' Samaha said. 'I would suspect it's the latter.'").

[32] Hansford, *supra* note 5, at 1151.

[33] 28 U.S.C. § 46.

[34] *See* SCOTUSblog Stat Pack, *supra* note 1. *But see The Supreme Court, 2010 Term – The Statistics*, 125 HARV. L. REV. 362, 362 n.A (2011) (concluding that "[s]even per curiam decisions contained legal reasoning substantial enough to be considered full-opinion decisions during the October Term 2010").

[35] *The Supreme Court Database*, scdb.wustl.edu/ (last visited Jan. 3, 2012).

[36] These five decisions are *Davis v. United States*, 131 S. Ct. 2419 (2011), *Fox v. Vice*, 131 S. Ct. 2205 (2011), *Turner v. Rogers*, 131 S. Ct. 2507 (2011), *Wal-Mart*

eliminated because, although the petition for certiorari references a circuit split,[38] the Court's opinion does not. Consequently, to evaluate circuit court performance on this issue would necessitate going outside the four corners of the Court's opinion. Of course, this would give us more data to work with. But it is not obvious that this would give a more accurate gauge of circuit court performance. That is, by confining the data set to the text of the Court's opinion, we know we're being under-inclusive.[39] But we are doing so in a deliberate fashion, with a clearly articulated limiting principle. Going outside the four corners will still be under-inclusive; the only question is by what degree the under-inclusivity will be reduced.[40] And against this, the risk of over-inclusivity must be balanced. Substituting our judgments about whether the Court's opinion addresses or resolves a circuit split instead of relying on the express statements of the Court injects an extra dose of subjectivity into the analysis that we thought best to avoid. On balance, we concluded that confining our data to those circuit splits expressly resolved by the Court provides the most objective measure of circuit split resolution.[41] In other words, we risked being under-inclusive in order to

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v. Dukes, 131 S. Ct. 2541 (2011), and *Williamson v. Mazda*, 131 S. Ct. 1131 (2011).

[37] 131 S. Ct. 1131 (2011).

[38] Petition for Writ of Certiorari at 8, 17, Williamson v. Mazda, 131 S. Ct. 1131 (2011) (No. 08-1314).

[39] And, dear reader, perhaps a little lazy. But with a reasoned analytical method to rationalize our laziness.

[40] We are not so confident in our legal research abilities as to believe we will find every published and unpublished circuit court opinion on the twenty-five issues in our original data set.

[41] The two exceptions to our method were in *DePierre v. United States*, 131 S. Ct. 2225 (2011), in which the Court acknowledged the circuit court's acknowledgment of a circuit split without listing all of the circuits itself, *id.* at 2231-32; and *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011), in which the Court recognized the Third Circuit was incorrect and that there was a circuit split, but did not list the large number of cases on the other side of the issue. *Id.* at 2493. Our guess is this was a practical concern of not wanting to list the citations for a six-six split in *DePierre* or the nine-one split in *Guarnieri*. For these cases, we utilized the cert. petitions to obtain our numbers.

eliminate the risk of skewing the results because of interpretative bias.

As an example of the latter type of opinion excluded from our data set, *Wal-Mart v. Dukes*[42] was eliminated as the Court declined to resolve the circuit split before it. The split arose over whether class actions certified pursuant to Rule 23(b)(2)[43] may append a claim for money damages to the equitable claims. All the circuits addressing the issue have answered in the affirmative, permitting plaintiffs to piggyback monetary relief claims on the back of their equitable relief claims under some circumstances.[44] The difference of opinion arises over which circumstances permit piggybacking the piggybank claims. The Second Circuit applies a test that focuses on the plaintiffs' subjective intent in bringing the lawsuit.[45] The Fifth, Sixth, Seventh, and Eleventh Circuits apply a test focusing on whether the monetary relief is "incidental to requested injunctive or declaratory relief."[46] And, in *Dukes*, the Ninth Circuit applied a third test focusing on whether the monetary relief claims "predominate" over the equitable relief claims.[47] Confronted with this three-way circuit split, the Court declined to agree with any of the circuits. Instead, the Court expressly disagreed with the Ninth Circuit's "predominance" test, and ignored the Second Circuit's "subjective intent" test, declined to reach the "incidental" test, writing: "We need not decide in this case whether there are any forms of 'incidental' mon-

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[42] 131 S. Ct. 2541 (2011).

[43] This provision permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

[44] Dukes v. Wal-Mart, 603 F.3d 571, 615-16 (9th Cir. 2010) (en banc) (collecting cases), *rev'd sub nom*. Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011).

[45] *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).

[46] *See, e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 646-51 (6th Cir. 2006); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001); Lemon v. Int'l Union of Operating Eng'rs Local No. 139, 216 F.3d 577, 580-81 (7th Cir. 2000); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415-16 (5th Cir. 1998).

[47] *Dukes*, 603 F.3d at 616.

etary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced."[48] Thus, because the Court did not resolve the circuit split, we excluded the case from our data set.

Additionally, we excluded decisions evaluating the Court of Appeals for the Federal Circuit. It was not involved in any of the circuit splits, as its jurisdiction is statutorily distinct, and far more limited, than that of the other twelve federal courts of appeals.[49] Thus, our metric evaluates the performance of twelve circuits; namely, the First through Eleventh Circuits, as well as the D.C. Circuit.

To summarize our methods, the specific data set of twenty circuit split resolutions is based exclusively on those that the Court itself expressly identified and resolved during the October Term 2010.[50] Our general data set is drawn from the statistics compiled by SCOTUSblog for the same time period,[51] as well as the groundbreaking work that Hansford performed using the Court's decisions during the 2005-2008 terms.[52]

Lastly, we compiled data on how the Court voted. The cases the Court hears range from the straightforward, involving little more than "error correction,"[53] to the "truly novel,"[54] involving questions purely in "the open area – the area in which the judge is a legislator."[55] "A lower court decision that the Court reverses unanimously," Posner observes, "is more likely to be just plain incorrect, rather than merely the reflection of political difference."[56] Circuit splits, we anticipated, would tend towards the open areas – if it divided the circuits, we thought it likely it would divide the Court as

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[48] *Dukes*, 1312 S. Ct. at 2560.
[49] *See* 28 U.S.C. § 1291.
[50] *See infra* app. tbl. 3.
[51] *See* SCOTUSblog Stat Pack, *supra* note 1.
[52] Hansford, *supra* note 5.
[53] RICHARD POSNER, HOW JUDGES THINK 143 (Harvard 2010).
[54] Richard Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1277 (2005).
[55] Posner, *supra* note 5353, at 143.
[56] Richard Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 716 (2000), *quoted in* Hansford, *supra* note 5, at 1157 & n.63.

well. As discussed below, we tested this assumption, using as proxy how the Court voted. To our surprise, the questions that split the circuits did not prove particularly divisive to the Court. None, for example, resulted in five-to-four decisions.[57] Indeed, three-fourths of the circuit splits were resolved by either unanimous judgment or with only one dissenting vote.[58] Before further examining this unexpected finding in more detail, however, we present our general observations.

III. OUT OF THE WOODS

The twenty circuit split resolutions expressly involve the appellate review of 116 circuit court opinions. The size of the circuit splits range from the largest possible (*DePierre v. United States*,[59] an even split with six circuits on each side), to the smallest possible (*Sorrell v. IMS Health, Inc.*,[60] an even split with one circuit on each side). The average size of the circuit split is slightly fewer than six circuits. All circuits are involved in at least six of the splits (aside from, unsurprisingly, the D.C. Circuit, which has the smallest docket of any of the circuits[61]). The Fifth and Eighth Circuits weighed in on more splits than the rest of the circuits. Each was involved in fourteen, or a little over two-thirds, of the circuit splits resolved by the Court during the 2010 term.

The overall parallel affirmance rate was 64 percent, more than

[57] A comprehensive study of decisions in the twentieth century concluded that "5-4 decisions of the United States Supreme Court highlight the essentially political nature of the body." Robert E. Riggs, *When Every Vote Counts: five-to-four Decisions in the United States Supreme Court*, 1900-90, 21 HOFSTRA L. REV. 667, 709 (1993).

[58] *See infra* app. tbl. 3.

[59] 131 S. Ct. 2225 (2011).

[60] 131 S. Ct. 2653 (2011).

[61] Over the decade spanning 1999-2008, for example, the D.C. Circuit decided a little less than 16,000 of the more than 600,000 federal appeals nationwide, or 2.6 percent. The Ninth Circuit, by way of comparison, decided a little less than 115,000, or more than seven times as many as the D.C. Circuit. See Hofer, *supra* note 7, tbl. 1. In 2009, the trend continued – the D.C. Circuit's percentage ticked downward to 2.2 percent. *See Federal Courts Management Statistics 2009: Courts of Appeals*, www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2009.pl (last visited Jan. 3, 2012).

double the primary appeal affirmance rate over the same period. Moreover, this doubling was not confined to 2010. For the 2005-2008 terms, the overall affirmance rate in circuit split resolutions was likewise more than double that of cases on primary review.[62]

The Tenth Circuit outperformed all other circuits with a 100 percent affirmance rate, while the First Circuit took second with an 86 percent affirmance rate. The Fifth Circuit followed, placing third with a 79 percent affirmance rate. Again, these results are consistent with prior observations. For the 2005-2008 terms, the Fifth Circuit had the highest affirmance rate, while the Tenth Circuit had the second highest affirmance rate.[63] In light of the combined size of the two studies (incorporating more than five hundred circuit court opinions),[64] we suggest that this consistency is unlikely to be mere coincidence.

The Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits likewise all posted affirmance rates at or above 50 percent. Indeed, only the Eleventh and D.C. Circuits fell below 50 percent. The rankings are thus:

October Term 2010 Parallel Review Affirmance Rates		
Rank	Circuit	Rate
1	Tenth	100%
2	First	86%
3	Fifth	79%
4	Third	78%
5	Fourth	67%
6	Seventh	62%
7	Second	60%
7	Ninth	60%
9	Sixth	50%
9	Eighth	50%
11	Eleventh	45%
12	D.C.	33%

[62] Hansford, *supra* note 5, at 1165 tbl. 1 (observing the overall affirmance rate in circuit split resolutions was 54 percent, while that of direct appeals was 26.9 percent).

[63] Hansford, *supra* note 5, at 1165 tbl. 1.

[64] Our study includes 116 circuit court opinions; Hansford's study adds an additional 385. *Infra* app. tbls. 1, 3; Hansford, *supra* note 5, at 1165 tbl. 1.

We conclude, consistent with the observations from the 2005-2008 terms, that these rankings "do not seem explicable on 'political' grounds."[65] The most "liberal" circuits: the Second, Third, and Ninth,[66] are in the upper-middle of the rankings, placing fourth, seventh, and seventh,[67] and collectively average a 67 percent affirmance rate (slightly above the overall average of 64 percent). The most "conservative" circuits: the Fourth, Fifth, and Sixth,[68] placed third, fifth, and ninth, and collectively averaging a 67 percent affirmance rate.

Reinforcing this conclusion are the unexpectedly outsized majorities by which the Court generally resolved the splits. As noted above, we anticipated questions that divided the circuits would tend to divide the Court as well. We were wrong. During the October Term 2010, the Court rendered a unanimous judgment in 48 percent of its seventy-five merits opinions.[69] In its twenty opinions addressing circuit splits, the Court rendered a unanimous judgment at almost precisely the same rate, 50 percent of the time.[70] Additionally, the Court decided an additional 20 percent of the cases addressing circuit splits over a lone dissent; thus, the Court resolved 70 percent of the circuit splits by overwhelming majorities. In contrast, while the Court split five-to-four in 20 percent of its seventy-five merits opinions,[71] not a single opinion addressing a circuit split was explicitly decided five-to-four.

This is not to suggest that questions that divide the circuits do

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[65] See Hansford, *supra* note 5, at 1164. We recognize that the classifications by various court observers may have varied between when Hansford collected sources and now. This did not concern us, given how little impact any such classifications would have on explaining these rankings.

[66] *See* Hansford, *supra* note 5, at 1164 (collecting sources).

[67] Yes, this is correct, not a typographical error. The Second and Ninth tied for seventh. *Infra* app. tbl. 1.

[68] *See* Hansford, *supra* note 5, at 1164 (collecting sources).

[69] SCOTUSblog Stat Pack, *supra* note 1. A "unanimous" judgment, for our purposes, is either nine-to-zero or eight-to-zero.

[70] Somewhat mitigating this conclusion, 60 percent of these cases included a concurrence.

[71] SCOTUSblog Stat Pack, *supra* note 1.

not occasionally sharply split the Court as well. *Wal-Mart v. Dukes*, although excluded from our data set, initially came before the Court as a circuit split, and resulted in a five-four decision. The most watched case of this Term – the challenge to the validity of the Patient Protection and Affordable Care Act[72] – comes before the Court as a circuit split.[73] Many expect a sharply divided opinion in this case. Our data, however, suggests that the popular wisdom may again be misguided. Rather, in the event that the Court expressly frames the issue as resolving a circuit split,[74] the majority circuit court approach is likely to prevail (as it did 90 percent of the time in 2010), and the decision is unlikely to result in a five-to-four decision.

Turning to how the specific circuits fared when the Court decided a case unanimously, unsurprisingly the circuits with the highest affirmance rates were more likely to be affirmed unanimously. The Tenth Circuit, of course, maintains its place at the top of the ranks, but is joined by the First Circuit with a 100 percent affirmance rate in cases decided unanimously. The Third and Fifth Circuit follow, with their affirmance rates rising to 83 percent. The Fourth Circuit is next; its affirmance rate holds steady at 75 percent. The Second, Seventh, Eleventh, and D.C. Circuits post affirmance rates at or above 50 percent. Bringing up the rear are the Ninth, Eighth, and Sixth Circuits, with respective affirmance rates of 40, 33, and zero percent.[75] The rankings are thus:

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[72] Pub. L. No. 111-148, 124 Stat 119, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029.

[73] *Compare* Liberty Univ. v Geithner, --- F.3d ----, 2011 WL 396291, 2011 US App. LEXIS 18618 (4th Cir. 2011) (upholding Act's constitutionality), Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) (same), *and* Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (same), *with* Florida v U.S. Dep't of Health and Human Servs., 648 F. 3d 1235 (11th Cir 2011) (holding Act's individual mandate unconstitutional).

[74] It is possible, of course, that the opinion of the Court will not directly address the split, an approach taken in the divisive decision in *Dukes*.

[75] Yes, the Sixth Circuit has a zero percent affirmance rate in the unanimous judgments of the Court addressing circuit splits. Indeed, all of the circuit split resolutions that the Sixth Circuit lost, it lost by the unanimous judgment of the

OT 2010 Parallel Review Affirmance Rates: Unanimous Decisions		
Rank	Circuit	Rate
1	First	100%
1	Tenth	100%
3	Third	83%
3	Fifth	83%
5	Fourth	75%
6	Seventh	67%
7	Eleventh	60%
8	Second	50%
8	D.C.	50%
10	Ninth	40%
11	Eighth	33%
12	Sixth	0%

In sum, the questions that divided the circuits were those which, paradoxically, tended to unite the Court at a greater than normal rate. The robustness of this finding, as well as the causes of this evident paradox, requires further research.[76]

CONCLUSION

What conclusions should be drawn from this data? Three, we suggest. First, the ubiquitous statistics regarding primary review rates do not accurately reflect the Court's assessment of circuit court performance. Our metric of appellate review, in contrast, demonstrates that most courts of appeals are getting the hard questions right more often than not. The majority approach to an issue is affirmed 90 percent of the time.[77] Three circuits – the First,

Court.

[76] As a working hypothesis, we suspect that this consensus may have to do with subject matter of circuit splits. Of the ten unanimous opinions, for example, five involved questions of statutory interpretation. Obtaining more data on the subject matter of consensus resolutions, we anticipate, will provide the opportunity for quantitative-based observations on the impact of various interpretive doctrines. For example, if the data consistently shows near unanimity when the Court resolves splits on statutory interpretation, this could vindicate the significant impact of the textualists on the Court.

[77] *See supra* note 17.

Tenth, and Fifth – have particularly impressive batting averages on parallel review. Even the Ninth Circuit bats well over .500.

Second, our findings are reinforced by prior observations. During 2005-2008, the affirmance rate on parallel review likewise exceeded 50 percent.[78] Like the most recent term, the affirmance rate on parallel review from 2005-2008 was more than double that on primary review.[79] The Fifth and the Tenth Circuits, moreover, were affirmed substantially more frequently than their peers over both periods.[80] In light of the size of our combined data sets, as discussed above,[81] we are confident that these results are not statistically anomalous.

Finally, and unexpectedly, the questions that divide the circuits are not ones that particularly divide the Court. While the Court split five-four in 20 percent of its seventy-five merits opinions in 2010, it resolved no circuit split by a five-to-four decision.[82] And it affirmed a startling 70 percent of the circuit splits either unanimously or eight-one (11 percent higher than generally observed in the 2010 term).[83]

Of course, much work remains to be done to further refine this metric and to examine why the questions that split the circuits do not tend to divide the Court. To be continued . . .

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[78] Hansford, *supra* note 5, at 1165 tbl. 1.
[79] *See* Hansford, *supra* note 5, at 1165 tbl. 1.
[80] Hansford, *supra* note 5, at 1165 tbl. 1.
[81] *See supra* note 64.
[82] *See* SCOTUSblog Stat Pack, *supra* note 1; *see also* app. tbls. 2-3.
[83] *Id*.

APPENDIX

Table 1:
Wins, Losses, At Bats, and Winning Percentage
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
Tenth	6	0	6	100.00%
First	6	1	7	85.71%
Fifth	11	3	14	78.57%
Third	7	2	9	77.78%
Fourth	6	3	9	66.67%
Seventh	8	5	13	61.54%
Second	6	4	10	60.00%
Ninth	6	4	10	60.00%
Sixth	5	5	10	50.00%
Eighth	7	7	14	50.00%
Eleventh	5	6	11	45.45%
D.C.	1	2	3	33.33%

Table 2:
Wins, Losses, At Bats, and Winning Percentage
in Unanimous Decisions
(sorted by winning percentage)

Circuit	Wins	Losses	AB	PCT
First	4	0	4	100.00%
Tenth	3	0	3	100.00%
Third	5	1	6	83.33%
Fifth	5	1	6	83.33%
Fourth	3	1	4	75.00%
Seventh	4	2	6	66.67%
Eleventh	3	2	5	60.00%
Second	2	2	4	50.00%
D.C.	1	1	2	50.00%
Ninth	2	3	5	40.00%
Eighth	2	4	6	33.33%
Sixth	0	5	5	0.00%

Table 3:
The Cases and Votes

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Abbott v. United States	131 S. Ct. 18	8 to 2	1, 3, 4, 5, 7, 8, 10, 11	2, 6	8-0 (Kagan recused)
Ransom v. FIA Card Services, N.A.	131 S. Ct. 716	1 to 3	9	5, 7, 8	8-1 (Scalia dissents)
Chase Bank USA, NA. v. McCoy	131 S. Ct. 871	2 to 1	1, 7	9	9-0 (unanimous)
Ortiz v. Jordan	131 S. Ct. 884	2 to 2	5, 9	6, 8	9-0 (Thomas concurs joined by Scalia and Kennedy)
Pepper v. United States	131 S.Ct. 1229	2 to 2	3, 4	8, 11	7-1 (Breyer and Alito write seperately to concur, Thomas dissents, Kagan recused)
Wall v. Kholi	131 S.Ct. 1278	2 to 3	1, 10	3, 4, 11	9-0 (Scalia concurs)
Milner v. Department of the Navy	131 S.Ct. 1259	3 to 3	5, 6, 8	2, 7, DC	8-1 (Alito concurs, Breyer dissents)
Skinner v. Switzer	131 S.Ct. 1289	3 to 2	2, 7, 11	4, 5	6-3 (Thomas dissents joined by Alito and Kennedy)
Kasten v. Saint-Gobain Performance Plastics Corp.	131 S.Ct. 1325	6 to 2	5, 6, 8, 9, 10, 11	2, 7	6-2 (Scalia dissents joined by Thomas, Kagan recused)
Sossamon v. Texas	131 S.Ct. 1651	6 to 1	4, 5, 6, 7, 8, 9	11	6-2 (Sotomayor dissents joined by Breyer, Kagan recused)
Fowler v. United States	131 S.Ct. 2045	4 to 2	2, 3, 5, 8	4, 11	7-2 (Scalia concurs, Alito dissents joined by Ginsburg)
McNeill v. United States	131 S.Ct. 2218	2 to 1	4, 5	2	9-0 (unanimous)
DePierre v. United States	131 S.Ct. 2225	6 to 6	1, 2, 3, 4, 5, 10	6, 7, 8, 9, 11, DC	9-0 (Scalia concurs)
Talk America v. AT&T Michigan	131 S.Ct. 2254	3 to 1	7, 8, 9	6	8-0 (Kagan recused, Scalia concurs)
Sykes v. United States	131 S.Ct. 2267	5 to 3	1, 5, 6, 7, 10	8, 9, 11	6-3 (Thomas concurs, Scalia dissents, Kagan Dissents (with Ginsburg))
Smith v. Bayer Corp.	131 S.Ct. 2368	3 to 2	5, 3, 11	7, 8	9-0 (Thomas only joins in part)

Case	Cite	Split	Winning Circuits	Losing Circuits	Court vote
Tapia v. United States	131 S.Ct. 2382	3 to 3	3, 11, DC	6, 8, 9	9-0 (Sotoamyor concurs with Alito)
Borough of Duryea v. Guarnieri	131 S.Ct. 2488	10 to 1	1, 2, 4, 5, 6, 7, 8, 9, 10, 11	3	8-1 (Thomas concurring, Scalia c/d)
Sorrell v. IMS Health Inc.	131 S.Ct. 2653	1 to 1	2	1	6-3 (Breyer dissenting with Ginsburg and Kagan)

# # #

24 ROUNDS

JUSTICES SCALIA'S AND STEVENS'S BATTLE FOR AMERICA'S HEARTS AND MINDS

Craig D. Rust[†]

It is no secret that Justices Antonin Scalia and John Paul Stevens did not see eye to eye on many of the legal issues that came before the United States Supreme Court in the twenty-four terms they served on the bench together.[1] In their final term together, they disagreed how cases should be decided 36 percent of the time, the second highest disagreement rate between any two justices.[2] Indeed, the back and forth between the two justices became caustic on occasion, as some commentators have observed.[3] This rivalry represented more than a battle of wits between two rival intellectuals, however; Justices Scalia and Stevens were considered the leaders of the Court's conservative and liberal wings, respectively, dur-

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[1] As an example, a study covering the 1986-1998 Supreme Court terms found that Justice Scalia joined Justice Stevens's "special" opinions (opinions other than a majority opinion for a court, such as a dissent) in only 1.8% of his opportunities to do so, while Stevens joined only 2% of Scalia's special opinions. JEFFERY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 400 (2002).

[2] The only two justices who disagreed with each other more often were Justice Stevens and Justice Clarence Thomas, who disagreed in 40% percent of cases decided. SCOTUSBLOG Final Stats OT09 (July 7, 2010), at 8, www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-070710.pdf.

[3] Brooks Holland, *Was Justice Scalia Disrespectful to Justice Stevens on Stevens' Last Day?*, PRAWFSBLAWG (June 28, 2010, 6:09 PM), prawfsblawg.blogs.com.

ing a large portion of their tenures. Now that Justice Stevens has retired, it seems like a fair time to ask the question: can either of them claim victory in their decades-long battle?

In the search for an answer, this Essay begins by briefly examining both the influence each exerted on their peers on the Court, and then surveys their influence on the federal judiciary as a whole. Such a review leads to only one conclusion: neither justice was truly victorious against the other. Both of the justices have very similar opinion authorship statistics, and the citation data suggests that while Stevens has exerted more aggregate influence over the federal judiciary during his time on the bench, Scalia has a higher ratio of citations per opinion written. In fact, not only is there no clear victor now, there may never be a time when the statistics can be tallied up and a winner declared; the opinions of both justices will likely continue to shape the legal discourse in this country for years to come.

I.
THE RULE OF FIVE

As Justice William J. Brennan often observed, the ability to get five votes for a particular opinion, the so-called "Rule of Five," is the most important rule on the Supreme Court.[4] Using objective, nonpartisan statistics, including research done by the editors of the *Supreme Court Sluggers* project,[5] one can evaluate the performance of these two justices by looking at how many times they persuaded four of their colleagues to join their respective opinions.

Scalia joined Stevens on the Court just before the start of the 1986 term,[6] and the two served together until Stevens's retirement

[4] David D. Savage, *Supreme Court Legal Titan Brennan Dies*, L.A. TIMES, July 25, 1997, articles.latimes.com/1997/jul/25/news/mn-16207.

[5] *Supreme Court Sluggers Home*, The Green Bag, www.greenbag.org/sluggers/sluggers_home.html (last visited Dec. 26, 2011). All of the data used in this Essay can be found at the Supreme Court Sluggers website unless otherwise noted. Special thanks to Benjamin A. Gianforti for his assistance in compiling the data for Justice Scalia.

[6] The Supreme Court divides each year into terms, with each term beginning on the first Monday in October and running until the first Monday in the following

after the 2009 term. During those twenty-four terms, Stevens wrote 215 majority opinions,[7] while Scalia wrote 214. This similarity is likely the result of the Court's internal opinion-assigning procedures, which call for the chief justice, if he is in the majority, or the senior associate justice, if he is not, to assign the responsibility for writing the majority opinion to a specific justice.[8] To maintain harmony, the opinion-assigner generally attempts to equally distribute majority opinions among the nine justices.[9] Thus, this similarity does not necessarily tell us much about the justices' respective abilities to persuade. In any event, neither justice distinguished himself from the other during this period based on the number of majority opinions authored.

The number of unanimous majority opinions written by each is also similar over this twenty-four year period. "Unanimous opinions," as used here, are defined as those which provoked no dissenting or concurring opinions by other members of the Court, and thus, may provide a better indicator of persuasiveness than simple majority opinions written. After all, the opinion-assigner, much to his or her frustration, cannot force all the members of the Court to agree to join a single opinion. Stevens thus deserves a point for his relative ability to build consensus as he holds something of an edge here, with sixty-one unanimous opinions, to only fifty-one for Justice Scalia. But this edge, of course, disappears in the hard cases – cases in which the nation's top jurists disagree.

Of course, typically the cases decided 9-0 do not make headlines. It is the hard, or polarizing, cases where the justices' persuasive skills are truly put to the test. The particularly hard cases sometimes result in what one might call a "majority decision in part," in

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October. *See* A Brief Overview of the Supreme Court, www.supremecourt.gov/about/briefoverview.aspx (last visited Dec. 26, 2011).

[7] Majority opinions here are defined as opinions which received a total of five or more votes, as distinguished from plurality opinions receiving less than five votes but still representing the opinion of the Court in a given case.

[8] Paul J. Walbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1735 (2006).

[9] *Id.*

which a justice received five votes for part of the opinion, but less than five votes for others. In these cases, unlike classic pluralities, a justice may still write an opinion representing the Court's opinion and judgment on one issue, but not all the issues. An example of this is the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which Justice Stevens wrote for a majority of the justices in striking down the mandatory federal Sentencing Guidelines in the first part of the Court's opinion, but was reduced to writing a dissent regarding the appropriate remedy for the constitutional violation when he lost the critical vote of Justice Ruth Bader Ginsburg.[10] During the 1986-2009 period, Stevens authored twelve majority decisions in part. Scalia authored fourteen.

Distinct from the majority decision in part opinion is the plurality opinion, in which five or more justices agree as to the appropriate judgment or outcome of the case, yet those five or more justices do not agree to join even a single part of one majority opinion. During the 1986-2009 period, Stevens wrote eleven plurality decisions, while Scalia authored ten. In terms of measuring the influence of a justice, majority in part opinions and plurality opinions represent something of a mixed bag. On one hand, these opinions may be no less important or historic than pure majority opinions, as evidenced by Justice Stevens's landmark *Booker* opinion. On the other hand, they represent an inability of the opinion-authoring justice to persuade a majority of the Court to join the full extent of his or her views on the subject. When the justices disagree in this manner, lower court judges are forced to fill in the gaps in the reasoning of these opinions in the absence of clear guidance from the nation's highest court.

"Special opinions," such as concurrences or dissents, also represent a failure to persuade, despite the fact that these opinions some-

[10] One could certainly consider the majority and dissenting portions of Stevens's opinion in this case to be two different opinions altogether; however, since together they represent his singular view on how the case should have been decided, it (and others like it) was treated as one opinion in compiling the statistics upon which this Essay relies.

times forecast important future shifts in the Court's jurisprudence.[11] By definition, a justice writing one of these types of opinions could not garner more than three other votes. This is not to suggest that simply comparing the sheer volume of special opinions written by any two given justices is necessarily always indicative of their persuasive ability, or lack thereof; sometimes otherwise highly persuasive judges are simply more willing to publicly take unpopular positions, for a variety of reasons, that they know have no chance of gaining traction with most of the Court.[12] That being said, few would make the claim that either Justice Stevens or Justice Scalia are meek in that respect. And certainly not all special opinions are created equal; for example, it is hard to fault a justice for writing a dissent receiving four votes in a case that splits the courts along clear ideological lines, as it is unrealistic to expect any jurist to convince his or her peers to abandon long and passionately held positions on these types of issues. Having clearly set forth these large and important caveats, not *every* case represents a life and death struggle between conservative and liberal justices. Over the course of twenty-four terms, the aggregate total of these special opinions may suggest something about the justice's persuasive abilities, as presumably that justice generally would not have felt the need to write separately if he or she agreed with the majority's view. While Justices Stevens and Scalia both were on the Court together, Stevens wrote 224 concurring opinions and 440 dissents, a total of 664 separate opinions. Scalia wrote 274 concurring opinions, and 225 dissents, a total of 499 separate opinions.

The sheer difference in the quantity of special opinions is striking. Stevens authored a staggering 165 more special opinions than Scalia, nearly seven per term. However, it is difficult to draw definitive conclusions from this disparity. Intuitively, it seems unlikely

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[11] *See, e.g.*, Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) (featuring a famous dissent by Justice Oliver Wendell Holmes, Jr. advocating a position that was later adopted by the court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

[12] Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010).

that all of Stevens's additional separate writing engendered a great deal of goodwill with his colleagues; studies have shown that Stevens received the least number of votes for his dissents and concurrences than any other justice during the 1986-1998 period.[13] However, it does not appear as though these dissents and concurrences measurably affected the rate at which Stevens was able to compose majority decisions over time.[14] Further, neither concurrences nor dissents require the support of any of the justice's colleagues, and thus, these statistics are a poor measure of the justice's ability to positively persuade his fellow justices, though it may, in the aggregate, suggest the absence of such persuasive ability. The disparity between the number of dissents and concurrences written by each judge might also be explained by the fact that they were both inclined to explain their reasoning and thought processes, regardless of who agreed with them in any given case, and that the Court's arguably more conservative lineup in these years simply turned potential Scalia special opinions from dissents into concurrences through no particular fault (or credit) of his own.[15]

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[13] *See* SEGAL & SPAETH, *supra* note 1, at 396-97; *see also* Ginsburg, *supra* note 12, at 7 (stressing that frequent and "random" dissents weaken the institutional impact of the Supreme Court).

[14] *See* Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 2 J.L. (1 J. LEGAL METRICS) 135 (2012) (originally published by the ELON J. OF LEADERSHIP AND THE LAW, *available at* www.elon.edu/e-web/law/leadership_journal/studiesinleadership.xhtml (last visited Dec. 26, 2011) (noting that Stevens's majority opinion authorship rate hovered around 8% throughout his tenure on the Court). This is not to suggest that Stevens's dissent rates had no impact on his ability to forge consensus, only to note that the rate at which Stevens wrote majority opinions did not appreciably change over time. Though outside the scope of this Essay, it is worth wondering if Stevens would have had a greater impact in terms of writing majority opinions had he curbed his practice of writing separately. However, because Stevens dissented frequently during his entire judicial career, we have no way to isolate how this particular variable affected his judicial performance.

[15] However, this explanation is not entirely persuasive either, if one looks at each justice's opinion writing trends before and after major changes in the composition of the Court. For example, in the years preceding the retirement of the liberal Justice Brennan from 1986-1990, Scalia averaged nineteen concurrences and roughly eleven dissents per term. From 1991-2009, while the Court ostensibly turned more conservative, Scalia's concurrences dropped sharply as he only aver-

In sum, very little in their opinion authorship rates distinguishes Scalia from Stevens. Both persuaded a majority of the Court to join their opinions in roughly the same number of cases, although Stevens was able to achieve unanimity at a slightly higher rate. Scalia wrote separately in dissent far less than Stevens did, though the practical impact of this on Scalia's ability to persuade his colleagues is unclear. Regardless, neither justice can point to their opinion authorship statistics and claim victory in their intellectual bout at One First Street. However, this was – and continues to be – a fight waged on multiple fronts.

II.
AMERICAN IDOL,
FEDERAL JUDICIARY EDITION

Although national media coverage of judicial opinions tends to focus on Supreme Court decisions, the bulk of the federal judiciary's work is handled in, as the Framers put it, "such inferior Courts as the Congress may from time to time ordain and establish."[16] Congress has "ordained and established," by conservative counting, well over eight hundred federal district court and appellate court judgeships.[17] That figure excludes federal magistrate judges, bankruptcy judges, and judges that have taken senior status, but who nonetheless keep the gears of the nation's courts from grinding to a halt.[18] While occasionally directly bound by a Supreme Court decision on point, these judges often have substantial discretion in applying general principles to the specific circumstances of the cases before them. When exercising their discretion, federal judges often

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aged about nine concurrences and nine dissents per term. Stevens averaged thirteen concurrences and twenty-four dissents between 1986-1990, and about eight concurrences and just shy of seventeen dissents between 1991-2009. Thus, while the overall opinion authorship rates of both dropped substantially, proportionally, the only change seen as the court tilted to the right was that Scalia concurred *less*.

[16] U.S. CONST. art. III, § 1.

[17] 28 U.S.C. §§ 44, 133 (2000).

[18] *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2010 YEAR END REPORT ON THE FEDERAL JUDICIARY 8.

look to different justice's individual opinions to guide them, both because they agree with the justice's ideology and because the lower court judges may believe that the justice's views indicate how the Court would rule if the specific issue being decided was brought before the Court. Thus, Supreme Court justices may have a great deal of influence even in these "open spaces" of the law.

In an attempt to measure the importance of opinions other than just majority opinions, the editors of the *Supreme Court Sluggers* project count references to individual Supreme Court justices by name in federal court opinions.[19] As the generally accepted citations rules do not require judges to refer to a particular justice by name when they cite majority opinions issued by the Court,[20] this method ensures that the our statistic reflects only instances where judges refer to the views of an individual justice by choice, and not out of obligation. Thus, the citation statistic attempts to capture when Supreme Court justices are influencing the legal discourse through the issuance of non-majority opinions, law review articles, and other citable, published comments when lower court judges delve into these gray areas.

Scalia and Stevens are undoubtedly among the most often cited justices of their era. Through the 2009 term, Stevens had been cited individually by name in 10,858 federal court opinions during his career, counting his time on the Seventh Circuit. Through 2009, Scalia had been cited in a similar manner "only" 8,657 times, including his D.C. Circuit tenure. However, this is not exactly an apples-to-apples comparison, as Stevens took a seat on the court of appeals in 1970, while Scalia did not join the judiciary until 1982. If we return to the 1986-2009 time frame used throughout this Essay, Scalia jumps ahead. During those twenty-four years, Stevens was cited in 8,437 federal court opinions, about 352 times per term, whereas Scalia was cited in 8,615 opinions, or an average of 359 times per term.

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[19] Ross E. Davies, Craig D. Rust, & Adam Aft, *Supreme Court Sluggers: Justice John Paul Stevens is No Stephen J. Field*, 13 Green Bag 2d 465 (2011).

[20] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1, at 100 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

If anything, this understates Scalia's influence, as it takes time for Supreme Court justices to build up a critical mass of citable opinions and accumulated thoughts on the law. For example, while both justices have averaged hundreds of citations per term over their careers, both had fewer than a hundred in their first term on the Court (seventy-six for Stevens in 1975 and eighty-seven for Scalia in 1986). If we remove Scalia's "rookie" year from the sample size and look at the 1987-2009 terms, Scalia's lead grows – up to 8,528 citations (371 per term) to 8,131 (354 per term).

Even this may not be an apples-to-apples comparison, however. Stevens, of course, was a more prolific author than Scalia in their twenty-four terms together. And Stevens's penchant for writing so frequently impacts his statistics. During the 1986-2009 period, Stevens was cited 8.08 times in federal judicial opinions per opinion that he had written. Scalia was cited 11.61 times per opinion during that same period.

In sum, although Stevens has generated substantially more citations by name than Scalia, Scalia has generated them at a higher rate per opinion and per term on the Supreme Court. Of course, citations can be accumulated long after a justice retires from the Court. Landmark opinions, like *Booker* and *Crawford v. Washington*, 541 U.S. 36 (2004) (Scalia, J.), will continue to be cited repeatedly. Thus, it remains unclear if Scalia will ever equal Stevens's impressive totals, even though at age seventy-five, Scalia likely has a number of years left on the Court.

CONCLUSION

Statistically, Justices Scalia and Stevens are far more alike than they are different. They are both extremely prolific writers, perhaps amongst the most prolific in the Supreme Court's history.[21] While they both served on the Court, they were able to build consensus about the same number of times through their majority opinions. Stevens dissented (significantly) more, while Scalia seemed to prefer concurring opinions. In terms of stretching their influence

[21] See Davies, Rust & Aft, *supra* note 19, at 480.

beyond the Supreme Court's steps and into federal courthouses around the country, Stevens has clearly had a greater aggregate impact, while Scalia has had a greater impact per term on the Court and per opinion written. This suggests that while Scalia has written less over fewer years, his opinions tend to pack a stronger statistical punch than Stevens's did.

Ultimately, even though Stevens has now retired from the bench, it is still too early to call a winner in this bout of intellectual heavyweights. Both are leading figures in modern American jurisprudence. While Stevens holds the edge in a number of career totals, Scalia still appears to have several years left to catch him. And, of course, it is possible either justice has, in some little-regarded dissent or concurrence, sown the seeds of a particularly powerful idea or philosophy that will come to dominate legal thinking in the future. Either way, those who have observed the Supreme Court over the last three decades have certainly witnessed an entertaining bout between two legal heavyweights.

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READING THE TEA LEAVES

AN ANALYSIS OF TEA PARTY BEHAVIOR INSIDE AND OUTSIDE OF THE HOUSE

Ian Gallagher & Brian Rock[†]

Following the Democratic takeover of the U.S. House of Representatives in 2006 and the election of Barack Obama as President in 2008, Republicans were faced with their lowest representation in the federal government since the Contract with America in 1994. Two years later, however, Republicans retook the majority in the House. The explanation behind why that happened is controversial, but it is indisputable that much of the energy behind the movement came from a new conservative group known as the Tea Party. The group began to take shape in early 2009 as a grassroots movement reacting to the bank bailouts and the stimulus bill, gained momentum during the health care reform debate in Congress, and became a household word by August 2009. Members of Congress took notice, and many were quick to praise and ally themselves with the movement.

The following year, Congresswoman Michele Bachmann (R-MN) formed an official "Tea Party Caucus" in the House. When the Republicans retook the House, it was largely attributed to Tea Party enthusiasm. With Republicans in control of the House, media attention has increasingly focused on the Tea Party. Who is this group? What will they do? Will they act as a bloc? Will they control the Republican Party? Will other Republicans marginalize them? With the first session of the 112th Congress having completed its first

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[†] Ian Gallagher expects to graduate from the George Mason University School of Law in 2014. Brian Rock graduated from the University of Virginia School of Law in 2011. He is also an Editor of the *Journal of Legal Metrics*. Brian and Ian would like to extend special thanks to Michael Myers, who provided his technical expertise in compiling these statistics.

year of business, we can begin to quantitatively answer those questions. We do so by analyzing the voting records and media appearances of all the members of the House of Representatives for the 2011 Congressional session.[1] Part I describes our methodology. Part II analyzes voting behavior to define factions within the House (especially the Tea Party) based on how often groups of legislators vote with or against each other. In Part III, we take a closer look at the demographics of these groups. Finally, in Part IV we compare how those factions perform overall as legislators in terms of getting bills passed, appearing in the media, and voting in the face of party or congressional opposition.

I.
DATA AND METHODOLOGY: DEFINING VOTING AGREEMENT

As of early September 2011, when the data for this Article was collected, the House of Representatives of the 112th Congress had recorded 691 roll call votes. Of those 691, four were quorum calls, and one was cancelled by unanimous consent. The remaining 686 were a mix of votes on various bills and resolutions, amendment adoptions, and procedural motions. On each roll call vote, a congressperson can cast a vote of *Yea*, *Nay*, or *Present*; otherwise he is counted as *Not Voting*.[2]

Using this data, we wanted to determine how often members of Congress vote with one another.[3] We decided to define our data set as all roll call votes – including motions, resolutions, and votes on amendments and procedure – except for votes of *Present* on quorum

[1] Although we compiled statistics on the members of the Senate as well, the concentration of the Tea Party in the House and the length of this Article led us to focus entirely on the House.

[2] *See* clerk.house.gov/evs/2011/index.asp.

[3] All of the data we present is in the form of raw data or descriptive statistics. While we offer a number of percentages and comparisons below, these are all descriptive in nature and not the results of regression analyses. Our purpose was to observe voting trends, compare them, and explain them, which is all best served by descriptive statistics.

calls. Although including all votes on amendments, procedure, and other possibly insignificant pieces of legislation may overemphasize the degree of agreement or disagreement, many amendments and resolutions *are* critically important and speak directly to a congressperson's political beliefs. To then count some and not others would be to pass judgment on what votes are or are not representative of ideology, which may skew the results because of selection bias. Therefore, our starting data set was all *Yea*, *Nay*, *Present*, or *Not Voting* votes for all members of Congress for all 686 roll call votes.

For illustration, our raw data looked something like this:

Congressman	Vote 1	Vote 2	Vote 3	. . . Vote 686
Ackerman	Nay	Nay	Yea	Nay
Adams	Yea	Yea	Nay	Present
Aderholt	Yea	Not Voting	Nay	Yea
. . . Young	Yea	Yea	Nay	Yea

Then we began to compare how Representatives vote with one another. On any roll call vote, two congressmen can have the following vote combination:

		Congressman 2			
		Y	N	P	NV
Congressman 1	Y	Y/Y	Y/N	Y/P	Y/NV
	N	N/Y	N/N	N/P	N/NV
	P	P/Y	P/N	P/P	P/NV
	NV	NV/Y	NV/N	NV/P	NV/NV

Where, for example, Y/N means that Congressman 1 voted *Yea* on the bill and Congressman 2 voted *Nay*. By coding each vote this way (for all 686 votes), we can get a picture of how any two members of Congress have voted with or against each other so far this year. As an example, below is the voting record for Representatives Michele Bachmann and Nancy Pelosi:

		Pelosi			
		Y	N	P	NV
Bachmann	Y	64	248	1	20
	N	171	58	0	23
	P	0	1	0	0
	NV	36	51	0	13

This data shows that Michele Bachmann voted *Yea* with Nancy Pelosi sixty-four times, voted *Nay* with her fifty-eight times, and voted against her (i.e., voted *Yea* when Pelosi voted *Nay* or vice versa) a total of 419 times. We did the same tally for every possible pairing of Representatives.

Next, we found how often congressmen voted together on average. Since no reliable information can be gleaned from a *Present* or *Not Voting* value, we decided to only count those votes for which both representatives cast either a *Yea* or *Nay* vote. Using that number as the denominator, we wanted to find out what percentage of the time both representatives voted the same way (both voting *Yea* or both *Nay*) on a piece of legislation. So, in the Bachmann/Pelosi example, we ignore all 145 times that either Bachmann or Pelosi (or both) voted *Present* or did not vote, leaving us with 541 Yea/Nay votes. Bachmann and Pelosi both voted the same way a total of 122 times, yielding an overall percentage of 22.6 percent voting agreement.

We then made the same calculation for every member of Congress versus every other member of Congress. This resulted in a 434-row by 434-column table of data,[4] with each row and column representing a member of Congress, and the intersection of any row with any column showing those members' average voting agreement. A condensed form of the resulting table[5] looks like this:

Congressman / Congressman	Ackerman	Adams	Aderholt	. . . Young
Ackerman	100%	23%	29%	23%
Adams	23%	100%	86%	91%
Aderholt	29%	86%	100%	88%
. . . Young	23%	91%	88%	100%

Notice that the main diagonal itself contains only 100 percent values (since every member of Congress, by definition, votes with himself

[4] We deleted former Congressman Lee (of Craigslist.org fame) from NY due to his low number of votes as a result of his February 2011 resignation. *E.g.*, www.nytimes.com/2011/02/10/us/politics/10lee.html.

[5] The full table, along with other data sets too large to fit comfortably in this publication, can be downloaded at www.fantasylaw.org.

100 percent of the time) and that the table is symmetrical around the main diagonal. The lowest voting agreement is around 11 percent,[6] likely due to non-partisan procedural votes, which are typically passed with unanimity, and the occasional bill like S. 188, "To designate the United States courthouse under construction at 98 West First Street, Yuma, Arizona, as the 'John M. Roll United States Courthouse.'"

Using this table of percentages, we could begin to see how groups of congressmen voted with or against others in the House.

II.
THE TEA PARTY:
WHAT'S IN A NAME?

The focus of this Article is the Tea Party: how they vote, how they legislate, and how they perform in the public eye. The first and most important question about the Tea Party is: Do they exist?[7] Is it meaningful to talk about the Tea Party as a group, or is being a "Tea Partier" a superficial label devoid of actual importance? After all, the Tea Party has no widely recognized national committee and is not a recognized electoral party. Using our voting data, we can see if the members' voting records form a coherent voting bloc.

The first step is to define the Tea Party. There is a group of Congressmen – all Republicans – who are self-identified official members of the Tea Party Caucus. They are as follows:

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[6] Ignoring outliers such as a voting agreement of 0 percent with John Boehner, who votes very infrequently due to his role as Speaker of the House.

[7] This article focuses on voting data, but for an interesting review of the impact of Tea Party supporters on their representatives see Madestam, *et al.*, *Do Political Protests Matter? Evidence from the Tea Party Movement* at 23, *available at* www.people.fas.harvard.edu/~veuger/papers/Political%20Protests%20--%20Evidence%20from%20the%20Tea%20Party.pdf (discussing tea party rallies and noting that "[i]ncumbent policy-making is also affected, as representatives respond to large [tea party] protests in their district by voting more conservatively in Congress").

The Tea Party[8]			
Sandy Adams	Howard Coble	Steve King	Tom Price
Robert Aderholt	Mike Coffman	Doug Lamborn	Denny Rehberg
Todd Akin	Ander Crenshaw	Jeff Landry	Phil Roe
Rodney Alexander	John Culberson	Blaine Leutkemeyer	Dennis Ross
Michele Bachmann	Jeffrey Duncan	Kenny Marchant	Edward Royce
Roscoe Bartlett	Blake Farenthold	Tom McClintock	Steve Scalise
Joe Barton	Stephen Fincher	David McKinley	Pete Sessions
Gus Bilirakis	John Fleming	Gary Miller	Adrian Smith
Rob Bishop	Trent Franks	Michael Mulvaney	Lamar Smith
Diane Black	Phil Gingrey	Randy Neugebauer	Cliff Stearns
Paul Broun	Louie Gohmert	Richard Nugent	Tim Walberg
Michael Burgess	Vicky Hartzler	Steven Palazzo	Joe Walsh
Dan Burton	Wally Herger	Steve Pearce	Allen West
John Carter	Tim Huelskamp	Mike Pence	Lynn Westmoreland
Bill Cassidy	Lynn Jenkins	Ted Poe	Joe Wilson

This list represents all of the members of the House who chose to publicly label themselves as Tea Party members. We ultimately decided that self-identification was the best way to define Tea Party membership, because any other method imposes our own judgment on what is or is not characteristic of the Tea Party philosophy. Thus, for the remainder of this Article, we will refer to these (and only these) congressmen as comprising the "Tea Party."

Using our data, we can now look to see if these members' voting records are consistent with their self-applied label. Although we do not judge whether any Tea Partier's position on a particular bill is sufficiently conservative to merit their Tea Party status, we do look at how they vote with each other on average. To do this, we pare down our House-wide table of data (containing all congressmen's

[8] *See* bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=226594.

voting similarities with all others') to just those sixty members of the Tea Party:

Tea Partier / Tea Partier	Adams	Aderholt	Akin	. . . Wilson
Adams	100%	89%	91%	91%
Aderholt	89%	100%	90%	87%
Akin	91%	90%	100%	93%
. . . Wilson	91%	87%	93%	100%
Average	90%	87%	90%	91%

The rows and columns of this table contain only Tea Partiers; therefore, every entry represents the voting similarity of a Tea Partier with another Tea Partier. The final row contains an average Tea Party voting percentage of each Tea Partier – in other words, how each Tea Party member votes with all other members of the Tea Party, on average. For instance, Joe Wilson (R-SC) votes with all other members of the Tea Party an average of 91 percent of the time.

The table revealed high voting similarity between all members of the Tea Party; indeed, our data showed remarkably high voting similarity within the Republican Party as a whole. The average voting similarity of the Tea Party members is 88.3 percent.[9] Republicans as a whole vote with each other an average of 86 percent of the time. If we look exclusively at voting data, it is difficult to identify an especially conservative voting bloc within the Republican Party – all Republicans tend to vote with each other, Tea Party or not.

In contrast, Republicans voted with Democrats 28 percent of the time. Democrats likewise show strong party loyalty. They vote with each other an average of 84 percent of the time. This is indicative of a larger trend in the House as a whole. It is polarized. With only limited exception, both Republicans and Democrats vote with themselves an overwhelming percentage of the time. This suggests that there is not a gentle gradient of agreement from the left to the right but rather a distinct grouping of the entire Republican Party and then a starkly different but equally distinct grouping of nearly

[9] The Tea Partier with the lowest average voting similarity, Congressman David McKinley (R-WV), has a score of 84 percent.

the entire Democratic Party.

There are at least two possible explanations some commentators provide for the high voting similarity between Tea Partiers and non-Tea Party Republicans. One is that the Tea Party has effectively dragged the entire Party to the right in a push for purity. The other explanation is that a "Tea Party" Republican versus a non-Tea Party Republican has always been a distinction without a difference, and the Tea Party label is merely a new word to describe an old kind of politician.

If there is a difference between Tea Party and non-Tea Party Republicans, voting data alone does not reveal a difference. Further distinctions between the two groups may reveal themselves in other data sets we will examine later.[10] And while there may be no large divisions within the Republican Party, we can nonetheless identify some kind of spectrum, which we undertake in the next several sections.

The "Independents"

Every member of the current House is either a Democrat or a Republican, so none are nominally "independent" of either party. And as we have already seen, the polarized voting data has seemingly left very few Representatives as middle-of-the-road legislators. That is, if you have an "R" behind your name, on average you vote 86 percent of the time with others with an "R" behind their name (and, 84 percent of the time, the same goes for the Democrats). That said, there do seem to be a handful of congressmen who are willing to break party ranks by voting a significant percentage of the time with members from the other party.

We defined these independents by the degree of polarization in their voting record. We decided that a "polarized" member would be one who votes in very high agreement with some members of the House and votes in very low agreement with the rest, with very few in between. An "independent" voter, by contrast, would vote with a lot of members around 50 percent of the time and have very strong voting similarity with neither party.

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[10] *See* Part IV, *infra*.

We quantified independent status by taking our voting similarity table – showing the average voting agreement of all members of Congress versus all other members of Congress – and finding each entry's distance from 50 percent.[11] For illustration, here are four highly-polarized congressmens' voting agreements:

Congressman / Congressman	Filner (D)	Jordan (R)	Lamborn (R)	Pence (R)
Filner (D)	100%	11%	11%	12%
Jordan (R)	11%	100%	93%	93%
Lamborn (R)	11%	93%	100%	96%
Pence (R)	12%	93%	96%	100%

And their resultant polarization scores:

Congressman / Congressman	Filner (D)	Jordan (R)	Lamborn (R)	Pence (R)
Filner (D)	50%	39%	39%	38%
Jordan (R)	39%	50%	43%	43%
Lamborn (R)	39%	43%	50%	46%
Pence (R)	38%	43%	46%	50%
Average (with all House members)	33.1%	33.5%	33.4%	33.4%

Because these Representatives are highly polarized, their average polarization score is approaching 50 percent. Independents, by contrast, will have a polarization score approaching zero percent. Also notice that two congressmen can both have a high polarization score but be in different parties; in this example, Jordan's (R) agreement with Lamborn (R) is about as high as his disagreement with Filner (D), so both entries would contribute to a high overall polarization.

We can now quantify how polarized a congressman is overall by taking his average polarization score across all members of Congress.[12] If a Representative toes the party line on almost every bill,

[11] If Congressman A's and Congressman B's voting agreement is x, their polarization score = $|x - 50\%|$. Although 50% voting agreement does not really represent the true midpoint of the data set (recall that the lowest voting agreement is actually around 11% due to agreement on unanimous bills), the effect of unanimous votes is relatively uniform across all of Congress and shouldn't skew our results.

[12] Just as every congressman has a voting agreement of 100% with himself, every

he will have a high average polarization; on the other hand, if a Representative votes more independently, his polarization will be lower on average because there will be relatively few people whom he votes uniformly with or against. After calculating these averages, we can rank each member from least polarized to most. Those with the lowest polarization – below 20 percent, whom we identify as the "Independents" – are provided in a table below:

The Independents					
Name	Party	Polarization	Name	Party	Polarization
Peterson	D*	8%	Barrow	D*	12%
Matheson	D*	8%	Cuellar	D*	12%
Costa	D*	9%	Owens	D	13%
Altmire	D*	9%	Cardoza	D*	14%
Shuler	D*	10%	Critz	D	15%
Jones	R	10%	Green (TX)	D	15%
Ross (AR)	D*	11%	Kissell	D	17%
Holden	D*	11%	Cooper	D*	17%
McIntyre	D*	12%	Rahall	D	17%
Donnelly	D*	12%	Costello	D	18%
Chandler	D*	12%	Reichert	R	19%
Boren	D*	12%	Fitzpatrick	R	19%

As shown above, only twenty-four congressmen have a polarization score of under 20 percent. Twenty-one of those twenty-four are Democrats. Of those twenty-one Democrats, fifteen are self-identified members of the "Blue Dog Coalition,"[13] a group of fiscally conservative Democrats who advertise themselves as "promoting positions which bridge the gap between ideological extremes."[14] These members have a star next to their party affiliation in the table above.[15]

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congressman has a polarization of 50% with himself. Although this is an artificial inflation, it's uniform across all of Congress and can be ignored.

[13] *See* ross.house.gov/BlueDog/Members/.

[14] *Id*.

[15] For an analysis of how Tea Party Republicans and Blue Dog Democrats impact the outcome specific legislation through Roll Call Votes, see the article directly following this one, Alex B. Mitchell, *Off the Beaten Voting Path: Finding the Mavericks of the 112th Congress*, 2 J.L. (1 J. LEGAL METRICS) 113 (2012).

The Tea Party Crashers

We also identified a group of Republicans who are not formally part of the Tea Party, but nonetheless vote with the Tea Party a large percentage of the time. To identify these "Tea Party Crashers" (which we define formally below), we first wanted to see how all House members vote with (or against) the sixty members of the Tea Party as a group. We did a similar calculation earlier with just members of the Tea Party, but now we extended the calculation to the entire House. A congressman's "Tea Party voting record" is the average of his voting agreements with each of the sixty members of the Tea Party.

A number of interesting findings resulted, summarized in the table below:

Tea Party Voting	
Highest Tea Party voting record	Randy Neugebauer (91%)
Lowest Tea Party voting record	Bob Filner (16%)
Republican with lowest Tea Party voting record	Walter Jones (65%)
Democrat with highest Tea Party voting record[16]	Dan Boren (66%)
Tea Party member with lowest Tea Party voting record	David McKinley (84%)
Number of Representatives voting with Tea Party at least 75% of the time	239
Number of Representatives voting with Tea Party 25% or less of the time	131

As noted, the Tea Party votes with itself 88.3 percent of the time. Eighty-eight Representatives vote with the Tea Party at least that often, and fifty-six of them are not formally in the Tea Party.[17] We have dubbed these fifty-six congressmen the "Tea Party Crashers," since they reliably vote with the Tea Party, but had declined to offi-

[16] Ranking all congressmen from highest Tea Party voting record to lowest also perfectly divides Congress along party lines, with the one exception seen in this table: Dan Boren (D) votes with the Tea Party slightly more often than Walter Jones (R). Otherwise, there is no party crossover.

[17] I.e., not in the Tea Party Caucus. *See* "What's in a Name," Part II, *supra*.

cially join the Caucus (as of September 2011). All other Republicans we refer to as "Tea Party Outsiders," since they are neither self-identified as Tea Partiers, nor do they vote as a typical Tea Partier (i.e., with the party 88.3 percent of the time). As discussed earlier, there is nothing inherent in the voting data suggesting that 88.3 percent is a self-evident cutoff between being a Tea Party Crasher or a Tea Party Outsider. The number chosen is not wholly arbitrary, of course, but on the margin it does create a sharp division among otherwise similar congressmen. Despite this concern, we wanted to distinguish between those Congressmen who tend to vote with the Tea Party most often and those who do not – to that end, some dividing line was needed, and we sought to pick one that was grounded in our data.

So we now have three groups to look at: the Tea Party (sixty members), the Tea Party Crashers (fifty-six members), and the Tea Party Outsiders (the remaining 125 Republicans).[18] The twenty-two Tea Party Crashers who have a 90 percent or greater Tea Party voting percentage are reproduced below:

Top Tea Party Crashers			
Name	TP Voting %	Name	TP Voting %
Pompeo	91%	Quayle	90%
Latta	91%	Jordan	90%
Flores	90%	Buerkle	90%
Lankford	90%	Scott, Austin	90%
Canseco	90%	Brady (TX)	90%
Kline	90%	Issa	90%
McCarthy (CA)	90%	Johnson, Sam	90%
Gowdy	90%	Thornberry	90%
Hensarling	90%	Nunes	90%
Conaway	90%	Southerland	90%
Scott (SC)	90%	Rokita	90%

The demographics of the Tea Party Crashers (as well as the Tea Party, Republicans, Democrats, etc.) are discussed in Part II, *infra*.

[18] We decided to lump the Independents into the Outsiders group to simplify the comparisons in Part III and to preserve the opportunity to write about the Blue Dog Democrats (which are strongly represented in that contingency) in a later article.

The Congressional Tea Party Leader

Just as we ranked members of the House by how they voted with the Tea Party, we can order the House by how representatives vote with Michele Bachmann, the founder of the Tea Party Caucus and apparent leader of the Tea Party movement in Congress today. Unsurprisingly, the list ordered from those who vote most like Bachmann to least looks much like the list ordered by those who vote most with the Tea Party.[19] One interesting result is that ordering the House by how congressmen vote with Michele Bachmann perfectly divides it by party line – i.e., no Democrat votes with Michele Bachmann more often than any Republican does.[20] Bachmann votes with the Tea Party 88% of the time (almost exactly the average of any member of the Tea Party Caucus), and she votes with all Republicans an average of 85% of the time.

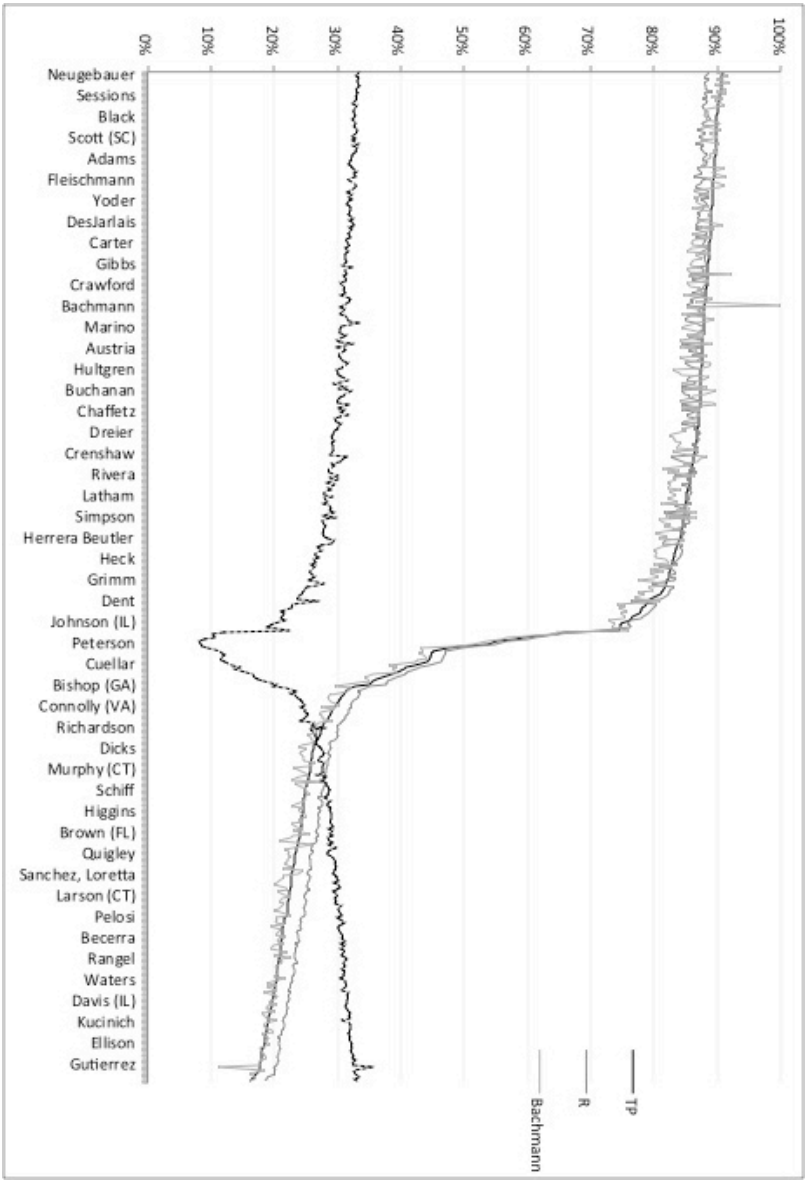
No Politics is Local Politics

We've seen that looking at congressmen by their voting similarity paints a very polarized picture of our legislature today, and Tea Party politics is at least one way to tease out how the House is divided. If one congressman votes with the Tea Party a high percent on average, he is likely to vote with both Michele Bachmann and all Republicans a high percentage of the time as well. As it turns out, the degree to which you vote with the Tea Party also predicts how polarized you are – the more closely you vote with or against the Tea Party, the more closely you vote with or against *any* congressman, on average.

All of this is perhaps best summarized in a graphic. The following page contains a graph with all members of the House on one axis (although many names have been omitted due to space) and voting percentages on the other. (Please note that, for readability, the chart has been rotated clockwise.) The former axis has been arranged with those voting the most with the Tea Party on the left

[19] For a visual representation, see "No Politics is Local Politics," Part II, *infra*.

[20] In this case, Dan Boren (D) votes with Bachmann 64% of the time, whereas Walter Jones (R) votes with Bachmann 65% of the time. Contrast this with the division along party lines based on Tea Party voting, *supra* note 12.



(i.e., beginning with Congressman Neugebauer) and those voting least with the Tea Party on the right (i.e., ending with Congressman Gutierrez).

Keeping that ordering constant, we include each congressman's

voting percentages with the Republican Party as a whole, Michele Bachmann, and their polarization scores. This gives a visual representation of how well correlated voting agreement is among these three benchmarks, and how they relate to polarization.[21]

Numerically, the data series (except polarization) are correlated as follows:

Voting Records	Correlation
Tea Party vs. Republican Party	99.93%
Tea Party vs. Michele Bachmann	99.56%
Republican Party vs. Michele Bachmann	99.26%

We can see several things from this graph. For one, the House is polarized: you either vote with the Tea Party (or Republicans, or Bachmann), or you don't. Graphically, this is apparent where the voting agreement percentages abruptly drop from around 80 percent agreement to 30 percent. The strong correlation between average voting with the Republican Party (241 members), the Tea Party (sixty members), and Michele Bachmann also shows that there exists a relatively low-cost acid test for how any member of Congress is going to vote on a bill: ask how Michele Bachmann is going to vote. The high correlation of voting records across all of Congress suggests that Michele Bachmann is not unique in this regard – i.e., there are many others who fit this description. However, it is not trivial that how one votes with *a single member* of Congress predicts with greater than 99 percent accuracy how he votes, on average, with *every other Republican* as well.[22] And while the graph of polarization is perhaps unsurprising – the congressmen on the far left and right have higher polarization – the result is not trivial when you consider that the distribution of voting similarity with all 241 Republicans is nearly identical to that with a single member. After all,

[21] John Boehner was removed from this graphical representation as an outlier (and thus distracting) because of his low vote count. His voting percentages were as follows: Tea Party – 75%; Republican Party – 85%; Michele Bachmann – 25%. The numerical correlations, however, were calculated with these values included.

[22] As we mentioned above, our data is only descriptive. *See supra*, note 2. What matters is that we are making an observation of what happens on average – we are not making a claim that how one votes provides any particular predictive power on any single vote.

it is conceivable that a particular member could vote with Michele Bachmann a high percentage of the time but not have that completely define his voting habits vis-à-vis all other members of the House, but that is not what the data shows.

The shape of the polarization curve is also noteworthy in that it does not gently slope down from the outer portions inwards in a parabolic fashion, a shape you might expect to see if Representatives were evenly distributed on the political spectrum from left to right. Instead, it plateaus above 30 percent on both sides and abruptly drops into a narrow, well-defined trench occupied by the few "independents" identified earlier. This displays visually what many believe is true anecdotally – the House is sharply divided between left and right, leaving little room for a middle-of-the-road politician. This trend transcends geography, age, gender, race, length of time in office, or any other identifiable demographic.[23]

III. DEMOGRAPHICS

We've seen that, as far as voting records go, there is not very much to distinguish one Republican from another. That said, we were able to establish a spectrum from right to left within the Republican Party based on how they vote with the Tea Party.[24] Next, we look at how these groups break down demographically:

Group	Size	M	F	%M	%F	Tenure (Avg)	Age (Avg)
The House	434[25]	363	71	84%	16%	10.7	57.2
Republicans	240	216	24	90%	10%	8.2	54.7
Democrats	194	147	47	76%	24%	13.7	60.1
Tea Party	60	55	5	92%	8%	8.0	57.6
TP Crashers	56	51	5	91%	9%	5.5	51.1
TP Outsiders	125	111	14	89%	11%	9.6	55.0

[23] Incidentally, we analyze the demographics of the various groups discussed here (Tea Party, Republicans, Democrats, etc.) in the next Part.

[24] Recall that Tea Party Crashers are those Republicans who are not in the Tea Party but vote with them a very high percentage of the time (over 88.3%). Tea Party Outsiders is a residual category comprised of all Republicans who are neither in the Tea Party nor are considered "Crashers."

[25] Our data for this and the next Part excludes Representative Lee.

For the most part, the average Tea Partier is similar to the average House Republican: late middle-aged and male. There are many more female Democrats than female Republicans, but we can also see that within the Republican Party, females tend to be Outsiders. This is in contrast to the fact that the Tea Party – the least female of all groups at only 8 percent – is led by a woman.

It is notable that the Tea Party is on average the oldest grouping of Republicans. They are also more experienced (in terms of years served) than the Crashers but less experienced than the Outsiders. This runs contrary to the common wisdom that the Tea Party is overwhelmingly made up of freshmen representatives who swept into power in the 2010 election. That distinction instead belongs to the Crashers, who are on average the youngest and least experienced of any other group we analyzed. This may reflect a perceived risk associated with joining the Tea Party or any such high profile group. This gives us a better picture of who the Tea Party is: male, relatively experienced, and slightly older than the average. We now turn to how these different groups perform as legislators and as national figures using our FantasyLaw data.

IV. FANTASYLAW DATA

Introduction to FantasyLaw

For the uninitiated, FantasyLaw is the fantasy sport (like fantasy football or baseball) where the players are lawmakers, not athletes. The FantasyLaw editorial board – students and recent alumni of law schools across the country – administers the game by collecting data on every member of Congress every week in one of thirteen categories:

Category	Abbr	Description
Sponsorship of bills introduced	SBI	Sponsoring a bill introduced in House or Senate
Sponsorship of bills reported	SBR	Sponsoring a bill that is reported out of committee and reported on the floor
Sponsorship of bills passing the House	SBH	Sponsoring or co-sponsoring a bill passing the House
Sponsorship of bills	SBS	Sponsoring or co-sponsoring a bill passing

Category	Abbr	Description
passing the Senate		the Senate
Sponsorship of bills enacted	SBE	Sponsoring a bill that becomes public law
Appearances in major daily newspapers	ADN	Name appears in daily editions of the *Boston Globe*, *New York Times*, *Washington Post*, *Los Angeles Times*, or *USA Today*
Appearances in major Hill periodicals	AHP	Name appears in *Roll Call*, *The Hill*, *Politico*, or *CongressDaily*
Appearances on Sunday talk shows	ATS	Interviewed on *Face the Nation*, *State of the Union*, *Meet the Press*, *Fox News Sunday*, or *This Week*
Appearances on Comedy Central	ACC	Appearing, as a guest or otherwise, on *The Daily Show* or *The Colbert Report*[26]
Press releases issued	PRI	Issuing a press release
Maverick voting	MVV	Voting against 95% of own party
Lone wolf voting	LWV	Voting against 95% of Congress

The categories roughly represent the three main duties of a national legislator today: passing legislation, being a national personality, and voting. The first five categories – SBI, SBR, SBH, SBS, and SBE – give an idea of how effective the congressman is at getting bills through each step of the legislative process. The next five – ADN, AHP, ATS, ACC, and PRI – give an overview of the congressman's visibility in the public eye, both positive and negative. For instance, an ATS appearance gives a congressman a desirable forum to communicate his or her political views, but an ACC appearance typically exposes gaffes, hypocrisy, or otherwise embarrassing events.[27] Finally, MVV and LWV award points for what many politicians claim to possess but rarely deliver on – principled, independent voting in the face of political pressure from one's own party or Congress as a whole.

[26] An "appearance" for the ACC category (but not for ATS) means that the congressman is mentioned by name contemporaneously with a video or picture of that congressman on screen. The idea is to score an appearance every time a viewer who didn't previously know who a particular congressman was could, after the segment, put a face with a name.

[27] Anthony Weiner, for example, completely dominated this category for several weeks in May–June 2011.

The Bachmann Issue

Michele Bachmann ran for President. Although her campaign proved unsuccessful, she has not faded from the national consciousness. Indeed, she has a knack for inviting public attention, and she is the de facto head of the Tea Party. All this is a way of saying that she gets media attention. In the upcoming sections, we compare how the Tea Party measures up to other groups in the House in the media based on our five FantasyLaw media metrics. Michele Bachmann is the highest scoring Tea Partier in all but one of those categories, and she completely dominates three:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1067	1485	14	52	96
Michele Bachmann	608	413	7	33	0
Rest of Tea Party	459	1072	7	19	96
% Bachmann	57%	28%	50%	63%	0%

Indisputably, discussing the Tea Party's media presence in some of these categories really means talking about Michele Bachmann's media presence. And being a major presidential candidate carried with it a guaranteed place in the national spotlight. We think it would be a mistake, however, to attribute Bachmann's media dominance solely to her presidential bid and not to her status as a Tea Partier – in fact, she probably owed a large part of her campaign's success to her stalwart presence as a Tea Party persona. We've also seen that her Tea Party status is not mere lip service – not only did she found the Tea Party Caucus, her voting trends are correlated with the Tea Party's.[28] So, while it is important to recognize that it is Michele Bachmann's individual stats that drive the Tea Party's numbers in some categories, in a lot of ways she *is* the Tea Party. Just as it would be a mistake to talk about the non-Tea Party Republicans without John Boehner, and it would be a mistake to talk about the Democrats without Nancy Pelosi, we feel it would be wrong to be distracted by the fact that Michele Bachmann's numbers drive the Tea Party's statistics in many of these media categories.

With that said, let's look at how the various factions of Congress

[28] *See* "No Politics is Local Politics," Part II, *supra*.

defined in Part II compare in terms of media presence.

Tea Party v. The House

First we look at the Tea Party compared to the House as a whole, including all Republicans and all Democrats:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1,067	1,485	14	52	96
The House	6,081	10,359	61	197	638

And as averages:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	17.78	24.75	0.23	0.87	1.60
The House	14.01	23.87	0.14	0.45	1.47
% Difference	27%	4%	66%	91%	9%

We see that the Tea Party is, generally speaking, more successful at gaining media attention (both favorable and otherwise) than the average Representative. This is especially true of television appearances, with a Tea Party member being 66 percent more likely to appear on a Sunday talk show and 91 percent more likely to be mentioned on Comedy Central. More media exposure is generally considered a good thing for a congressman, but in reality, this is a double-edged sword. A Sunday talk show appearance implies that the interviewee is seen as an important opinion maker but a Comedy Central appearance often has a more negative connotation. The desirability of mentions in daily newspapers and in the Hill periodicals probably lie somewhere between these two extremes. We can say, however, that compared to the average member of the House the average Tea Party member has a greater media presence in any of our data categories than the House as a whole.

Tea Party v. Republicans

Next we compare the Tea Party with all Republicans, again with Tea Partiers included in the Republican statistics. There are a total of 241 Republicans in the House.

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1,067	1,485	14	52	96
Republicans	3,996	6,795	43	132	406

On average:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	17.78	24.75	0.23	0.87	1.60
Republicans	16.58	28.20	0.18	0.55	1.68
% Difference	7%	– 12%	31%	58%	– 5%

Here we see more of a mixed bag. The Tea Party wins again in the television categories by a large margin, but the Tea Party's advantage here is much smaller than it was against the House as a whole – an unsurprising result considering that Republicans are in power. Press releases and daily newspapers are basically a wash, and the Tea Party slightly loses in Hill periodicals. The difference between performance in the ADN and AHP categories is probably due to the fact that Hill periodicals typically concentrate more on procedural coverage than stories of general interest; therefore, they are more likely to include stories about committee leadership, which is underrepresented in the Tea Party.[29]

Tea Party v. Democrats

Now we compare the Tea Party to the Democratic members of the House, of which there are 193. This is the first comparison where the Tea Party members are not part of the group to which they are compared:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1,067	1,485	14	52	96
Democrats	2,085	3,564	18	65	232

On average per member:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	17.78	24.75	0.23	0.87	1.60
Democrats	10.80	18.47	0.09	0.34	1.20
% Difference	65%	34%	150%	157%	33%

It is clear that the Tea Party gets significantly more media attention than Democrats, and as a whole the Tea Party outscores the

[29] The only Tea Party member who is a committee chair is Representative Lamar Smith (R-TX) who heads the Committee on the Judiciary. There are twenty-one chairmen in total. *See* clerk.house.gov/committee_info/index.aspx.

Democrats by greater margins than any other category of representatives we look at. To be sure, the Republicans (and therefore the Tea Party) are in the majority and there is a natural tendency for the majority to garner more media attention, but this data (along with the comparison of the Tea Party to the Republicans as a whole above) emphasizes just how dominant this subsection of the majority is.

Indeed, the Tea Party's advantages are all in the double digits. The smallest advantage is in press releases, where they beat the average Democrat by 33 percent. They receive substantially more coverage than Democrats in both newspaper categories (although they're not quite as heavily favored in the Hill periodicals), and again, we see the Tea Party has drawn outsized attention in television media. Although we don't formally track whether media appearances are positive or negative, we think it's fair to say based on this data that the Tea Party presence cannot be considered to be marginalized in the national media.

Tea Party v. Tea Party Crashers

There are sixty members of the Tea Party, and fifty-six Tea Party Crashers. Their totals for the media categories are as follows:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1067	1485	14	52	96
Tea Party Crashers	974	1465	13	12	98

In terms of average points per congressman:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	17.78	24.75	0.23	0.87	1.60
Tea Party Crashers	17.39	26.16	0.23	0.21	1.75
% Difference	2%	– 5%	1%	304%	– 9%

The two groups are virtually identical in four of the five categories. They get about the same coverage in daily newspapers and in Hill periodicals. They have about equal representation on Sunday talk shows, and issue the same number of press releases.

On Comedy Central, however, the Tea Party name ostensibly carries a lot of weight – a congressman is three times more likely to be lampooned on *The Daily Show* or *The Colbert Report* if he identifies

as a Tea Partier than if he merely votes like one. This is the greatest percentage difference in any category among any of the groups we analyze. As mentioned above, this discrepancy is largely due to Jon Stewart's and Stephen Colbert's fascination for all things Bachmann, but even ignoring her stats in this category, a Tea Partier is over 50 percent more likely to appear on Comedy Central than a Tea Party Crasher.

Tea Party v. Tea Party Outsiders

There are 125 Tea Party Outsiders (Republicans who are neither in the Tea Party nor vote with them a high percentage of the time), and sixty members of the Tea Party.

In total, here's how the media data pans out:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	1067	1485	14	52	96
Outsiders	1955	3845	16	68	212

And here are the averages:

Category	ADN	AHP	ATS	ACC	PRI
Tea Party	17.78	24.75	0.23	0.87	1.60
Outsiders	15.64	30.76	0.13	0.54	1.70
% Difference	14%	– 20%	82%	59%	– 6%

On average, the Tea Party and the Outsiders appear in daily newspapers at about the same rate, with a slight edge to the Tea Party. Both issue about the same amount of press releases. The Hill periodicals seem less interested in the Tea Party members over the Outsiders, perhaps because the Outsiders are made of more senior members who are more likely to be committee chairmen, which the Hill periodicals are more concerned about than general newspapers are. The two television categories, however, show a strong preference for Tea Partiers. Total appearances on Sunday talk shows come in about the same – fourteen for the Tea Party and sixteen for the rest – but there is less than half the number of Tea Partiers than Outsiders, resulting in an 82 percent higher likelihood of a Tea Partier being interviewed. The Tea Party name seems to carry weight in the Comedy Central category as well, although not as significantly as compared with the Crashers.

Media Categories Conclusion

It's difficult to give a cohesive summary of the media data among the Tea Party versus the rest of the House, but in most categories the Tea Party is better represented than any other group we identified. They dominate the Comedy Central category, and tend to be more represented in both Sunday talk shows and in daily newspapers. This seems consistent with the Tea Party's role in the national discourse today – positive or negative, most big political stories involve the Tea Party's role in shaping policy. The Tea Party's advantage is present but muted in the Hill periodicals category, which we hypothesize is due to those publications' concentration on procedural and technical actions of the House rather than national headlines. On the whole, then, this data confirms what we expected to see: the Tea Party makes headlines and has risen to national prominence both within their Party and on the whole.

Lone Wolf and Maverick Voting

Congressmen can send messages by many other means than just the media, and one of those ways is through voting itself. FantasyLaw tracks two types of votes: Maverick voting is a vote that goes against 95 percent of one's own party, and Lone Wolf voting is voting against 95 percent of Congress. These categories attempt to reflect a member's willingness to put principles above party politics – a characteristic championed by candidates on the campaign trail, but in reality appears quite rarely. We now examine how the Tea Party stacks up against the rest of the House in each of these voting categories.

Group	MVV (Total)	LWV (Total)	MVV (Average)	LWV (Average)
The House	1353	157	3.12	0.36
Republicans	817	96	3.39	0.40
Democrats	536	61	2.78	0.32
Tea Party	102	27	1.70	0.45
Tea Party Crashers	27	9	0.48	0.16
Tea Party Outsiders	688	60	5.50	0.48

Perhaps the most interesting factor to come from this is that in terms of Maverick Voting, the least "maverick" group is the Crashers. Under the majority of voting conditions the Crashers vote with the Tea Party, but we see that Tea Partiers are much more willing to go against the Republican Party than Crashers are. On the other side of this, the Outsiders are the least disciplined, which comports with their position as closer to the middle of the partisan spectrum. It is interesting to note that, on average, most of the Maverick Votes come from those in the middle, not those on the far right.

A parallel analysis holds true for Lone Wolf Voting. We see again that the Crashers are the least radical group. Unexpectedly, however, the more middle-of-the-road Republicans (the Outsiders) are actually the most likely group to vote against the entire House, which seems to undermine their position as compromisers. There are, however, at least two caveats to that finding. For one, the average number of lone wolf votes is very similar for all groups except the Crashers. The second is that not everyone fits perfectly on a two-dimensional political spectrum.

On the whole, this voting data shows that the Tea Party is not the most disciplined group of Republicans (which seems consistent with their claim of being non-partisan), but they are also not the most independent members of the Party either.

Rain on the Parade

Finally, Congressmen are not only judged by their ability to communicate but also on their ability to actually get legislation passed and enacted. On this metric we see that the Tea Party is wholly ineffective. As of September 2011, no Tea Party member had gotten a single bill enacted this session. This is opposed to the Crashers who have enacted seven bills.

IV. CONCLUSION

As far as voting trends go, the Tea Party is largely indistinguishable from other Republicans – if you vote consistently with one, you vote consistently with the other. In addition, we see a House of

Representatives that is extremely polarized, whether by Tea Party politics or not. So if being a Tea Partier is a meaningful distinction, it doesn't seem to reveal itself in how congressmen vote.

Nevertheless, we see trends in our FantasyLaw data (especially in the media categories) suggesting that the Tea Party is distinct. Tea Partiers are more likely to garner television attention and generally speaking are more effective users of the media. At the same time the Tea Party members are less likely to get bills passed and are not the extreme maverick voters that many would purport them to be. While these differences may not expose an obvious partisan or philosophical distinction; it is clear that the Tea Party name is more than just a name.

# # #

OFF THE BEATEN VOTING PATH

FINDING THE MAVERICKS OF THE 112TH CONGRESS

Alex B. Mitchell[†]

In the late afternoon on May 25, 2011, the United States House of Representatives had been debating its fiscal year 2012 defense spending bill when, at approximately 4:28PM, it set aside 10 minutes to consider a potential amendment to that bill – House Amendment 309. The amendment was mixed in among a long line of 30 others to consider, and its sponsor, Representative Chris Murphy (D-CT), stood to make the case for its adoption.[1]

Representative Murphy explained that by permitting contractors to include a "jobs impact statement" along with their bid, this amendment would allow the United States Government to consider, as one of many factors in its decision-making process, the impact that awarding a contract would have on domestic employment. This "statement" would allow the bidder to report the number of U.S. jobs a particular contract would create in their company, or the number of existing U.S. jobs that would otherwise be lost if their company was not awarded the contract. Representative Murphy continued, stating that this would be sound policy to allow the Government to see how the acquisition process can support the U.S. economy, or conversely, how contracts being awarded to those using foreign services or foreign labor exacerbate domestic unemployment.[2]

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[1] For a full outline of the House events concerning the National Defense Authorization Act for Fiscal Year 2012, *see* Bill Summary & Status, 112th Congress (2011-2012) H.R. 1540, *available at* thomas.loc.gov/cgi-bin/bdquery/z?d112:H.R.1540:#.

[2] 157 CONG. REC. H3,616-17 (daily ed. May 25, 2011) (statement of Rep. Chris-

Representative Mike Conaway (R-TX) quickly rose in opposition. He argued that the amendment would create bad policy because it contained a debarment penalty used to disqualify contractors from future bidding if they mistakenly – or intentionally – report false employment statistics in the jobs "statement." He also argued that the "statement" itself would add another layer to an already complicated contracts system. The two Members exchanged rebuttals for the remainder of the allotted 10 minutes.[3] Debate ended and a little over two hours later, at approximately 6:41PM, two minutes were allotted to permit Roll Call Vote #346 to determine the amendment's fate. The amendment failed.[4]

This scene plays out infinitely in the course of one Congress – hundreds of amendments among hundreds of bills – the votes tallied and debate recorded. What made this amendment unique was not the substance, length of its consideration, or its outcome, but instead, the way in which the House reached that outcome. The vote was extremely close – the amendment failed by a mere four votes, a tally of 212-208. Notably, House Democrats enjoyed the company of 25 Republicans in their losing effort. More importantly, four Democrats joined House Republicans, effectively ensuring the amendment's defeat.[5] By the slimmest of margins, Amendment 309 was defeated and the House defense spending bill continued on toward eventual passage without it.

THE STUDY

A maverick is "an unorthodox or independent-minded person."[6] The word is conveniently and often applied to politicians. While a single vote, a brazen public statement, or a general stance against party policy on an issue can lead to politicians being branded with the maverick label, my study sought to discern those Members of Congress who are mavericks through their everyday task of vot-

topher S. Murphy).

[3] *Id*. at H3,617.

[4] *Id*. at H3,632-33.

[5] For the full Roll Call Vote, *see* clerk.house.gov/evs/2011/roll346.xml.

[6] *New Oxford American Dictionary* 1081 (3rd ed. 2010).

ing – like those 4 Democrats and 25 Republicans who crossed party lines in Roll Call Vote #346.

For FantasyLaw, I tracked "Maverick Voting" by U.S. Senators and Members of the House of Representatives, singling out those who cast votes with a majority of the opposing party, and at the same time, voted against 90% or more of his/her own party.[7] I analyzed voting in both the Senate and House Chambers from the beginning of the 112th Congress on January 5, 2011, through the beginning of the respective chambers' summer recesses in August.[8]

The Maverick Voting formula is based on the numbers of Democrats, Republicans, and Independents in the House and Senate. There were multiple resignations and replacements during my study's seven-month period,[9] but because these changes were only a minor percentage of the entire Congress, the mathematics of the Maverick Voting formula was not affected.

The Maverick Voting formula has two parts: 1) A Representative or Senator must vote with a majority of the *opposing* party, and 2) vote against 90% or more of his/her *own* party.[10]

Each time a Representative or Senator satisfied these requirements, they were considered a Maverick, and were awarded one point. In this way, my study sought to find patterns in who cast the most Maverick Votes, in order to score the most Maverick points on a FantasyLaw team.

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[7] It is one of 14 categories of data relating to the activities of federal legislators that FantasyLaw editors gather and analyze every week for our legislation-themed fantasy league. For a full explanation of FantasyLaw, *see* fantasylaw.org/forms/draftkit_mar13.pdf.

[8] The last House vote before the August recess was Roll Call Vote 691 on August 1, 2011, and in the Senate, it was Roll Call Vote 123 on August 2, 2011.

[9] There were five resignations in the House and former Representative David Wu's (D-OR) seat remains vacant as of the date of this article. There was one resignation in the Senate and that seat was filled. Coincidentally, former Representative Dean Heller (R-NV) resigned from the House to assume the vacant Senate seat in Nevada.

[10] The two Independents in the U.S. Senate cannot score points in FantasyLaw for Maverick Voting. The five House Delegates and lone Resident Commissioner are also excluded from FantasyLaw Maverick Voting.

House Maverick Formula

Party[11]	Majority of the Party	90% of the Party	10% of the Party
Republicans (242)	122	218	25
Democrats (192)	97	173	19

Senate Maverick Formula

Party	Majority of the Party	90% of the Party	10% of the Party
Democrats (51)	26	46	5
Republicans (47)	24	42	5

Given the party breakdowns, whenever 25 or fewer House Republicans (10% or less) voted the same way as 97 or more House Democrats (a majority of the House Democrats), those Republicans were counted as Mavericks, and so on. Or in the Senate, for example, five or fewer Senate Democrats voted the same way as 24 or more Republican Senators, they were counted as Mavericks. To see an actual Maverick Vote, consider Senate Roll Call Vote 95, where two Democrats, Senators Benjamin Nelson (D-NE) and Joe Manchin (D-WV) voted *Aye* along with 45 Republican Senators and against the entire Democratic Party.[12] The Amendment at issue – one that would require all Presidential Czars to be subject to Senate confirmation, as well as ending all salaries for such Czars – ultimately failed, but the clear party-line voting highlighted the two Democrats' straying from their own party. Members from both parties often received Maverick voting points in the same vote.

WHO WERE THE MAVERICKS?

The Senate experienced Maverick Votes during 27 of the 123 Roll Call Votes, or about 22% of the time. In the House, Maverick Votes were cast during 419 Roll Call Votes out of 686, or

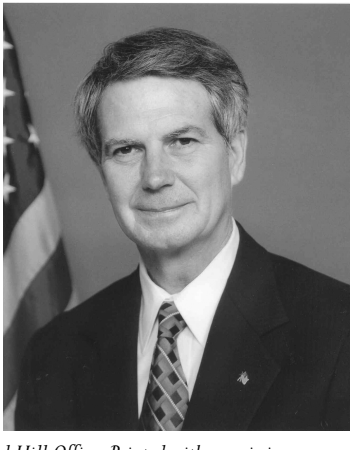
[11] *See* clerk.house.gov/member_info/cong.aspx (vis. Jan. 2, 2012).

[12] For the full Roll Call Vote, *see* www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00095 (vis. Jan. 2, 2012).

61% of the time. Overall, 378 representatives, or about 87% of the House, cast at least one Maverick Vote, while only 34 Senators accounted for that chamber's Maverick Votes.

The Top Mavericks in the Senate and House

Above: Senators Scott Brown (left) and Ben Nelson.
Below: Representatives Dan Boren (left) and Walter Jones.



Images courtesy of each Member's Capitol Hill Office. Printed with permission.

Maverick Senators[13]

Senator	No. of Maverick Votes
Brown (R-MA)	9
Collins (R-ME)	9
Nelson (D-NE)	8
Snowe (R-ME)	7
Murkowski (R-AK)	6
Kirk (R-IL)	4
Manchin (D-WV)	4
Cochran (R-MS)	3
Lugar (R-IN)	3
Pryor (D-AR)	3
Reid (D-NV)	3
Alexander (R-TN)	2
DeMint (R-SC)	2
Kyl (R-AZ)	2
Landrieu (D-LA)	2
Lee (R-UT)	2
McCaskill (D-MO)	2
Paul (R-KY)	2
Shelby (R-AL)	2
15 Senators	1
Total Senate Maverick Votes	90

Maverick Representatives

Representative	No. of Maverick Votes
Boren (D-OK)	201
Altmire (D-PA)	160
Peterson (D-MN)	147
Ross (D-AR)	146
Jones (R-NC)	130
Matheson (D-UT)	130
Shuler (D-NC)	106
Costa (D-CA)	105
McIntyre (D-NC)	81
Holden (D-PA)	77

[13] For the entire list of Mavericks in the Senate and House, *see* Appendix I at the conclusion of the article.

Representative	No. of Maverick Votes
Cardoza (D-CA)	72
Chandler (D-KY)	72
Donnelly (D-IN)	71
Owens (D-NY)	69
Barrow (D-GA)	65
Cuellar (D-TX)	65
Reichert (R-WA)	58
Gibson (R-NY)	57
Critz (D-PA)	55
Cooper (D-TN)	54
Green, Gene (D-TX)	54
Kissell (D-NC)	54
Rahall (D-WV)	54
Fitzpatrick (R-PA)	53
Paul (R-TX)	53
22 Representatives	25-50
140 Representatives	5-25
191 Representatives	1-5

IN WHICH PARTY WERE THE MAVERICKS?

While the effect of party control in each chamber on Maverick Voting is notable, a focus on political sects within the Democratic and Republican parties further elucidates Maverick Voters. While Tea Party Republicans make up about 12% of Congress as well as accounting for about 12% of Maverick Votes, it is the smaller House Democratic Blue Dog Coalition that accounted for a large percentage of Maverick Votes. Comprising only about 6% of the House, Blue Dog Democrats cast over 35% of all House Maverick Votes. On average, Blue Dog Democrats cast Maverick Votes six times more often than other representatives.

Putting these smaller political party sects aside, in total, Republicans who make up about 54% of Congress only accounted for 45% of Maverick Votes while Democrats make up 45% of Congress yet cast 55% of the Maverick Votes. Thus, Democrats crossed party lines more often to cast Maverick Votes than their Republican counterparts, and Blue Dog Democrats did so at a much higher rate than

the rest of the Democratic Party.[14]

Maverick Voting by Party – Senate

Party	In Senate	Maverick Votes
Democrats	51% (51)	37.8% (34)
Republicans	43% (43)	55.6% (50)
Tea Party Republicans[15]	4% (4)	6.6% (6)

Maverick Voting by Party – House

Party	In House	Maverick Votes
Republicans	41.9% (182)	38.8% (1834)
Democrats	38.5% (167)	20.3% (958)
Tea Party Republicans[16]	13.8% (60)	5.6% (265)
Blue Dog Democrats[17]	5.8% (25)	35.4% (1673)

Maverick Voting by Party – All of Congress

Party	In Congress	Maverick Votes
Republicans	54.1% (289)	44.7% (2155)
Democrats	45.5% (243)	55.3% (2665)

SENIORITY

The longer a Representative or Senator is in office, the more Maverick Votes he or she will cast. This trend is true in both the House and Senate.

[14] For a more robust analysis of voting bloc trends among Tea Party Republicans and Blue Dog Democrats, *see* the article directly preceding this one, Ian Gallagher & Brian Rock, *Reading the Tea Leaves: An Analysis of Tea Party Behavior Inside and Outside of the House*, 2 J.L. (1 J. LEGAL METRICS) 87 (2012).

[15] I attributed Tea Party membership to Senators Jim DeMint (R-SC), Mike Lee (R-UT), Jerry Moran (R-KS), and Rand Paul (R-KY), all identified as members of the Senate Tea Party Caucus. *See* www.washingtonpost.com/wp-dyn/content/article/2011/01/27/AR2011012706966.html (vis. Jan. 2, 2012).

[16] I attributed Tea Party membership to those representatives in the House Tea Party Caucus. *See* bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=226594 (vis. Jan. 2, 2012).

[17] I attributed Blue Dog Coalition membership to those representatives listed on Blue Dog Co-Chair Representative Mike Ross's (D-AR) webpage. *See* ross.house.gov/BlueDog/Members/ (vis. Jan. 2, 2012) [hereinafter *Blue Dog Membership*].

Maverick Votes by Years in Office

Senate			House		
In Office	Representation in Senate	Maverick Votes	In Office	Representation in House	Maverick Votes
0-6 Years	43% (43)	33.3% (30)	0-6 Years	40.6% (176)	33.8% (1600)
6+ Years	57% (57)	66.6% (60)	6+ Years	59.4% (258)	66.2% (3130)

ON WHAT DID MAVERICKS VOTE?

During my study period, the House registered 691 Roll Call Votes, while the Senate cast 123 Roll Call Votes. I tracked every vote in both chambers through The Library of Congress Thomas webpage.[18] I deleted five House votes from the study, but included all Senate votes.[19] The vote types in each chamber were as follows:

Senate

Type	Number of Roll Call Votes
Motions (For Bills/Resolutions)	48 (39.0%)
Amendments (For Bills/Resolutions)	28 (22.8%)
Nominations (Judges/Executive Officers)	27 (22.0%)
Agreeing to Resolutions	12 (9.8%)
Passage of Bills	8 (6.5%)
Total	123

House

Type	Number of Roll Call Votes
Amendments (For Bills/Resolutions)	427 (62.2%)
Motions (For Bills/Resolutions)	96 (14.0%)
Agreeing to Resolutions	62 (9.0%)

[18] *See* Roll Call Votes, thomas.loc.gov/home/rollcallvotes.html# (vis. Jan. 2, 2012).

[19] I ignored three votes for Calls of the House for Quorum (Roll Call Votes 1, 7, and 689), one vote that was vacated by unanimous consent (Roll Call 484), and the initial vote for the Election of the Speaker of the House (Roll Call 2) because they did not provide Members with the normal opportunity to vote Yea, Nay, or Present.

Type	Number of Roll Call Votes
Other Miscellaneous Matters[20]	53 (7.7%)
Passage of Bills	48 (7.0%)
Total	686

Maverick Voting in both chambers occurred at roughly equivalent rates as regular voting on all matters. For example, Senate motion votes were the most common type of Roll Call Vote as well as most likely to experience Maverick Voting. Thus, those casting Maverick Votes had no particular affinity for any one particular type of vote (such as votes concerning the passage of bills.)

When Maverick Votes Were Cast

SENATE		HOUSE	
Type of Vote	**Frequency**	**Type of Vote**	**Frequency**
Motions	55.6% (15)	Amendments	63.2% (265)
Amendments	25.9% (7)	Resolutions	12.2% (51)
Nominations	7.4% (2)	Motions	10.0% (42)
Resolutions	7.4% (2)	Passage of Bills	7.9% (33)
Passage of Bills	3.7% (1)	Procedural	6.7% (28)
Total	27 Votes	Total	419 Votes

DID THE MAVERICKS MATTER?

In the end, House Maverick Voters had a real impact, altering the outcome on 11 different Roll Call Votes (including the Murphy Amendment, discussed earlier) – and all of those votes resulted in approving or rejecting amendments within prospective bills. Most telling is that all the Maverick Votes altered the outcome so a Republican representative's amendment was approved or a Democratic representative's amendment failed.

The most surprising find in my study was that small groups of Democrats, voting against their party in all 11 of these Roll Call

[20] The House initiated 53 Roll Call Votes for various matters, including 15 votes on approving the House Journal and 30 votes on ordering the previous question on bills and resolutions, as well as providing appropriations for governmental purposes.

Votes, to either deliver the final Yea votes to propel a Republican-based amendment to approval, or deliver the final No votes needed to defeat a Democratic-based amendment. In this way, the Republican Party benefitted 100% of the time on Maverick-altering votes. Those votes' summaries follow:

The Ten House Votes Where Mavericks Mattered

Roll Call Vote	Amendment Offered By	Description	Outcome	Mavericks Affecting Outcome
68	Representative Walberg (R-MI)	Reduces funding for the National Endowment for the Arts by $20.594 million	Approved 217 Ayes to 209 Noes	3 Democrats voted Aye; 22 Republicans voted No
111	Representative McClintock (R-CA)	Prohibiting use of funds for the Klamath Dam Removal and Sedimentation Study	Approved 215 Ayes to 210 Noes	5 Democrats voted Aye
218	Representative Shuster (R-PA)	Places new requirements on the FAA rulemaking process	Approved 215 Ayes to 209 Noes	6 Democrats voted Aye; 25 Republicans voted No
287	Representative Jackson Lee (D-TX)	Requires notice of rescinded Health Care Bill funds for school health center construction	Failed 207 Ayes to 218 Noes	9 Democrats voted No
288	Representative Pallone (D-NJ)	Requires a GAO study to determine neediest school districts for school-based health centers	Failed 205 Ayes to 210 Noes	8 Democrats voted No
306	Representative Deutch (D-FL)	Prohibits an exclusive venue in the Fifth Circuit for civil actions relating to the leasing of Federal lands in the Gulf of Mexico for energy development, production and exploration.	Failed 205 Ayes to 222 Noes	24 Republicans voted Aye; 10 Democrats voted No
373	Representative McGovern (D-MA)	Requires plan and timeframe on accelerated transition of military operations to Afghan authorities	Failed 204 Ayes to 215 Noes	8 Democrats voted No

Roll Call Vote	Amendment Offered By	Description	Outcome	Mavericks Affecting Outcome
428	Representative Richardson (D-CA)	Reduce Farm Service Agency funds by $10 million increases funds for the Commodity Assistance Program	Failed 200 Ayes to 224 Noes	19 Democrats voted No
550	Representative Wu (D-OR)	Transfers $60.5 million in funds from DOE Administration to Energy Efficiency and Renewable Energy Department	Failed 196 Ayes to 228 Noes	18 Democrats voted No
657	Representative Scalise (R-LA)	Decreases the Office of the Secretary in the Department of the Interior by $420,000	Approved 215 Ayes to 213 Noes	3 Democrats voted Aye; 25 Republicans voted No

CONCLUSION

Tracking the Maverick Vote through the first seven months of the 112th Congress revealed that the party in control in one chamber will enjoy Maverick Votes from minority party Members most often, and in the House, these votes turned into real results, directly propelling four Republican amendments to success and defeating seven Democratic amendments.

A Maverick Voting forecast would certainly aid the party in control in determining whether they have adequate support to pass legislation. Often these votes come from the minority party and Members with greater seniority. Maverick voting is especially notable when the Maverick Voters form a loose voting bloc of their own. For example, Blue Dog Democrats accounted for a disproportionately high rate of Maverick Votes, voting with the Republican Party six times more often than other Members in the House. In this way, my study lends tangible voting record-support for Blue Dog Democrats' claim of "promoting positions which bridge the gap between ideological extremes."[21]

But a lot of Members cast Maverick Votes who were neither

[21] *Blue Dog Membership*, *supra* note 17.

Blue Dog Democrats nor senior legislators. These votes may be the genuine product of one Member from a unique district, representing his/her own constituency with its own set of interests. I set out, in the Appendix, all of the Maverick Votes during the study period, with the hope that future research and study will reveal other patterns and predictions about Maverick Votes.

President John F. Kennedy observed that "the legislator has some responsibility to conciliate those opposing forces within his state and party and to represent them in the larger clash of interests on the national level; and he alone knows that there are few if any issues where all the truth and all the right and all the angels are on one side."[22] In that spirit, maybe Maverick Voting proves that party lines are just one factor among many considered as a Member prepares to enter the Senate or House chamber to join colleagues and cast a vote.

APPENDIX I

Senate Maverick Voting

Senator	Maverick Votes
Brown (R-MA)	9
Collins (R-ME)	9
Nelson (D-NE)	8
Snowe (R-ME)	7
Murkowski (R-AK)	6
Kirk (R-IL)	4
Manchin (D-WV)	4
Cochran (R-MS)	3
Lugar (R-IN)	3
Pryor (D-AR)	3
Reid (D-NV)	3
Alexander (R-TN)	2
DeMint (R-SC)	2
Kyl (R-AZ)	2
Landrieu (D-LA)	2
Lee (R-UT)	2
McCaskill (D-MO)	2
Paul (R-KY)	2
Shelby (R-AL)	2

[22] JOHN F. KENNEDY, PROFILES IN COURAGE 5 (1955).

Senator	Maverick Votes
Baucus (D-MT)	1
Begich (D-AK)	1
Blumenthal (D-CT)	1
Blunt (R-MO)	1
Cantwell (D-WA)	1
Johanns (R-NE)	1
Johnson (D-SD)	1
Klobuchar (D-MN)	1
Levin (D-MI)	1
Rockefeller (D-WV)	1
Tester (D-MT)	1
Udall (D-CO)	1
Vitter (R-LA)	1
Warner (D-VA)	1
Webb (D-VA)	1

House Maverick Voting

(*no longer in Congress)

Representative	Maverick Votes
Boren (D-OK)	201
Altmire (D-PA)	160
Peterson (D-MN)	147
Ross (D-AR)	146
Jones (R-NC)	130
Matheson (D-UT)	130
Shuler (D-NC)	106
Costa (D-CA)	105
McIntyre (D-NC)	81
Holden (D-PA)	77
Cardoza (D-CA)	72
Chandler (D-KY)	72
Donnelly (D-IN)	71
Owens (D-NY)	69
Barrow (D-GA)	65
Cuellar (D-TX)	65
Reichert (R-WA)	58
Gibson (R-NY)	57
Critz (D-PA)	55
Cooper (D-TN)	54
Green, Gene (D-TX)	54
Kissell (D-NC)	54
Rahall (D-WV)	54
Fitzpatrick (R-PA)	53
Paul (R-TX)	53

Representative	Maverick Votes
LoBiondo (R-NJ)	48
Smith (R-NJ)	48
Costello (D-IL)	46
Hanna (R-NY)	46
Schrader (D-OR)	46
Johnson (R-IL)	43
Bass (R-NH)	42
LaTourette (R-OH)	36
Dold (R-IL)	33
Gerlach (R-PA)	32
Harris (R-MD)	32
Meehan (R-PA)	32
Platts (R-PA)	32
Amash (R-MI)	31
Fortenberry (R-NE)	31
Boswell (D-IA)	29
Dent (R-PA)	29
Lipinski (D-IL)	29
Hayworth (R-MD)	26
Ros-Lehtinen (R-FL)	26
Wolf (R-VA)	25
Young (R-FL)	25
Bartlett (R-MD)	22
Duncan (R-TN)	22
Peters (D-MI)	22
Lance (R-NJ)	21
Biggert (R-IL)	20
Petri (R-WI)	20
Bilbray (R-CA)	19
Bishop (D-GA)	19
Campbell (R-CA)	19
Carney (D-DE)	19
McClintock (R-CA)	19
Griffith (R-VA)	18
Grimm (R-NY)	17
Hinojosa (D-TX)	17
Smith (D-WA)	17
Burgess (R-TX)	16
DeFazio (D-OR)	16
Heinrich (D-NM)	16
Buchanan (R-FL)	15
King (R-NY)	15
Rohrabacher (R-CA)	15
Barletta (R-PA)	14
Richardson (D-CA)	14

Representative	Maverick Votes
Ruppersburger (D-MD)	14
Emerson (R-MO)	13
Green, Al (D-TX)	13
Sensenbrenner (R-WI)	13
Turner (R-OH)	13
Wittman (R-VA)	13
Bono Mack (R-CA)	12
Coble (R-NC)	12
Diaz-Balart (R-FL)	12
Gonzalez (D-TX)	12
Heck (R-NV)	12
Paulsen (R-MN)	12
Perlmutter (D-CO)	12
Rigell (R-VA)	12
Simpson (R-ID)	12
Bachmann (R-MN)	11
Connolly (D-VA)	11
Frelinghuysen (R-NJ)	11
Posey (R-FL)	11
Richmond (D-LA)	11
Visclosky (D-IN)	11
Cassidy (R-LA)	10
Chaffetz (R-UT)	10
Cole (R-OK)	10
Gohmert (R-TX)	10
Goodlatte (R-VA)	10
Herrera Beutler (R-WA)	10
Jackson Lee (D-TX)	10
Michaud (D-ME)	10
Murphy (R-PA)	10
Polis (D-CO)	10
Quigley (D-IL)	10
Reyes (D-TX)	10
Runyan (R-NJ)	10
Shimkus (R-IL)	10
Berkley (D-NV)	9
Bilirakis (R-FL)	9
Broun (R-GA)	9
Capito (R-WV)	9
Flake (R-AZ)	9
Kind (D-WI)	9
Lewis (R-CA)	9
Lummis (R-WY)	9
McCotter (R-MI)	9
Miller (R-MI)	9

Representative	Maverick Votes
Reed (R-NY)	9
Renacci (R-OH)	9
Stivers (R-OH)	9
Upton (R-MI)	9
Walden (R-OR)	9
Blumenauer (D-OR)	8
Coffman (R-CO)	8
Forbes (R-VA)	8
Himes (D-CT)	8
Huelskamp (R-KS)	8
Inslee (D-WA)	8
King (R-IA)	8
Kinzinger (R-IL)	8
Mack (R-FL)	8
McKinley (R-WV)	8
Mulvaney (R-SC)	8
Murphy (D-CT)	8
Terry (R-NE)	8
Thompson (R-PA)	8
Walsh (R-IL)	8
Benishek (R-MI)	7
Bishop (R-UT)	7
Dicks (D-WA)	7
Franks (R-AZ)	7
Hochul (D-NY)	7
Kaptur (D-OH)	7
Labrador (R-ID)	7
Pastor (D-AZ)	7
Rogers (R-AL)	7
Scott, David (D-GA)	7
Stearns (R-FL)	7
Webster (R-FL)	7
Young (R-AK)	7
Barton (R-TX)	6
Cleaver (D-MO)	6
Davis (R-KY)	6
Eshoo (D-CA)	6
Kucinich (D-OH)	6
Larsen (D-WA)	6
Loebsack (D-IA)	6
Lofgren, Zoe (D-CA)	6
Poe (R-TX)	6
Ribble (R-WI)	6
Schilling (R-IL)	6
Schweikert (R-AZ)	6

Representative	Maverick Votes
Sewell (D-AL)	6
Speier (D-CA)	6
Tiberi (R-OH)	6
Whitfield (R-KY)	6
Wu (D-OR)*	6
Camp (R-MI)	5
Carson (D-IN)	5
Cohen (D-TN)	5
Crenshaw (R-FL)	5
Duffy (R-WI)	5
Frank (D-MA)	5
Granger (R-TX)	5
Graves (R-MO)	5
Hurt (R-VA)	5
Johnson (D-TX)	5
Keating (D-MA)	5
Kingston (R-GA)	5
Latham (R-IA)	5
McCarthy (D-NY)	5
Meeks (D-NY)	5
Pearce (R-NM)	5
Pitts (R-PA)	5
Rivera (R-FL)	5
Schmidt (R-OH)	5
Scott, Austin (R-GA)	5
Walz (D-MN)	5
West (R-FL)	5
Baca (D-CA)	4
Boustany (R-LA)	4
Brooks (R-AL)	4
Brown (D-FL)	4
Clay (D-MO)	4
Clyburn (D-SC)	4
Cravaack (D-MN)	4
Dreier (R-CA)	4
Farenthold (R-TX)	4
Garrett (R-NJ)	4
Gingrey (R-GA)	4
Gutierrez (D-IL)	4
Hoyer (D-MD)	4
Johnson (R-OH)	4
Kelly (R-PA)	4
Landry (R-LA)	4
Lucas (R-OK)	4
Luján (D-NM)	4

Representative	Maverick Votes
Lungren (R-CA)	4
Manzullo (R-IL)	4
McCaul (R-TX)	4
McKeon (R-CA)	4
Miller (R-FL)	4
Moran (D-VA)	4
Myrick (R-NC)	4
Noem (R-SD)	4
Rehberg (R-MT)	4
Rogers (R-KY)	4
Ryan (R-WI)	4
Scalise (R-LA)	4
Schock (R-IL)	4
Schwartz (D-PA)	4
Shuster (R-PA)	4
Sires (D-NJ)	4
Thompson (D-MS)	4
Aderholt (R-AL)	3
Bachus (R-AL)	3
Berg (R-ND)	3
Bonner (R-AL)	3
Brady (R-TX)	3
Canseco (R-TX)	3
Carnahan (D-MO)	3
Chu (D-CA)	3
Conyers (D-MI)	3
Engel (D-NY)	3
Fattah (D-PA)	3
Foxx (R-NC)	3
Gallegly (R-CA)	3
Grijalva (D-AZ)	3
Holt (D-NJ)	3
Honda (D-CA)	3
Huizenga (R-MI)	3
Kildee (D-MI)	3
Marino (R-PA)	3
Pingree (D-ME)	3
Rogers (R-MI)	3
Royce (R-CA)	3
Schiff (D-CA)	3
Scott (D-VA)	3
Stark (D-CA)	3
Thompson (D-CA)	3
Thornberry (R-TX)	3
Waters (D-CA)	3

Representative	Maverick Votes
Welch (D-VT)	3
Woodall (R-GA)	3
Ackerman (D-NY)	2
Andrews (D-NJ)	2
Berman (D-CA)	2
Bishop (D-NY)	2
Braley (D-IA)	2
Burton (R-IN)	2
Calvert (R-CA)	2
Chabot (R-OH)	2
Conaway (R-TX)	2
Culberson (R-TX)	2
Davis (D-IL)	2
Denham (R-CA)	2
DesJarlais (R-TN)	2
Dingell (D-MI)	2
Edwards (D-MD)	2
Farr (D-CA)	2
Garamendi (D-CA)	2
Gosar (R-AZ)	2
Graves (R-GA)	2
Guthrie (R-KY)	2
Hall (R-TX)	2
Hastings (D-FL)	2
Issa (R-CA)	2
Jordan (R-OH)	2
Long (R-MO)	2
Lynch (D-MA)	2
Marchant (R-TX)	2
Matsui (D-CA)	2
McCollum (D-MN)	2
McDermott (D-WA)	2
McMorris Rodgers (R-WA)	2
McNerney (D-CA)	2
Miller (D-CA)	2
Moore (D-WI)	2
Olver (D-MA)	2
Payne (R-NJ)	2
Price (R-GA)	2
Roby (R-AL)	2
Roe (R-TN)	2
Rokita (R-IN)	2
Rooney (R-FL)	2
Roskam (R-IL)	2
Rothman (D-NJ)	2

Representative	Maverick Votes
Ryan (D-OH)	2
Sanchez, Loretta (D-CA)	2
Sherman (D-CA)	2
Smith (R-TX)	2
Southerland (R-FL)	2
Sullivan (R-OK)	2
Tipton (R-CO)	2
Tonko (D-NY)	2
Watt (D-NC)	2
Waxman (D-CA)	2
Woolsey (D-CA)	2
Young (R-IN)	2
Alexander (R-LA)	1
Austria (R-OH)	1
Buerkle (R-NY)	1
Butterfield (D-NC)	1
Cantor (R-VA)	1
Capuano (D-MA)	1
Carter (R-TX)	1
Castor (D-FL)	1
Clarke (D-NY)	1
Crowley (D-NY)	1
DeGette (D-CO)	1
Deutch (D-FL)	1
Doggett (D-TX)	1
Duncan (R-SC)	1
Ellison (D-MN)	1
Fincher (R-TN)	1
Fleischmann (R-TN)	1
Fleming (R-LA)	1
Flores (R-TX)	1
Fudge (D-OH)	1
Gowdy (R-SC)	1
Guinta (R-NH)	1
Hanabusa (D-HI)	1
Harman (D-CA)*	1
Heller (R-NV)	1
Hensarling (R-TX)	1
Herger (R-CA)	1
Higgins (D-NY)	1
Hinchey (D-NY)	1
Hirono (D-HI)	1
Hultgren (R-IL)	1
Hunter (R-CA)	1
Israel (D-NY)	1

Representative	Maverick Votes
Jenkins (R-KS)	1
Johnson (D-GA)	1
Johnson, Sam (R-TX)	1
Lamborn (R-CO)	1
Langevin (D-RI)	1
Lankford (R-OK)	1
Lee (D-CA)	1
Lewis (D-GA)	1
Lowey (D-NY)	1
Maloney (D-NY)	1
McCarthy (R-CA)	1
McGovern (D-MA)	1
Miller (D-NC)	1
Miller (R-CA)	1
Napolitano (D-CA)	1
Nunes (R-CA)	1
Pascrell (D-NJ)	1
Rangel (D-NY)	1
Rush (D-IL)	1
Sánchez, Linda T. (D-CA)	1
Schakowsky (D-IL)	1
Scott (R-SC)	1
Serrano (D-NY)	1
Slaughter (D-NY)	1
Smith (R-NE)	1
Stutzman (R-IN)	1
Sutton (D-OH)	1
Tierney (D-MA)	1
Towns (D-NY)	1
Tsongas (D-MA)	1
Van Hollen (D-MD)	1
Velázquez (D-NY)	1
Walberg (R-MI)	1
Wasserman Schultz (D-FL)	1
Weiner (D-NY)*	1
Westmoreland (R-GA)	1
Wilson (R-SC)	1
Yoder (R-KS)	1

# # #

THE LEADERSHIP LEGACY OF JUSTICE JOHN PAUL STEVENS

Craig D. Rust[†]

What defines Justice John Paul Stevens's tenure as one of the longest serving members of the federal judiciary in the history of the United States? Legacies of Supreme Court justices are sometimes shaped by landmark decisions, and Justice Stevens has produced many, such as his opinion in *Chevron v. Natural Resources Defense Council*,[1] the most cited decision in the Court's history.[2] In other cases, a justice might be better remembered for his or her personal characteristics or ideology.[3] And in the months since Justice Stevens's retirement, commentators have praised his reputation as a consensus-builder[4] and leader of the

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[1] 467 U.S. 837 (1984).

[2] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 CHI. L. REV. 823, 823 (2006).

[3] Of course, all of these scenarios presuppose that the members of the public can identify a given justice at all. According to one study, only 8% of Americans could name John Paul Stevens as a U.S. Supreme Court Justice, which tied for the third lowest name recognition of any of the justices that finished the 2009 Term together. *Two-Thirds of Americans Can't Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey*, PR Newswire, June 1, 2010, *available at* www.prnewswire.com/news-releases/two-thirds-of-americans-cant-name-any-us-supreme-court-justices-says-new-findlawcom-survey-95298909.html.

[4] Joan Biskupic, *Justice Stevens to retire from Supreme Court*, USA TODAY, Apr. 12,

Court's liberal bloc.[5]

However, from a quantitative standpoint, something else stands out immediately when one considers Justice Stevens's legacy – the sheer, record-breaking number of dissents[6] he has authored. The 720 dissents he authored during his tenure on the Court[7] are more than any other justice in history; indeed, his output is roughly fifty percent greater than that of the second most prolific justice, Justice William O. Douglas (with 486).[8] Moreover, even when Stevens agreed with his colleagues, he often insisted on writing separately. Thus, one who simply looked at his opinion authorship statistics in a vacuum might get the impression that Stevens was one of the most disagreeable people to ever don a black robe.[9] Such, of course, is not Stevens's reputation – he is widely regarded as being cordial and professional with both his peers and those appearing before him.[10]

So what do the statistics tell us about Justice Stevens's legacy? This essay proposes that these statistics shed a unique light on the type of leadership he exhibited on the Court during his nearly thirty-five terms there. His leadership had very little in common with

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2010, *available at* www.usatoday.com/news/washington/judicial/2010-04-09-justice-stevens-retire_N.htm.

[5] Robert Barnes, *After years as justice, John Paul Stevens wants what's 'best for the court'*, WASH. POST, April 4, 2010, *available at* www.washingtonpost.com/wp-dyn/content/article/2010/04/03/AR2010040301693.html.

[6] Ross E. Davies et al., *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 465, 479-80 (2010), *available at* www.greenbag.org/v13n4/v13n4_davies_rust_aft.pdf.

[7] The complete set of statistics collected for Justice Stevens can be found on the website for the academic journal the *Green Bag*. *See* Green Bag trading cards, www.greenbag.org/sluggers/sluggers_cards_and_stats.html. Unless otherwise noted, the statistics referenced in this essay can all be found at this location on the *Green Bag*'s website.

[8] LEE EPSTEIN et al., THE SUPREME COURT COMPENDIUM 635 (4th ed. 2007).

[9] In Justice Stevens' early years on the Court, his habit of writing separate opinions did not exactly endear him to the other justices on the Court. *See* BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 201 (2010).

[10] *See* Pamela Harris, *The importance of Stevens' good manners*, SCOTUSBLOG (Apr. 26, 2010, 3:32 PM), www.scotusblog.com/2010/04/the-importance-of-stevens-good-manners/.

the unifying, consensus-building approaches exhibited by prominent justices such as Chief Justice John Marshall, or aspired to by current Chief Justice John Roberts.[11] Instead, Stevens led by example, prolifically recording his own thoughts on the law and allowing them to influence generations of jurists and scholars, though his position may not have won the day or even garnered much support among his colleagues, initially.

Part I of this essay briefly describes what one can learn from Justice Stevens's opinion authorship statistics and discusses the process of compiling that data. Part II analyzes those statistics in the context of Stevens's reputation as a leader and a consensus-builder and argues that this label does not neatly fit his judicial style. Finally, Part III notes that while his opinion authorship statistics may not indicate that Stevens had any particularly powerful ability (or inclination) to unify all of his colleagues to join his opinion in any given case, his citation statistics, which show that Stevens was cited by name in well over 10,000 federal court opinions during the course of his career, indicate that his opinions were profoundly influential to others within the federal judiciary.

I. THE DATA

Distilling a judge's work into numerical form based on the number and type of opinions that judge or justice authored, of course, tells one little to nothing of the substantive nuances of that jurist's view of the law. The raw numbers do not reveal (directly, at least) that Justice Breyer believes in a living Constitution, while Justice Scalia believes in a "dead Constitution."[12] However, statistics reveal patterns which illustrate the jurist's general temperament and style in a way that an analysis of individual opinions might not.

Take, for example, *Boumediene v. Bush*.[13] Commentators cite this particular case as a prime example of Justice Stevens's consensus-

[11] M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 283-84 (2007).

[12] Interview with Justice Antonin Scalia with NPR (April 28, 2008), *available at* www.npr.org/templates/story/story.php?storyId=90011526.

[13] 553 U.S. 723 (2008).

building approach, reasoning that Stevens decided to assign the responsibility of authoring the Court's opinion to Justice Kennedy, knowing that Kennedy would be less likely that he would withdraw his support for Stevens's position if Kennedy could control the scope of the opinion.[14] Assuming this is true, Justice Stevens certainly deserves credit for exhibiting leadership skills through his savvy use of the Court's internal procedures in that particular case. However, this type of anecdotal evidence carries the risk of losing sight of the forest for the trees. Justice Stevens spent almost forty years on the federal bench; his legacy as a jurist deserves to be tested by a more comprehensive methodology, a more robust, quantitative model.

Testing these types of theories in a quantitative fashion is one of the primary aims of the research underlying this essay. For example, the total number of opinions written by a judge might demonstrate that judge's "productivity" on the bench. Specific outcomes, such as the number of majority opinions written, the number of unanimous majority opinions, and the number of concurrences, provide further data on how successful a judge was in persuading others that he had provided the correct basis for ruling on a case. Additionally, the number of times a judge has been cited specifically by name[15] by one

[14] *See, e.g.*, Jonathan H. Adler, *The Kennedy Court Comes of Age*, THE VOLOKH CONSPIRACY (Apr. 10, 2010, 9:38 AM), volokh.com/2010/04/10/the-kennedy-court-comes-of-age/.

[15] The citation counts compiled as part of the *Green Bag*'s research into Stevens's career underlying this Essay focused on the number of times Stevens was cited by name, rather than merely how many times a majority opinion penned for the Court by Stevens was cited. For example, a general citation to *Chevron* would not count, but a textual reference to Stevens as the author of *Chevron* would. After all, all federal courts, particularly at the district and circuit court levels, are compelled to cite certain precedents when faced with a situation directly governed by those precedents. Judges in these situations may not agree with the legal rule established by the opinion they are citing, but they generally do not have the discretion (or, in the case of the Supreme Court, the inclination to overrule precedent) to disregard that opinion. Therefore, a citation to a Supreme Court majority opinion may not reflect the persuasiveness of that opinion, but rather the dutiful observance of the constraints that bind that jurist. This is not to imply that Justice Stevens would not fare well in a study analyzing the number of citations to

of his fellow Article III appointed brethren may serve as a proxy for how influential the judge has been over his career.[16]

The compilation of this data on a term-by-term basis allows one to identify the opinion writing tendencies and trends of a given member of the Court. With respect to this essay, it allows one to measure how effective Justice Stevens was in his ability to persuade other members of the court to subscribe to his view of the law. Rather than relying on anecdotal accounts for proof of Justice Stevens's strategic prowess in obtaining votes to support his position in any particular case, the statistics provide a more reliable view of Stevens's success in this regard throughout his career.

The process by which this data was collected has been described in painstaking detail elsewhere.[17] In short, the citation data was collected by extensively searching through online legal databases such Westlaw for any specific mention of Stevens. The opinion authorship data was pulled from the opinion tracking data collected by the researchers who maintain the Supreme Court Database.[18]

II.
JUSTICE STEVENS AS A UNIFIER & CONSENSUS BUILDER

Following Stevens's retirement from the Supreme Court, commentators naturally sought to summarize his tenure. The popu-

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one of his opinions for the Court. In fact, Stevens's opinion in *Chevron* is "the most cited case in modern public law." Miles & Sunstein, *supra* note 2.

[16] Citation counts have been used for a variety of purposes in the past, such as for measuring a judge's "greatness" or "insignificance," fitness to be appointed to the Supreme Court, and the influence of the judge within a particular jurisdiction. Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1284-85 (2007).

[17] *See* Davies et al., *supra* note 6 (discussing which statistics we collected for Justice Stevens and how we collected them); *see also* Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers*, 13 GREEN BAG 2D 215, 219-23 (2010) (discussing the same process used for collecting data for the Chief Justice John Roberts trading card).

[18] The Supreme Court Database, scdb.wustl.edu/. A spreadsheet detailing all of the statistics used in this article is also available on the *Green Bag*'s website. *See supra*, note 7.

lar narrative went something like this: While Justice Stevens was initially regarded as idiosyncratic or a "maverick" during his early years on the Supreme Court, he transformed into a coalition builder and leader of the Court's liberal wing over the last fifteen years of his tenure.[19] This essay argues that the former characterization of Stevens's career is supported by the statistics. The latter is not.

A. The Early Years

After spending a period of time in private practice, John Paul Stevens joined the Seventh Circuit in late 1970. Then-Judge Stevens wasted no time in establishing that he was an independent thinker, dissenting twelve times in his first term[20] on the bench, which represented a dissent rate of over 13 percent.[21] By comparison, Judge Stevens wrote twenty-seven majority opinions, representing about 30 percent[22] of the cases he participated in during that first Term.

Over the next several years, Stevens wrote fewer dissents and a

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[19] *See, e.g.*, Barnes, *supra* note 5; Jess Bravin, *Stevens Evolved From Court Loner to Liberal Wing's Leader*, WALL ST. J., June 30, 2010, *available at* online.wsj.com/article/SB10001424052748703374104575337264290709470.html; Greg Stohr, *Justice Stevens, Court's `Great Liberal Voice,' Stepping Down*, BLOOMBERG, Apr. 9, 2010, *available at* www.bloomberg.com/news/2010-04-09/john-paul-stevens-to-retire-as-u-s-supreme-court-s-great-liberal-voice-.html.

[20] The Circuit Courts of Appeals do not divide each session into terms as the Supreme Court does. For the purposes of tracking year by year results, however, this Essay divides each year into terms as is the practice of the Supreme Court; namely, each year or term begins on the first Monday in October, and runs until the first Monday in the following October. *See* A Brief Overview of the Supreme Court, www.supremecourt.gov/about/briefoverview.aspx.

[21] For the purposes of this Essay, the dissent rate constitutes the number of dissenting opinions a justice authored, divided by the total number of other types of opinions he wrote and joined (including per curiam decisions). This and other ratios used in this article were calculated using the numbers compiled for the Justice Stevens trading card, see *supra* note 7, and are listed by Term in Appendices A & B.

[22] The majority rate is calculated by dividing the number of majority opinions a judge or justice authored by the total number of other types of opinions he wrote or merely joined (including per curiam decisions). These totals can be found in Appendices A & B.

greater number of concurring opinions. During his entire tenure on the Seventh Circuit, spanning a little more than five years and parts of six terms, Stevens wrote a total of forty-one dissenting opinions, representing a dissent rate of approximately 7 percent. Stevens also penned twenty-two concurring opinions and 164 majority opinions, and joined more than 350 others.[23] By comparison, Chief Justice John G. Roberts wrote three dissents, three concurring opinions, and forty-three majority opinions in his roughly two terms on the D.C. Circuit. Then-Judge Roberts's dissent rate was a mere 1.5 percent.[24]

Upon his ascension to the Supreme Court, Stevens dramatically increased his dissent rate. During his first (partial[25]) term on the Court in 1975, Stevens wrote nineteen dissents, representing a dissent rate just shy of 20 percent. During his first full term on the Court, Stevens added twenty-nine dissents, which equated to a dissent rate of over 16 percent, more than double his average during his Seventh Circuit tenure. Thus, from the outset, Stevens made it very clear that he would not defer to the opinions of the other justices on the Court simply because they were senior to him.

Also noteworthy are the number of concurring opinions that Justice Stevens wrote during his early years on the Court. A concurring opinion indicates that the author agrees with the majority's ruling – but not with (at least parts of) the majority's reasoning. For example, a justice will often use a concurring opinion to express his disa-

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[23] Interestingly, an article profiling Stevens in the *New York Times* after President Ford nominated Stevens to the Supreme Court evaluated eleven opinions that Stevens had written while on the Seventh Circuit; six of these were dissents. This pre-nomination focus on his dissents, in retrospect, was prophetic, given that Stevens would go on to write the most dissents in Supreme Court history.

[24] This Essay often uses Chief Justice Roberts as a point of comparison for Justice Stevens, both because Roberts has expressed a dramatically different opinion on the value of dissent and separate opinion authorship than Stevens, and because the same opinion authorship data has been collected for both Roberts and Stevens. *See supra*, note 7.

[25] *See* Biographies of Current Justices of the Supreme Court, *available at* www.supremecourt.gov/about/biographies.aspx (noting that Stevens took his seat on the Court on December 19, 1975).

greement with the method of analysis employed by the majority, even if it led the majority to the same conclusion as the author. Thus, ironically, a concurring opinion may express as much hostility toward the majority's position as a dissent.

By this measure, Stevens also embodied his reputation as a "maverick." During the 1975 and 1976 terms, Stevens wrote twelve and seventeen concurring opinions, respectively. This amounts to a concurrence rate of over 12 percent during the 1975 term, and nearly 10 percent during 1976. These rates represent a sharp uptick from the 3.75 percent concurrence rate posted by Stevens while on the Seventh Circuit. In fact, during his entire tenure on the Supreme Court, his concurrence rate only dipped below 4 percent once, during the 2001 term. It is one thing to refuse to join an opinion reaching a result that one disagrees with, even as a junior justice; it seems slightly more brazen to refuse to defer to the reasoning employed by a senior justice who agrees regarding the ultimate ruling. Stevens, of course, did both.

Another way to evaluate the accuracy of the characterization of Stevens's early years on the Court as "idiosyncratic" is to combine Stevens's dissent and concurrence rates into a "separate opinion" rate. This statistic represents the rough percentage of cases in which Justice Stevens felt compelled to document his view of the case because it differed (to some degree) with that of the majority. In this way, one can see the true extent of Stevens's refusal to defer to the opinions of other justices, or put another way, the low value he appeared to place upon consensus.[26] During Stevens's tenure on the

[26] This is not to suggest that deferral and a desire to achieve conformity are necessarily admirable traits. This essay expresses no opinion on that normative question, and certainly does not suggest a judge should sign onto a wrongly decided opinion simply so the Court can present a united front to the public. However, this lack of deference is noteworthy in the sense that one might expect a newcomer to any job to survey his new professional landscape and "settle in" before pointing out the flaws of his or her peers, particularly if that person intended to take on a leadership role within that group later on. Thus, Stevens' approach during his early years on the Court appears at to run counter to what one might intuitively expect to see from one who intends on eventually establishing a leadership role in his or her new environment.

Seventh Circuit, his separate opinion rate averaged 10.7 percent. During the Supreme Court's 1975 term this tripled to nearly 32 percent. Certainly, Stevens's disagreement with the majority in some respect in almost one-third of the Court's cases in his first term validates the commonly held belief that he started off as something of a "maverick," unafraid to express his opinions even when they failed to garner the support of four other justices on the Court.

B. The "Transformation"

While the statistics support the general characterization of Justice Stevens's early years as an "idiosyncratic maverick," they are inconsistent with the assertion that he transformed into a liberal leader and consensus builder during the latter half of his tenure on the bench. The commonly accepted narrative explains that after liberal icons such as Justices William Brennan and Thurgood Marshall retired, Stevens stepped in and filled a vacuum of leadership on the Court's left-leaning wing.[27] Indeed, with six justices retiring from the Court between 1986 and 1994, one would expect that any transformation in Stevens's leadership style would begin to manifest itself during these years, or at least very shortly thereafter. For example, one would expect a leader of the Court and a consensus builder to write more majority opinions, perhaps even unanimous ones, and fewer concurrences and dissents as that justice exercises a greater degree of influence amongst his or her peers. The statistics demonstrate, however, Stevens's continued penchant for frequently publishing his disagreements with the majority's view.[28]

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[27] Stohr, *supra* note 19.

[28] An intangible quality such as leadership is generally tough to quantify in any profession, let alone within an institution like the Supreme Court, which conducts its deliberations behind closed doors and out of the public view. A justice could potentially "lead" in a variety of ways, such as unifying the court behind a majority opinion, or by using his or her seniority to assign the responsibility for writing a majority opinion to another justice who would otherwise be on the fence regarding an issue, as is sometimes speculated to have been the case in *Boumediene*. *See, e.g.*, *supra* Part I. Even a dissent in a 5-4 decision could be viewed as an exercise of leadership ability, particularly when that dissent obtains the votes of all the dis-

To illustrate, Justice Brennan retired in 1990, and Justice Marshall retired just prior to the beginning of the 1991 term. Yet between the 1990 and 1991 terms, Stevens's dissent rate dropped less than 0.7 percent (he authored only one less dissent in the 1991 term). And during the same period, his concurrence rate jumped from 4.7 percent to 9.5 percent. Accordingly, his separate opinion rate increased from 23.6 percent to 27.8 percent. But his majority rate[29] dipped from over 11 percent to 9.5 percent. Significantly, in each category Stevens was simply being Stevens – none of his 1991 opinion rates deviated appreciably from his Supreme Court career averages in those categories.[30]

In 1994, Justice Blackmun retired and Stevens assumed the position as the senior member of the Court's liberal bloc.[31] Yet Stevens's majority opinion rate dropped between the 1993 and 1994 terms, while his dissent rate jumped nearly 7 percent from 1993 and 1994. His dissent rate continued to climb the next year, reaching a career high 27.5 percent in 1995. During the 1996 and 1997 terms, he returned to levels in line with his career norms. However, his dissent rate again spiked above 25 percent in both 1998 and

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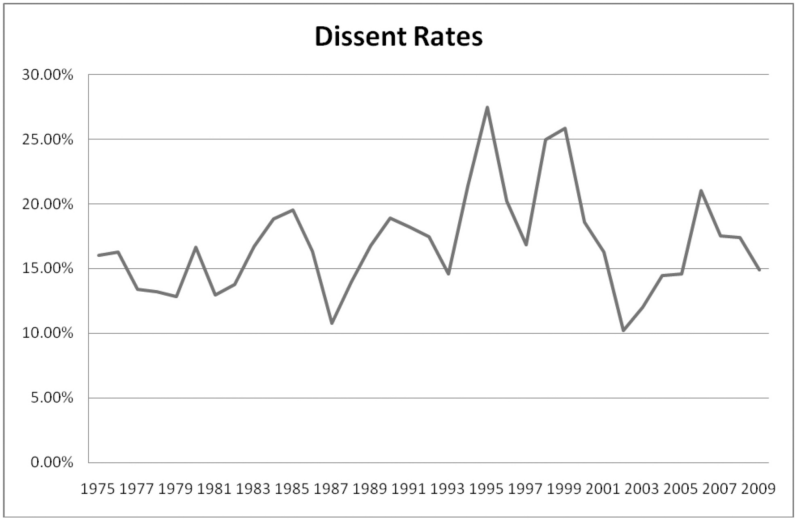
senting justices in the case. Not all of these factors can be accounted for by tracking the number and types of opinions written by a justice. In particular, statistically tracking a justice's influence according to how persuasively that justice used his or her seniority to strategically assign is certainly outside the scope of this Essay, though others have attempted to do so. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 390-94 (2002). However, the opinion tracking data we have compiled can give us a general idea of what type of leadership role Justice Stevens filled on the court, both on a year-by-year and macro level.

[29] For the purposes of this Essay, Stevens' "majority opinions" include all opinions in which Stevens was able to command a majority of votes for at least part of the opinion. It does not include plurality opinions, where Stevens may have written the opinion of the court, but it did not attract the votes necessary to be included as a majority opinion.

[30] Over the course of his Supreme Court career, Stevens averaged a 16.6% dissenting opinion rate, a 9% concurring opinion rate, a 25.6% separate opinion rate, and an 8.4% majority opinion rate.

[31] The same nine justices would then preside over the Court until the death of Chief Justice Rehnquist in 2005.

1999. In fact, of the six terms of Stevens's career in which he averaged a dissent rate of over 20 percent, five of those came between 1994-1999, the period in which Stevens ostensibly took on a leadership and consensus building role within the Court.



Even Stevens's relatively steady "majority opinion" rates during this period do not tell the whole story. Although his majority rate between 1994-1999 dropped by only 1 percent compared to his rate during the previous six terms (from 1988-1993), six of his "majority opinions" were actually mere "majority in part" opinions in which he convinced a majority of the court to join only *part* of his opinion. Thus, in 12.5 percent of the cases in which he ostensibly wrote the majority opinion between 1994 and 1999, Stevens was unable to convince four other justices to join his opinion in its entirety. In contrast, in the eighteen previous terms (from 1975-1993), Stevens had written only three such "majority in part" opinions, accounting for a mere 1.2 percent of his total majority opinions.

These increases in Stevens's dissent rates, and decreases in majority rates, were not limited to the late 1990's. If one splits his career into two segments, the "maverick" period from his arrival on

the Court in 1975 until Justice Blackmun retired prior to the 1994 term, and the "leadership" period from the 1994 term until his retirement following the 2009 term, the same results manifest themselves. Stevens's dissent rate during the 1975-1993 period was 15.7 percent; from 1994-2009, it was 18.5 percent. Stevens's majority rate between 1975-1993 was 8.8 percent; from 1994-2009, it was 8.5 percent, (although the drop is more significant if the majority-in-part decisions are subtracted from the totals (8.7 percent to 7.7 percent)).[32]

Despite the statistics' suggestion that Stevens did not assume a greater leadership role in the second half of his career as a justice, one might argue that because the newly appointed justices were generally more conservative than their predecessors, the group of liberals that Stevens led was forced into a minority or dissenting position in more cases. To the extent that Stevens's leadership credentials rest on his ability to get Justices Breyer, Souter, and Ginsburg to join these concurrences and dissents, Stevens demonstrated some aptitude for doing so. In fact, one study of the 1986-1998 Terms found that Justices Breyer and Ginsburg were more likely to join a concurrence or dissent written by Justice Stevens than any other Justice.[33]

However, a few pieces of information emerge from that same study which weaken the argument that Stevens acted as a coalition or consensus builder with regard to the remaining justices on the

[32] Counting a majority in part decision with the rest of the majority opinions can be misleading. A powerful example is the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), in which Justice Stevens wrote for a majority of the justices in striking down the mandatory Federal Sentencing Guidelines in the first part of the opinion. However, Justice Stevens lost Justice Ginsburg's critical vote in describing what the appropriate remedy for the Sixth Amendment violation should be. The difference between Justice Stevens' proposal and that of Justice Breyer (which was adopted by five justices) was stark and has had profound effects on the operation of the federal criminal justice system. *Id.* at 246-47 (describing the differences between Stevens' proposal and Breyer's adopted solution).

[33] *See* SEGAL & SPAETH, *supra* note 28, at 400. Justice Souter voted most often to join concurrences and dissents written by Justice Ginsburg, although Justice Stevens ranked second in this regard. *Id.*

Court. First, Stevens was actually substantially less successful in attracting the votes of Justices Breyer, Souter, and Ginsburg in his special opinions than he had been in obtaining the support of Justices Blackmun, Brennan, and Marshall, members of the outgoing liberal bloc.[34] Second, Stevens clearly lost the battle with his intellectual rival Justice Antonin Scalia for the votes of critical moderate Justices O'Connor and Kennedy during this period, at least when writing these special opinions.[35] Justice O'Connor joined a special opinion written by Scalia in 10.6% of her opportunities to do so, compared to only 5.3% for Stevens; Kennedy joined Scalia's opinions in 17.1% of his opportunities, compared to a mere 2.3% for Stevens.[36] Most importantly, Stevens also received the lowest average number of votes for his concurrences and dissents than *any other justice* during the 1986-1998 Terms.[37] Thus, Stevens's ability to attract liberal votes actually appears to have *decreased* during this period, and he showed less ability to find support from members of the Court at large for his special opinions than any of the other thirteen justices in the study.

Finally, the sheer volume of dissents and separate opinions that Stevens wrote throughout his career also appears to undercut the argument that Stevens acted as a great unifier of the justices at any point. During Stevens's tenure on the Court, he wrote a staggering 720 dissents. According to the *Supreme Court Compendium*, Stevens wrote 234 more dissents than the second most prolific dissenter in Court history, Justice William O. Douglas, penned in his 36 years of judicial service.[38] Justice Scalia, famous for his high profile and sharply worded dissents (often targeted at Stevens), only wrote 208

[34] *Id.* Justices Blackmun, Brennan, and Marshall joined Stevens' special opinions in 19%, 14%, and 18.9% of their opportunities to do so during the terms analyzed by the study, respectively. Justices Breyer, Ginsburg, and Souter joined Stevens' special opinions in 14.6%, 17.1%, and 10.5% of their opportunities, respectively. *Id.*

[35] "Special opinions," as used by the study, are the combined number of concurrences and dissents written by a particular justice. *See id.*

[36] *Id.*

[37] *Id.* at 396-97.

[38] EPSTEIN ET AL., *supra* note 8.

dissents[39] between the 1986 and 2009 terms.[40]

So what does all of this mean? The popular narrative of Justice Stevens's career would have you believe that Stevens's changed from a lone wolf among the justices, into a consensus-building leader of the Court's liberal wing after the retirement of several renowned liberal justices in the mid-1990's. The numbers, however, show that Justice Stevens wrote less for the majority, and wrote separately more often, after he ascended to this supposed leadership position. In fact, for his career, Stevens wrote separately in a historically unprecedented number of cases, even during his later years when he was an alleged liberal consensus builder.

That is not to say that Stevens in no way took on a greater leadership role on the Court during the latter part of his career. These statistics certainly cannot account for all of the Court's internal dynamics and behind the scenes maneuvering. However, these numbers do suggest that, at the very least, Stevens's opinion writing behavior did not reflect the type of change that one would instinctively expect to see given the commonly recited history of his career on the Court.

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[39] Supreme Court Database Analysis, scdb.wustl.edu/analysisCaseListing.php?sid=1101-POTLUCK-3903 (search conducted Mar. 10, 2011).

[40] Again, this essay certainly does not mean to imply that the expression of dissent is inherently antithetical to the exhibition of great leadership skill. Justice Ginsburg has commented that dissents often have great practical value to the justices in the opinion drafting process by exposing glaring weaknesses in an early draft of a majority opinion. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010). In the same article, however, Justice Ginsburg cites with approval Justice Brandeis's view on dissents (as related by John P. Frank), which was that "random dissents . . . weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents . . . need to be saved for major matters if the Court is not to appear indecisive and quarrelsome." *Id.* at 7-8 (citing John P. Frank, Book Review, 10 J. LEGAL EDUC. 401, 404 (1958)). Applying Brandeis's theory on the appropriate role of dissenting opinions, Stevens' penchant for dissenting in every case with which he disagrees with the outcome or reasoning, *see* BARNHART & SCHLICKMAN *supra* note 9 at 165, would appear to diminish the stature of the Court, and detract from the quality of whatever type of leadership Stevens brought to the table.

III.
STEVENS AS AN INTELLECTUAL LEADER

While Stevens's opinion writing statistics are not entirely consistent from what one would expect of a consensus-building leader on the Court, his jurisprudence nonetheless profoundly and quantifiably affected the American legal landscape. Stevens's biggest impact did necessarily not come from building voting coalitions and swaying swing voters on the Court; instead, the best evidence supporting Stevens's leadership legacy is found in the number of citations to his opinions by federal judges throughout the country. From that perspective and on a national scale, Stevens undoubtedly acted as an intellectual leader while serving as a justice.

This research underlying this essay focused on the number of times Justice Stevens was referred to specifically by name, either in the text of an opinion or as part of a citation within that opinion.[41] By this measure, Stevens was been individually cited by name in a staggering 10,858 federal court opinions[42] during his career up until his retirement in 2010. On average, federal judges individually referenced Stevens in 271 different opinions per term during his tenure. This equates to more than 5.5 citations per each opinion ever penned by Stevens.[43]

Those who have read several of Stevens's opinions are perhaps familiar with his tendency to frequently cite opinions he had written in the past, even when those opinions were dissents or did not oth-

[41] *See supra* Part I (describing how the citation statistics were collected). Certain categories of specific citations by name were not counted. For example, if Stevens wrote a majority opinion in a case from which Justice Scalia dissented, and Scalia referred to Stevens' opinion in that case while doing so, this would not count toward Stevens' citation statistics. The idea was to measure the influence of Justice Stevens' opinion in future cases, and not to catalogue the internal disagreements within the court over the result in any one particular case. Similarly, multiple citations in a single opinion only counted as one citation for the purposes of our study.

[42] This total includes Supreme Court opinions.

[43] This number is based on our study's conclusion that Stevens wrote 1,965 opinions while a member of the federal judiciary. *See supra* note 7; *see also* Davies et al., *supra* note 6, at 475-79 (describing how these statistics were collected).

erwise represent the view of the Court. Regardless of Stevens's rationale for citing his previous separate opinions in this manner,[44] one might legitimately be concerned that this self-citation inflated these citation statistics. However, even if one removes all of the Supreme Court opinions from the study, federal district and circuit court still cited Stevens by name in 9,818 opinions through the end of the 2009 term. The judges authoring these opinions were very rarely in a position where such a citation was absolutely necessary; after all, if they were citing a controlling majority opinion of the Court, there would be no need to refer to Stevens individually.[45] Even if the judge cited one of Stevens's separate opinions in a disapproving fashion, Stevens still influenced the debate by forcing that judge to respond to his thoughts on that particular area of the law. Thus, these citation numbers demonstrate Stevens's profound impact on the thought processes of a generation of federal jurists.[46]

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[44] One former Stevens clerk recalls that Stevens frequently quoted himself in order to demonstrate that he has been consistent in his reasoning over the course of his career. Richard Brust, *Practical Meaning: As the Court Shifted Right, Stevens Kept His Place*, A.B.A. J., Apr. 9, 2010, *available at* www.abajournal.com/news/article/practical_meaning_as_the_court_shifted_right_stevens_kept_his_place.

[45] The Bluebook, a commonly used citation formatting system, only requires a reference to the author of the opinion when that author is writing separately, not for the court. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6.1., at 91 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

[46] Stevens's policy of frequently dissenting may have in fact been calculated to produce these results. In a 2008 interview, Justice Scalia explained why he chose to frequently dissent: "Who do you think I'm writing my dissents for? I'm writing for the next generation and for law students. You know, read this and see if you want to go down that road." Later in the interview, Scalia opined that:

> [O]ne of the reasons this Supreme Court is so prominent – compared to the Supreme courts of other countries – is because of the dissent. The dissent combined with the case law system is the way the law is taught. You don't have to write a commentary, and the professor doesn't have to pick apart the opinion. You get both sides just from the U.S. report. So it's somewhat of a self-contained academy here . . . .

Dan Slater, *Law Blog Chats With Scalia, Part II: 'Master of the Dissent'*, WALL STREET JOURNAL, May 30, 2008, *available at* blogs.wsj.com/law/2008/05/30/law-blog-chats-with-scalia-part-ii-master-of-the-dissent/. In a similar vein, Stevens's dissents may have been crafted not to persuade his colleagues or to express his frus-

While the Part II.B detailed the reasons why Stevens may not have morphed into a consensus-building leader of the Court in the mid-1990's, there is some evidence that Stevens became more influential throughout the judiciary as a whole as he aged. Stevens's citation numbers were generally fairly consistent between his first full term in 1976 (177 citations) and 2003 (263 citations). However, in 2004, his citation count skyrocketed to 500, and peaked at 563 in 2006. The likely cause of this spike is Stevens's opinions in the seminal criminal sentencing case *United States v. Booker*, 543 U.S. 220 (2005), in which Stevens wrote both a portion of the majority opinion and a strongly worded dissent. The numerous opinions penned by the justices in that case have virtually necessitated that any citation to that opinion also refer to the opinion's author for clarity's sake. Nevertheless, perhaps this late career increase in publicity (as measured by the jump in citations) drove the perception that Stevens had in fact changed from an idiosyncratic maverick into an intellectual among liberal members of the federal judiciary, even though he did not appear to exert greater influence on the other eight justices on the Supreme Court.

It is perhaps worth wondering whether we will see the nomination of another Supreme Court justice that inspires a similar number of citations in the future, given today's highly politicized confirmation process. While on the Seventh Circuit before being nominated to the Court, Stevens received 59 citations by name, which of course pales in comparison to the thousands he received after he joined the Supreme Court. However, this is still an impressive number for a circuit court judge. By comparison, Chief Justice Roberts was only cited once by name during his over two years on the D.C. Circuit. It is possible that the same type of bold rulings, or use of creative reasoning, from a circuit court judge that generates cita-

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tration with their decisions, but with the long run goal of influencing the debate on the subjects of those opinions, both in the legal academy and in the lower federal courts. *Cf.* Orin Kerr, *When Scalia Dissents*, THE VOLOKH CONSPIRACY (Mar. 10, 2010, 1:20 AM), volokh.com/2011/03/10/when-scalia-dissents/ (positing that this is Scalia's ultimate goal when he issues his characteristic sharply worded dissents).

tions may also provide ammunition for those feverishly opposed to that judge's elevation to the nation's highest court. Further, it seems reasonable to assume that, once a member of the Supreme Court, a justice is unlikely to suddenly abandon his or her long-practiced, demure, "confirmable" style in favor of the highly quotable styles of justices such as Stevens or Scalia. For example, Chief Justice Roberts was cited only 60 times by name during the 2009 Term, his fourth full term on the Court. In Stevens's fourth full term, he was cited 216 times.

Regardless, it is apparent from the number of federal jurists who specifically cited Justice Stevens's work, even when they were under no compulsion to do so, that Stevens was a highly successful intellectual leader of the federal judiciary overall. The sheer volume of cases that he influenced, even when he was not directly involved, is an impressive testament to his skill as a judge.

CONCLUSION

The conventional wisdom that Justice Stevens changed from a highly idiosyncratic, maverick justice into a unifying, consensus building leader of the Supreme Court does not find much support in his opinion writing statistics. Those statistics demonstrate that Stevens was a highly individualistic judge both on the Seventh Circuit and throughout his career on the Court. Justice Stevens may have gained more visibility as his seniority increased and the Court's overall ideology shifted in a conservative direction during his tenure, but Stevens was always one to speak his mind, and there is no indication that he would have stopped doing so had the Court remained more consistently liberal throughout his service.

But, one may demonstrate leadership in other ways besides being a consensus builder in the mold of legendary Chief Justice Marshall; one can be an intellectual leader, and Stevens influence in this regard cannot be denied. Justice Stevens's prolific writing had a profound impact on the federal judiciary, as evidenced by the sheer number of times his words were cited by others in the nation's judicial system. Asserting that Stevens suddenly developed this leadership ability in the latter part of his career on the Supreme Court

does not do this aspect of his legacy justice; the data shows that Stevens has always been an influential figure in the American legal system, dating back to his time on the Seventh Circuit. Perhaps this latter characterization of Justice Stevens's legacy is at once both more accurate and more flattering than that which has been frequently attributed to him in the days following his retirement.

APPENDIX A

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
7th Cir.	1970	0.1333	0.0222	0.1556	0.3000
7th Cir.	1971	0.0880	0.0160	0.1040	0.2960
7th Cir.	1972	0.0625	0.0268	0.0893	0.3125
7th Cir.	1973	0.0660	0.0566	0.1226	0.1698
7th Cir.	1974	0.0088	0.0619	0.0708	0.3363
7th Cir.	1975	0.0750	0.0500	0.1250	0.2250
7th Cir.	1976	0.0000	0.0000	0.0000	0.0000
Totals		0.0698	0.0375	0.1073	0.2794

APPENDIX B

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
S. Ct.	1975	0.1959	0.1237	0.3196	0.0722
S. Ct.	1976	0.1638	0.0960	0.2599	0.0791
S. Ct.	1977	0.1342	0.0738	0.2081	0.0940
S. Ct.	1978	0.1321	0.0755	0.2075	0.0881
S. Ct.	1979	0.1282	0.0897	0.2179	0.0833
S. Ct.	1980	0.1667	0.1200	0.2867	0.0800
S. Ct.	1981	0.1299	0.0960	0.2260	0.0734
S. Ct.	1982	0.1379	0.0805	0.2184	0.0862
S. Ct.	1983	0.1675	0.1257	0.2932	0.0838
S. Ct.	1984	0.1882	0.0588	0.2471	0.0941
S. Ct.	1985	0.1955	0.0894	0.2849	0.0894
S. Ct.	1986	0.1637	0.1053	0.2690	0.0936
S. Ct.	1987	0.1078	0.0479	0.1557	0.1078

Court	Term	Dissent Rate	Concurrence Rate	Separate Opinion Rate	Majority Rate
S. Ct.	1988	0.1395	0.0872	0.2267	0.0872
S. Ct.	1989	0.1677	0.1226	0.2903	0.0645
S. Ct.	1990	0.1890	0.0472	0.2362	0.1102
S. Ct.	1991	0.1825	0.0952	0.2778	0.0952
S. Ct.	1992	0.1750	0.0917	0.2667	0.0917
S. Ct.	1993	0.1458	0.1146	0.2604	0.1146
S. Ct.	1994	0.2143	0.0612	0.2755	0.0918
S. Ct.	1995	0.2747	0.0659	0.3407	0.0769
S. Ct.	1996	0.2020	0.0505	0.2525	0.1010
S. Ct.	1997	0.1683	0.1089	0.2772	0.0594
S. Ct.	1998	0.2500	0.0938	0.3438	0.0938
S. Ct.	1999	0.2584	0.0899	0.3483	0.0787
S. Ct.	2000	0.1860	0.0581	0.2442	0.1047
S. Ct.	2001	0.1628	0.0349	0.1977	0.0930
S. Ct.	2002	0.1023	0.1364	0.2386	0.0909
S. Ct.	2003	0.1205	0.1084	0.2289	0.0843
S. Ct.	2004	0.1446	0.1084	0.2530	0.0843
S. Ct.	2005	0.1461	0.0787	0.2247	0.0787
S. Ct.	2006	0.2105	0.1184	0.3289	0.0921
S. Ct.	2007	0.1757	0.0946	0.2703	0.0676
S. Ct.	2008	0.1744	0.0581	0.2326	0.0930
S. Ct.	2009	0.1489	0.1383	0.2872	0.0638
Totals (S. Ct.)		0.1662	0.0898	0.2560	0.0870
Career Totals (all courts)		0.1547	0.0836	0.2383	0.1100

# # #

SUPREME COURT SLUGGERS

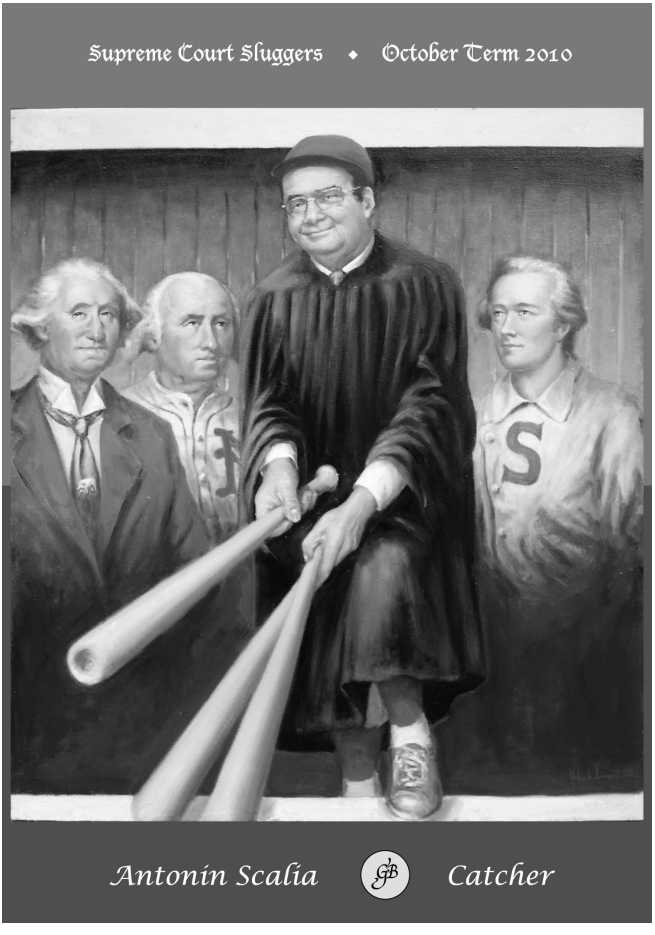
INTRODUCING THE SCALIA, FORTAS, AND GOLDBERG/MILLER TRADING CARDS

Ross E. Davies, Craig D. Rust & Adam Aft[†]

We are pleased to introduce a few new members of the "Supreme Court Sluggers" trading card lineup. The addition of Justice Antonin Scalia to the team is in keeping with our goal of expeditiously compiling and publishing data for all current members of the Supreme Court. (We have issued cards featuring Chief Justice John G. Roberts and Justice John Paul Stevens, and Justices Sandra Day O'Connor and Samuel Alito are in the works.) This season, we have also completed the first two cards of what might be called our "Veterans" series of those who served long ago: Justice Arthur Goldberg, who appears in the company of baseball great Marvin Miller, and Justice Abe Fortas.[1]

[†] Ross Davies is a professor of law at George Mason University and editor-in-chief of the *Green Bag*. Craig Rust is a former law clerk to the Honorable Samuel G. Wilson of the U.S. District Court for the Western District of Virginia. Adam Aft is a law clerk in the United States Court of Appeals for the Fifth Circuit.

[1] *See* National Baseball Hall of Fame and Museum, *2010 Induction Ceremony*, baseballhall.org/hall-famers/hall-fame-weekend/past-ceremonies/2010-induction-ceremony ("The Veterans Committee for Managers and Umpires elected former National League arbiter Doug Harvey to the Hall of Fame . . ."). This analogy invites the question of what we ought to do about recognizing jurists who had no real chance of serving on the Supreme Court because of their race (for which our "Veterans" date might be 1966 (pre-Thurgood Marshall) or 2008 (pre-Sonia Sotomayor)), or gender (perhaps 1980 (pre-Sandra Day O'Connor)). *See* National Baseball Hall of Fame and Museum, *Rules for Election for Managers, Umpires, Executives and Players for Pre-Integration Era Candidates to the National Baseball Hall of Fame*, baseballhall.org/hall-famers/rules-election/eras-pre-integration.

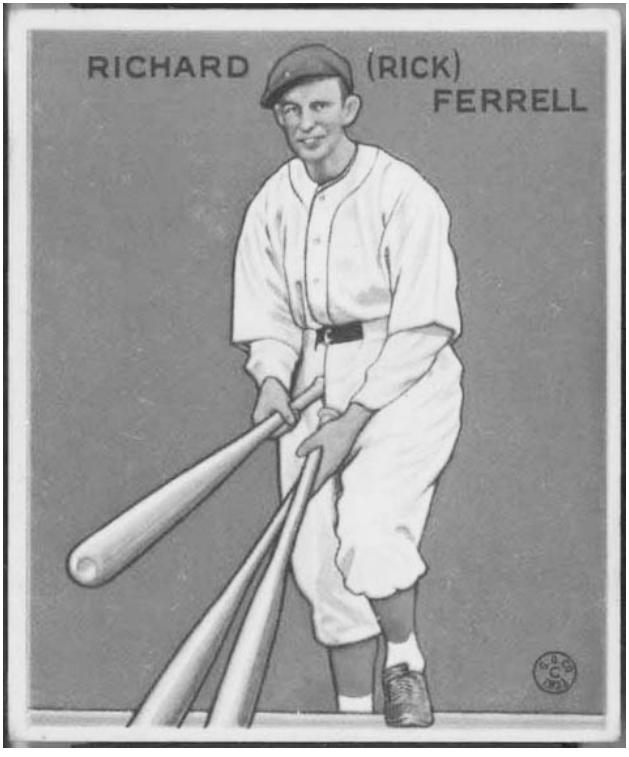


I.
JUSTICE ANTONIN SCALIA, ILLUSTRATED

John Sargent painted this portrait of Justice Scalia.[2] It is based on the classic Richard Benjamin "Rick" Ferrell trading card pictured on the next page.[3] Why Ferrell? Because:

[2] John A. Sargent III, *Supreme Court Justice Antonin Scalia* (2010) (oil on canvas). *See* www.johnasargent.com; www.greenbag.org/sluggers/sluggers_home.html.

[3] *Richard "Rick" Ferrell, Boston Red Sox*, No. 197 (Goudy Gum Co. 1933).



- He was a catcher, the #2 position on the baseball diamond, just as Scalia is #2 in seniority on the Court.[4] (And just as Justice John Paul Stevens was when we based his Supreme Court Sluggers portrait on a Gabby Hartnett card.[5])
- He was an excellent performer over a long career. Between 1929 and 1947, he played more than 1,800 games – all of them at catcher – for the Boston, St. Louis, and Washington teams in the American League. He was a good batter, with a career average of .281,[6] but he was best-known for his work

[4] KERRIE FERRELL WITH WILLIAM M. ANDERSON, RICK FERRELL, KNUCKLEBALL CATCHER (2010); 28 U.S.C. § 3.

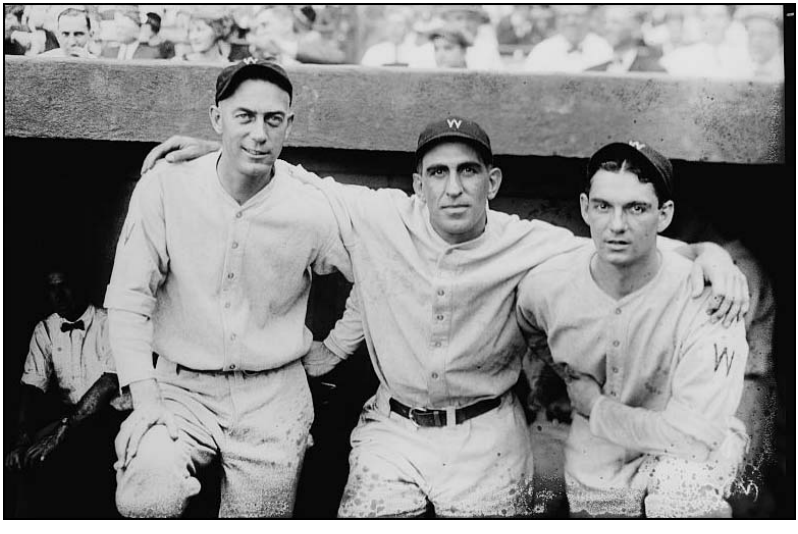
[5] Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 2D 465, 472-73 (2010).

[6] *Rick Ferrell*, RETROSHEET, www.retrosheet.org/boxesetc/F/Pferrr101.htm (vis. Feb. 5, 2010).

> behind the plate, and especially for his skill catching knuckleball pitchers. According to his brother, All-Star pitcher Wes Ferrell, "Brother or no brother . . . he was a real classy receiver. You never saw him lunge for the ball; he never took a strike away from you. He'd get more strikes for a pitcher than anybody I ever saw, because he made catching look easy." He was elected to the Baseball Hall of Fame in 1984.[7]

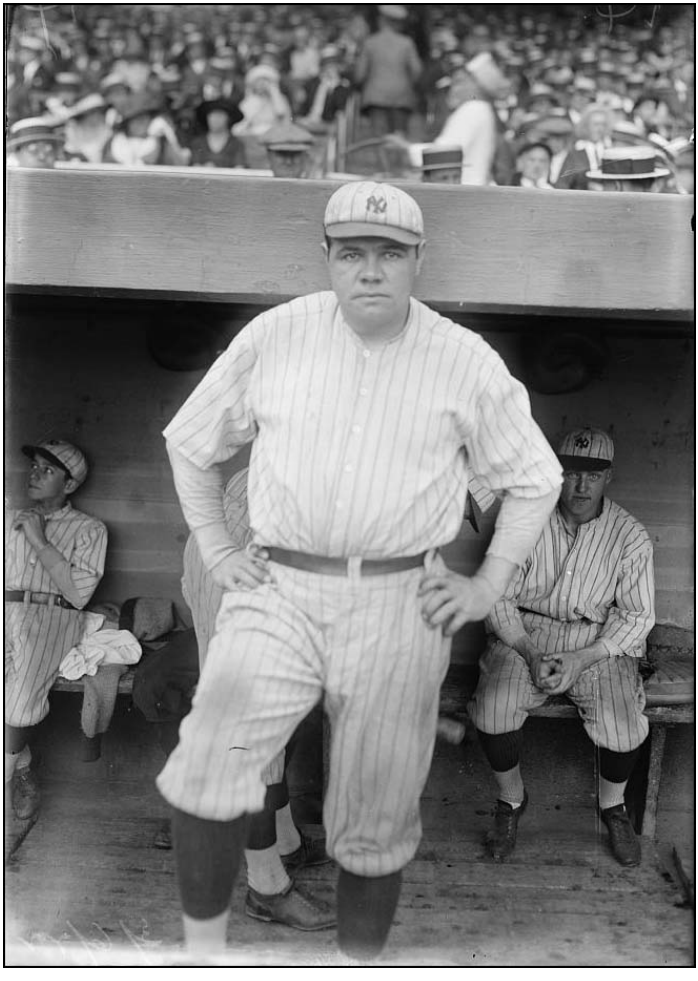
People who know more about Scalia and Ferrell might well come up with other interesting connections.

The selection of the Ferrell card, however, had as much to do with his pose on the card as with his performance on the field. Ferrell is clearly standing at the edge of a dugout. And if we had the whole picture, it would surely include at least one or two of his teammates, sitting or standing around or behind him, like the Washington Senators below or the New York Yankees on the next page.



Left to right: George Mogridge, Roger Peckinpaugh, and Herold "Muddy" Ruel. Library of Congress, repro. no. LC-DIG-ggbain-37515.

[7] National Baseball Hall of Fame and Museum, *Rick Ferrell*, baseballhall.org/hof/ferrell-rick; *see also* DICK THOMPSON, THE FERRELL BROTHERS OF BASEBALL ch. 14 (2005) ("The Knuckleball Catcher").



Babe Ruth. Library of Congress, repro. no. LC-DIG-ggbain-32385.

This kind of dugout setting seems like an appropriate one in which to portray, light-heartedly, Scalia's important relationship to the uses of history in modern American adjudication – to originalism, that is. It is an arena in which he is the great figure. He has presented his views in widely-discussed scholarship,[8] and applied them

[8] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

in important judicial opinions.[9] His views are not uncontested,[10] but they also are not without influence. Indeed, their durability is apparent from the very fact that "[t]he debate over constitutional Originalism continues to spark scholarly controversy" among serious students of the subject.[11]

And so we present Scalia in a constitutional dugout, in the company of three prominent early figures in American lawmaking (commonly called "Framers" or "Founders") whose intentions might well qualify as original in at least some constitutional contexts. And we portray those Framers in the distinctive garb of similarly prominent figures from the early years of baseball – figures whose public identities to some extent interestingly correspond to and contrast with their Framing counterparts.

From left to right, appearing with Antonin Scalia on his "Supreme Court Sluggers" card, we have:

1. George Washington – with whom Scalia has associated himself in several cases, including, for example, *City of Boerne v. Flores*.[12] Washington appears on the card in the guise of Cornelius McGillicuddy, Sr., better known in his own day and ours as Connie Mack. Mack was a founder of the Philadelphia (now Oakland) Athletics and manager of the team for its first 50 years, from 1901 to 1950. Like Washington in the fields of constitution-making, nation-building, and governing, Mack in the field of baseball had "the greatest impact . . . in establishing orthodoxy in how the game was played"[13] due to his incomparable combination of ability, industry, decency, dignity, and success.

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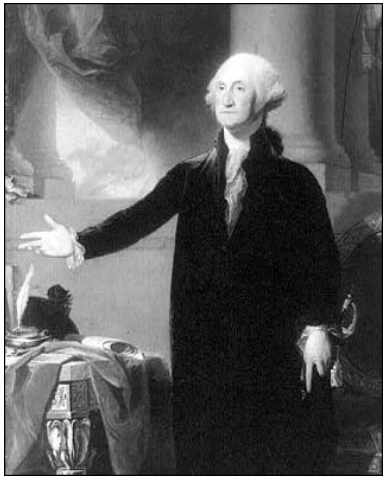
[9] *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[10] Start with the dissenting opinions in *District of Columbia v. Heller* and the majority opinion in *Roper v. Simmons*.

[11] Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution*, 23 YALE J. L. & HUMANITIES 295, 295 (2011).

[12] 521 U.S. 507, 542 (1997) (Scalia, J., joined by Stevens, J., concurring in part); *see also, e.g., McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[13] THE BILL JAMES GUIDE TO BASEBALL MANAGERS 64 (1997).

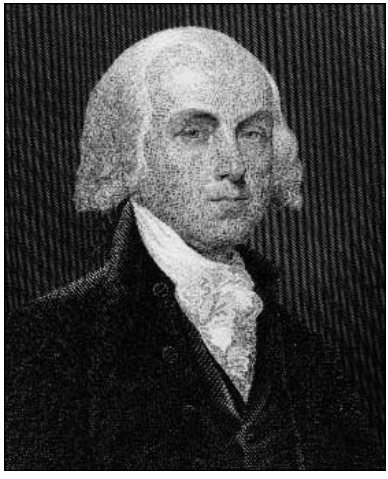



Connie Mack (with Bucky Harris at left) and George Washington. Library of Congress, repro. nos. LC-DIG-hec-24442 and LC-USZ62-96385.

To the extent there is a foundational character in baseball who is of Washingtonian stature, it is Mack. (He was also notable as the manager who continued to wear a suit-and-tie in the dugout long after his peers had switched to player-style attire.) In other words, Washington and Mack were much alike in fundamental ways – they were important players, formative figures, and fine role models in their respective fields both because of who they were and because of the results they achieved by being who they were.[14]

2. James Madison – with whom Scalia has associated himself in many cases, including, for example, *Printz v. United States*.[15] Madison appears on the Scalia "Sluggers" card in the uniform of longtime New York (now San Francisco) Giants manager John McGraw. Like Mack, McGraw was tremendously successful over a long period of time and is still respected and influential today.[16] And just as Madi-

[14] *See, e.g.*, NORMAN L. MACHT, CONNIE MACK AND THE EARLY YEARS OF BASEBALL (2007); JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON (2004).
[15] 521 U.S. 898, 910, 914-15, 919-22 (1997); *see also, e.g., Rogers v. Tennessee*, 532 U.S. 451, 478 (2001) (Scalia, J., joined by Stevens and Thomas, JJ., dissenting).
[16] *See, e.g.*, THE BILL JAMES GUIDE TO BASEBALL MANAGERS at 48-58; *see generally* CHARLES C. ALEXANDER, JOHN MCGRAW (1988).

John McGraw (left) and James Madison. Library of Congress, repro. nos. LC-DIG-ggbain-21535 and LC-USZ62-106865.

son was a talented junior to Washington – in some respects a superior talent – so was McGraw to Mack. As Giants manager from 1902 to 1932 he won ten National League pennants and three World Series, and at his retirement had a far better won-lost record than Mack would at his (at 2763 and 1947, McGraw had a winning percentage of .587, while Mack at 3731 and 3948 had a winning percentage of .486). But head-to-head on the biggest stage, Mack dominated. While McGraw's Giants did defeat Mack's Athletics in the 1905 World Series, Mack's team turned the tables in 1911 and 1913).[17] Similarly, for as long as Washington chose to lead, he did. Madison and Thomas Jefferson and their political allies failed to occupy the Presidency or, through it, significantly influence the makeup of the federal judiciary until after Washington had left public office, and this world.

Essential differences between the greatnesses of McGraw and Mack (paralleling again, perhaps, Madison and Washington) are cap-

[17] *Compare John McGraw*, RETROSHEET, www.retrosheet.org/boxesetc/M/Pmcgrj101.htm (vis. Feb. 3, 2012), *with Connie Mack*, RETROSHEET, www.retrosheet.org/boxesetc/M/Pmackc101.htm (vis. Feb. 3, 2012); *see also* ROB NEYER AND EDDIE EPSTEIN, BASEBALL DYNASTIES chs. 2 & 3 (2000).

tured to some extent in one modern expert remark and one old anecdote. The modern remark:

> McGraw's philosophy was, you have to control every element of the player's world and get rid of everything in there that might cause you to lose a game. Mack's philosophy was, you get good people, you treat them well, and you'll win. McGraw's approach was and is much more common among managers and coaches in all sports. But Mack won just as often, and his approach has another advantage.
>
> If you do it Connie Mack's way, you won't drink yourself into an early grave.[18]

And the old anecdote:

> Midway through the 1902 season McGraw deserted the faltering Baltimore Orioles in the new [American] league and hooked up with the New York Giants. From his new vantage point with the old establishment, McGraw told the press that [half-owner of the Athletics Benjamin] Shibe, in Philadelphia, would find that he had a "white elephant" on his hands. [Quarter-owner and manager of the Athletics Connie] Mack quickly adopted the White Elephant as the symbol of his club. It was an enduring symbol [that is still used by the modern Oakland Athletics] . . . . In 1902 it provided a rallying point for Mack and his team as they fought for the pennant.[19]

Thus the white-elephant tie tack worn by Mack on the Scalia "Sluggers" card.[20]

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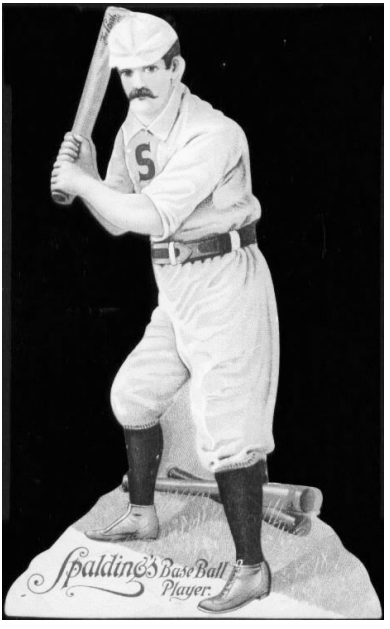
[18] THE BILL JAMES GUIDE TO BASEBALL MANAGERS at 65.

[19] DAVID M. JORDAN, THE ATHLETICS OF PHILADELPHIA: CONNIE MACK'S WHITE ELEPHANTS, 1901-1954 at 15-16, 26 (1999); *see also, e.g.,* DOROTHY AND HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 78 (1971). Consider, in this light, Washington's famous use of eyeglasses during his speech to the Continental Army at Newburgh on March 15, 1783 – a gesture that Mack may well have been familiar with. *See* WASHINGTON IRVING, 4 LIFE OF WASHINGTON 380-83 (1859).

[20] These days the elephant – now called "Stomper" – is more gray than white and the official mascot of the Oakland Athletics. *See About Stomper*, oakland.athletics.mlb.com/oak/fan_forum/about_stomper.jsp.



The Spalding Base Ball Player card, front and back (circa 1894).

3. Alexander Hamilton – with whom Scalia also has associated himself in many cases, such as *Neder v. United States*.[21] Hamilton appears on the Scalia card outfitted not as real-life baseball icon, but, rather, as a fabricated icon. He is wearing the uniform of "Spalding's Base Ball Player" – a marketing device employed in the 1890s by the A.G. Spalding & Brothers sporting goods company. The company was founded in 1876 by Albert G. Spalding, an individual of prodigious ability and even more prodigious energy and ambition, much like Hamilton.

Both men left distinctively durable marks in their respective fields in part because of their penchant for expressing their ideas in ink, on paper. Hamilton had, among many other works, his famous "Reports" on Public Credit (1790) and on Manufactures (1791);

[21] 527 U.S. 1, 31 (1999) (Scalia, J., joined by Souter and Ginsburg, JJ., concurring in part and dissenting in part); *see also, e.g., Nevada v. Hicks*, 533 U.S. 353, 366 (2001).

Spalding had, among many other products, his "Official" baseball guides (1878 and for the rest of his life).

Like Hamilton's departure from the fields of law and government, Spalding's departure from the game of baseball came at an early age. The critical difference between the two was that Spalding had a plan that worked out well. Hamilton did not. Hamilton died in a duel with Aaron Burr, and so he did not live to see his young children grow up, or see many of his controversial policy initiatives endure despite the rising power of his Jeffersonian political adversaries, or see his own reputation rise and solidify.[22] Spalding chose the less risky (or at least lower-stakes) path of entrepreneurship in the untried field of mass-market sporting goods during the commercially and socially volatile Gilded Age. He cut short a brilliant pitching career (he won 253 games and lost 65) at age 27 in 1878 to pursue his commercial vision. He was blessed with a life long enough to see his choices vindicated. Spalding built his company into the most important operator in the sporting goods business. "To this day, no other athlete has so successfully managed to transform athletic prowess and personal celebrity into such corporate dominance."[23]

These three giants constitute just a fraction of Scalia's team of Framers. But alas, there is not room for everyone on just one "Supreme Court Sluggers" card. Maybe the next edition of the Scalia card will feature the likes of John Adams,[24] Thomas Jefferson,[25] and James Wilson.[26]

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[22] *See* RONALD CHERNOW, ALEXANDER HAMILTON CH. 43 (2004).

[23] *See* MARK LAMSTER, SPALDING'S WORLD TOUR: THE EPIC ADVENTURE THAT TOOK BASEBALL AROUND THE GLOBE – AND MADE IT AMERICA'S GAME 23-26 (2006); *see also Heritage Timeline*, www.spalding.com/heritage.html; *compare* Letter from Thomas Jefferson to James Madison, Sept. 21, 1795, *in* 16 THE PAPERS OF JAMES MADISON 88 (1989) (J.C.A. Stagg et al., eds.) ("Hamilton is really a colossus to the antirepublican party. Without numbers, he is an host within himself.").

[24] *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

[25] *See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 372 (1995) (Scalia, J., joined by Rehnquist, C.J., dissenting).

[26] *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 585 (2008).

II.
JUSTICE ANTONIN SCALIA, QUANTIFIED

As we continue to compile statistics for more members of the Supreme Court, we are presented with new opportunities to make comparisons between the justices. These new opportunities are – from a methodological standpoint – some of the most exciting aspects of the Justice Antonin Scalia card. Many people have strong opinions regarding Scalia, and in presenting his opinion authorship and citation statistics, we hope to provide a basis for comparing him to other justices, and perhaps the opportunity to prove or dispel certain theories about his opinion writing behavior over the years. And all of our data is, as usual, available in the "Supreme Court Sluggers" area of the *Green Bag*'s website at www.greenbag.org.

As to the card's compilation, we utilized the same methodology as we did for the compilation of Justice Paul Stevens's card.[27] For Scalia's time on the U.S. Court of Appeals for the District of Columbia Circuit, we collected all of the data by conducting Westlaw searches and checking each search result individually. For his time on the Supreme Court, we utilized the Supreme Court Database[28] to gather his opinion authorship data, while we collected his cites by name by again conducting Westlaw searches and manually verifying the results. By using the same methods as we did to create previous cards in the series, we can to continue to create opportunities to make "apples-to-apples" comparisons between the different justices that we examine. One such in-depth comparison is made elsewhere in this volume.[29]

However, we have one other brief observation to make, at this time, about the Scalia data. Between Justice Stephen Breyer's arrival on the Court in 1994 and Chief Justice John G. Roberts's in 2005,

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[27] Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 215 (2010).

[28] *The Supreme Court Database*, http://scdb.wustl.edu/.

[29] *See* Craig D. Rust, *24 Rounds: Justices Scalia's and Stevens's Battle for America's Hearts and Minds*, 2 J.L. (1 J. LEGAL METRICS) 77 (2012).

the Court went through one of the longer stretches in its history without a change in its makeup. Other researchers have used this opportunity to look for trends and other observations we can utilize to learn more about the Court and the way it conducts its business.[30] For Scalia, this stable environment may have contributed to the rate at which he authored unanimous opinions. From the 1995 Term through the 2004 Term he wrote unanimous opinions at a rate of 3.11 per term. That is about a 33% greater rate than his career average, which is just over two unanimous opinions per term.

Given the generally low number of unanimous opinions it is difficult to draw any concrete conclusions from this trend. One potential explanation is that as the Court settled into an iterated game with the same players[31] it was easier for one justice to determine where the votes would lie and carry more votes. Perhaps it is an indication of increased civility among the members of the Court bred by working with the same colleagues over a long period of time. Maybe it is an indication that this group of justices simply worked well together, or, in the alternative, were simply more receptive to Scalia's persuasive techniques. It is, at best, an anecdotal observation when viewed in the context of only one justice. Still, these anecdotal observations are important as the Sluggers project continues to gather more data. As we achieve a critical mass in the data, these anecdotes will become concrete and identifiable trends.

For example, when Stevens's numbers are also examined, it appears that at least some of these theories do a particularly poor job explaining the trend. During the same time period (the 1995 through 2004 Terms), he authored an average of 1.2 unanimous

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[30] The Supreme Court Database collects data on this statistic under the heading "natural court." *The Supreme Court Database*, scdb.wustl.edu/. *See also* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); Josh Blackman, Adam Aft, & Corey Carpenter, *FantasySCOTUS: Crowdsourcing a Prediction Market for the Supreme Court*, 10 NW. J. OF TECH. & INTELL. PROP. 125 (2012).

[31] For models of Supreme Court decision making, see generally MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

opinions per term, almost two opinions per term lower than his career average of about three per term.

Another potential explanation could be the nature of the cases. During the 1995 and 1996 Terms, in which Scalia authored five unanimous opinions per term, almost all of those cases – eight out of ten – involved questions of statutory interpretation.[32] Given that the 1995 Term came after he had spent a decade on the Court, it could be that this trend of unanimous opinions we have observed is a quantitative vindication of his jurisprudential philosophy on statutory interpretation. Alas, this explanation is still imperfect, as it fails to explain the recent decline in his number of unanimous opinions.[33]

As stated above, it is difficult to draw any conclusions from this one trend. However, we hope that our data will give both us and our readers a platform to make similar and more definitive observations about these types of trends in the future.[34]

III.
JUSTICES ARTHUR GOLDBERG AND ABE FORTAS, QUANTIFIED

And now to our first "Veterans" – that is, justices no longer serving on the Supreme Court.

We chose Arthur Goldberg (1962-65) and Abe Fortas (1965-69) to be our first "Veterans" because each served on the Court for only a few years. They provided relatively small data sets with which we could experiment, testing our methods of data collection and analysis, and, if need be, refining them. We are pleased to report that our experiments were successful. With these historical, yet still fair-

[32] The only two cases that were not questions of statutory interpretation were *Whren v. United States*, 517 U.S. 806 (1996) and *Gilbert v. Homar*, 520 U.S. 924 (1997).

[33] Since the 2005 Term, Scalia has averaged only .833 unanimous opinions per term.

[34] For another example of the use of Supreme Court data see Lincoln Caplan, *Clarence Thomas's Brand of Judicial Logic*, N.Y. TIMES, Oct. 22, 2011 (editorializing on Justice Thomas's first 20 years on the Court utilizing data from the Supreme Court database).

ly modern, justices we were able to apply the same methods we have used before and discussed above in reference to Roberts, Stevens, and Scalia.

Goldberg and Fortas also have a lot in common. For example, they served in successive order, both resigning – albeit under very different circumstances – to pursue other endeavors. Additionally, both authored seminal opinions in their short time on the Court.[35]

One striking data set to consider is citations by name (CN) while on the Court. Fortas and Goldberg have about the same average CN numbers for their time on the Court – approximately 25 per term. Their CN statistics do not even come close to such moderns as Scalia and Stevens. Fortas and Goldberg are closer to Roberts, although even he has about twice as many citations by name per term:

Rank	Justice	Avg. Cites by Name Per Term
1	Scalia	358.48
2	Stevens	317.62
3	Roberts	52
4	Fortas	25.5
5	Goldberg	23

As we continue to compile data for both current and former members of the Court it will be interesting to see if there is an era adjustment needed to fairly compare justices' CN statistics across time, or if instead the numbers will eventually converge in some sensible way.

A. Justice Fortas and His Up-to-Date CN Trend

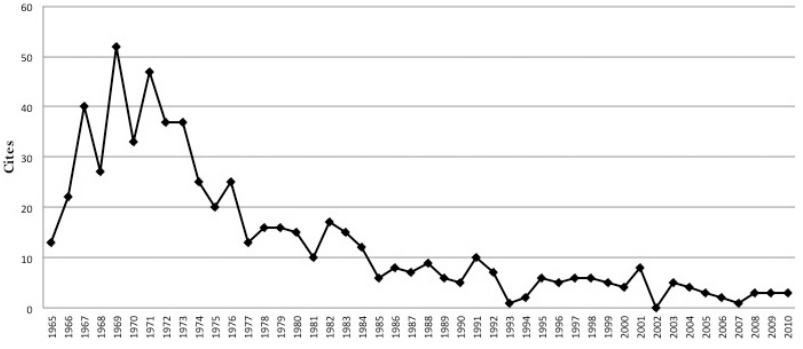
With Fortas we also are excited to present our first set of CN data that runs from the beginning of a former justice's service on the Court all the way up to the present day, rather than simply through the justice's date of retirement. CN is only a rough and inexact indicator of a justice's impact,[36] but it is still a fascinating metric to con-

[35] Goldberg wrote a concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and Fortas wrote for the Court in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), and *In re Gault*, 387 U.S. 1 (1967).

[36] *See* Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 2 J.L. (1 J.

sider, as it gives us a view into the influence a justice exerted after he or she left the high court. The graphical representation of Fortas's CN for his time on the Court up to the present is striking:

FORTAS CITES BY NAME



Fortas's diminishing impact over time is obvious. While we lack the data for other justices necessary to form a supportable hypothesis regarding the meaning of this trend, it seems consistent with our intuition that as a justice's opinions are superseded or updated, or as the thoughts of an individual inevitably become dated as society continues to grow and evolve, the influence of any given justice will decline. Whether these suppositions will stand up once we have compiled more CN data remains to be seen.

IV.
JUSTICE ABE FORTAS, ILLUSTRATED

There is a painfully obvious choice for the baseball great on whom to base a "Supreme Court Sluggers" card for Justice Abe Fortas: Shoeless Joe Jackson, star outfielder of the Chicago White Sox from 1915 to 1920.[37] Both men were supremely talented and widely regarded by contemporaries as among the most accom-

LEGAL METRICS) 135 (2012).

[37] *See, e.g.*, SEYMOUR K. FREIDIN, A SENSE OF THE SENATE 149 (1972).

plished professionals in their respective fields. But each failed spectacularly, driven from his high-status role based on plausible but still-debated grounds of corruption. And each suffered his fate partly due to the prompting of an individual – White Sox owner Charles Comiskey in Jackson's case, U.S. Attorney General John Mitchell in Fortas's case – whose own separate malfeasances were arguably at least as reprehensible. In other words, pots calling kettles, and making it stick. These are truly disheartening episodes for any observer who values professional integrity or the reputation of either of the two great and tarnished national institutions in which they took place.

Jackson made the mistake of accepting money from someone involved in an attempt to pay him and several of his teammates to intentionally lose the 1919 World Series. It may have been more than a mistake. Maybe Jackson was corrupt. He took the money, which was bad – bad enough to justify the punishment he would eventually receive. But he played very well in the Series, which was good – good enough to suggest that he never betrayed the game on the field, even if he did so off the field. And he was acquitted of criminal charges in the matter. On the rare occasions when he spoke about the scandal in later years, Jackson insisted he was not a crook.[38] In any event, Jackson's involvement made him one of the infamous Chicago Black Sox. For his part, Comiskey at first financed an elaborate cover-up in an attempt to hold onto his star players who were implicated in the Black Sox affair, but when that maneuver failed, he claimed credit for having investigated and revealed their misdeeds.[39] Jackson's role in the scandal got him banned for life from major league baseball; Comiskey was elected to the Hall of Fame in 1939.

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[38] *See* G. EDWARD WHITE, CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF, 1903-1953 at 91-104 (1996).

[39] *See id.*; Gene Carney, *Comiskey's Detectives*, 38 BASEBALL RESEARCH J. 108 (Fall 2009); *see also* MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION 404-05 (1991; 2004 ed.) ("I don't want to rehash the 1919 scandal, nor will I deny that there was evidence that gambling interests were a danger to baseball before the 1920s. . . . But I've always maintained that the question 'Why isn't Joe Jackson in the Hall of Fame?' should be supplemented with 'Why isn't Charles Comiskey *out*?'") (emphasis in original).

The passage of time, an incomplete factual record, and the moral ambiguities of many of the actors and the contexts in which they were acting have combined to leave room for reasonable minds to convict, acquit, or suspend judgment about Jackson.[40] But one lesson should be clear: money taken with a wink and a nod toward an illicit quid pro quo is dirty, and clean money accepted on the sly can look just as dirty and tends to be treated that way.

Alas, it was a lesson that Fortas, like Jackson, learned late. Fortas made the mistake of accepting money (or at least the promise of it) from Wall Street financier Louis Wolfson under suspicious circumstances, and then compounded his error by attempting to conceal the nature and extent of their dealings. The financial relationship may have been more than a mistake. The cover-up surely was. Wolfson turned out to be a crook. During and after Wolfson's prosecution and conviction for various crimes connected with securities fraud, information about his relationship with Fortas began to come out, and Fortas responded by trying to cover it up.[41] There is no more evidence that Fortas did anything improper to help Wolfson than there is evidence that Jackson did anything improper to hurt the White Sox. But shady dealings combined with a cover-up – bad form for anyone – are poison to prominent public servants. When, on May 7, 1969, Mitchell presented Chief Justice Earl Warren with documentation of the Wolfson-Fortas relationship – enough to raise eyebrows, but not enough to support an indictment – Warren's reaction was, "He [Fortas] can't stay." That turned out to be the consensus on the Court. Fortas resigned one week later and spent the rest of his life in private practice. A remunerative but under the circumstances ignominious end to a brilliant career.[42]

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[40] *See, e.g.*, Marc Fisher, *Shoeless Joe Jackson, best foot forward*, WASH. POST, Feb. 5, 2012, at F1, F4.

[41] This was not Wolfson's only, or even his most important, role in U.S. history. "He invented the modern hostile tender offer. This invention, which activated and energized the market for corporate control, was the primary cause of the revolutionary restructuring of American industry in the 1970s and '80s, and the ensuing economic boom." Henry G. Manne, *The Original Corporate Raider*, WALL ST. J., Jan. 18, 2008.

[42] *See generally* LAURA KALMAN, ABE FORTAS 322-26, 359-78 (1990).

Like Jackson, Fortas was never convicted of a crime for his acceptance of money that might have been dirty. Indeed, Fortas was never even indicted, or impeached. And it was ironic, but surely no consolation to Fortas (who was not a mean-spirited person), that Mitchell would pay for his own cover-up work during the Watergate affair with a jail term and loss of his license to practice law.[43]

There is little evidence that Fortas had any interest in the game of baseball. But he did speak of baseball on two occasions that merit notice, and get it in his Sluggers card. (Like the Scalia portrait, this one was painted by John Sargent.[44])

First, and importantly, there is the 1967 case of *In re Gault*.[45] Young Gerald Gault "had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona," accused of, among other things, stealing another child's

[43] *See* Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988; *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-nine Lawyers*, 62 A.B.A.J. 1337 (Oct. 1976).

[44] John A. Sargent III, *Supreme Court Justice Fortas* (2011) (oil on canvas). *See* www.johnasargent.com; www.greenbag.org/sluggers/sluggers_home.html.

[45] 387 U.S. 1 (1967).

baseball glove.[46] The Supreme Court decided that the procedures under which Gerald had been locked up were not up to federal constitutional standards. Writing for the Court, Fortas concluded that

> the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[47]

Other due process rights applied in such proceedings as well, including "notice which would be deemed constitutionally adequate in a civil or criminal proceeding" and "the constitutional privilege against self-incrimination."[48] Thus the glove labeled "G.G." in Fortas's left hand, and his protective right hand on the young baseball fan's shoulder.

Second, and less importantly, there is the knothole through which the young fan is watching Shoeless Joe chase a leftfield fly for his Chicago White Sox. It recalls Fortas's defense of his friend, President Lyndon Johnson, from some critics outside the Johnson administration. Fortas derided the non-insiders for their simple-minded and ill-informed commentary, describing them as

> like the little boy who would look through the knothole to see a baseball game, and it was a very small knothole and all he could see was the left fielder. The little boy would see that game and he would think that action happens only occasionally because only then does the left fielder move back and forth . . . .[49]

It must have been very difficult for Fortas, ceasing to be an insider after his resignation from the Court.

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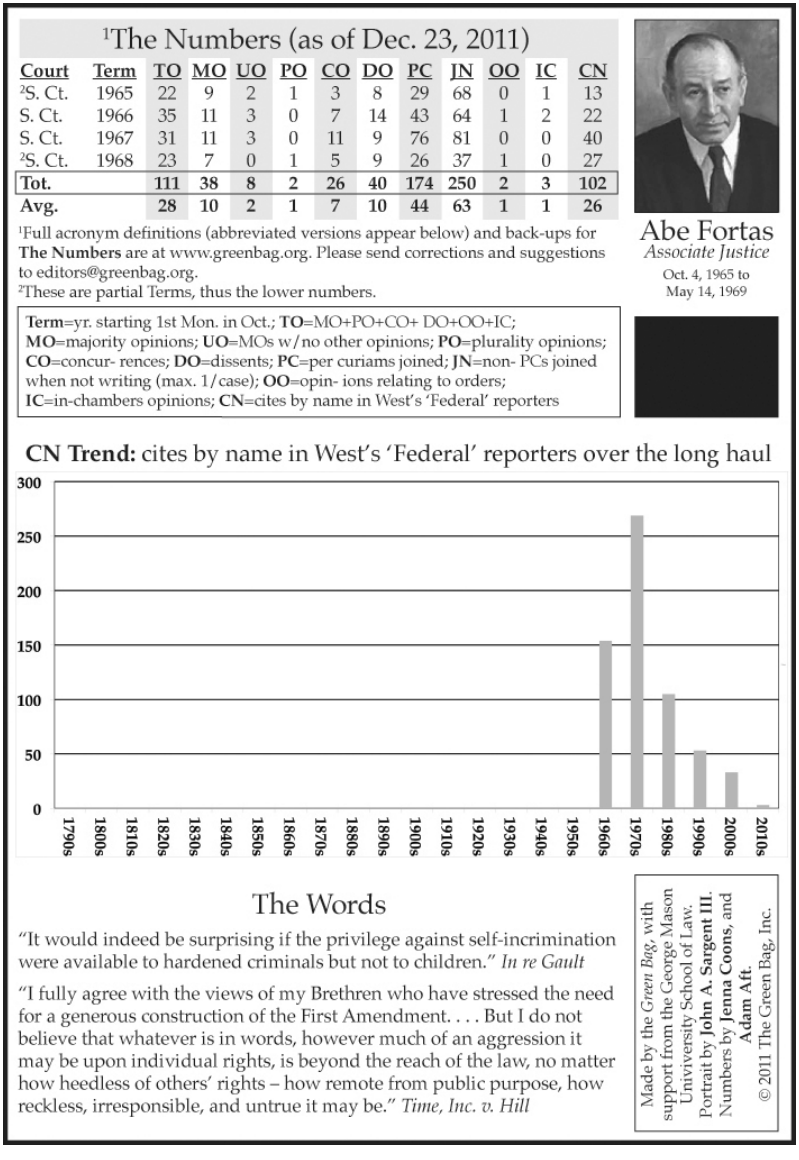
[46] *Id.* at 4, 9.

[47] *Id.* at 41.

[48] *Id.* at 33, 55.

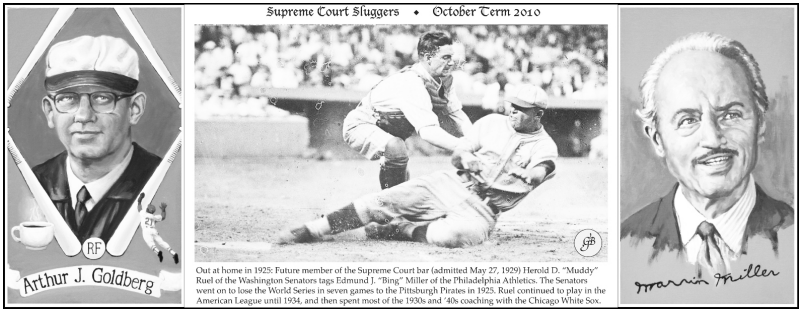
[49] BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 124 (1988).

The Fortas card also features a graphic presentation of Fortas's up-to-date CN trend. It is in a format that should make for easy back-of-the-card comparisons between justices. We hope to make the "CN Trend" histogram a standard feature of all "Sluggers" cards.



V.
JUSTICE ARTHUR GOLDBERG AND MARVIN MILLER OF THE MLBPA, ILLUSTRATED

The background and symbolic significance of this card are at least as elaborate and (we think) as interesting as the Scalia card's. Plus, we expect that in the not-too-distant future there will be another, better forum in which to describe the Goldberg-Miller card in full. And so for now this preview will have to suffice:[50]



CONCLUSION

From another current justice to our first forays into the Court's more distant past, we are continuing to strive towards our goals:

> (a) to develop and share comparable measurements of the work of every member of the Supreme Court since 1789;
>
> (b) to gradually expand and refine those measurements with an eye to making them as useful and interesting as possible;

[50] At least for those readers who do not already own this card, which was released last year and distributed at the annual convention of the Society for American Baseball Research.

> (c) to create informative, entertaining, and unorthodox yet respectful portraits of the Justices by first-rate artists; and
>
> (d) to present all of this material in a way that will be enjoyable for the producers, consumers, and subjects of the "Sluggers" cards.[51]

We hope that our new feature of up-to-date CN statistics will – along with all of our data – continue to provide fertile ground for appreciation and study of the people who did and do decide cases at the Supreme Court.

# # #

[51] Davies & Rust, *supra* note 27, at 215.

LAW REVIEW CIRCULATION 2011

MORE CHANGE, MORE SAME

Ross E. Davies[†]

Every year, the tallying of law review circulation numbers presents at least one opportunity to examine the role played by puffery in the world of scholarly law publishing. Last year the result was a gentle needling of the *Virginia Law Review*.[1] The year before that it was the *Harvard Law Review*.[2] This year the *Stanford Law Review* is honored with similar treatment.

But first a few observations:

1. A new low. In 2011, for the first time since the U.S. Postal Service began requiring law reviews to track and report their circulation numbers,[3] no major law review had more than 2,000 paying subscribers. The *Harvard Law Review* remains the top journal, but its paid circulation has declined from more than 10,000 during much of the 1960s and '70s to about 5,000 in the 1990s to 1,896 last year.

2. Rates (of decline) may vary — and they do. The *Harvard Law Review*'s experience is merely the biggest example of an across-the-board phenomenon. All of the law reviews we track have suffered large declines in paid subscriptions in recent decades. Nevertheless, there has been plenty of room for variation in their collected dismal

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[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*. Thanks to Cattleya Concepcion.

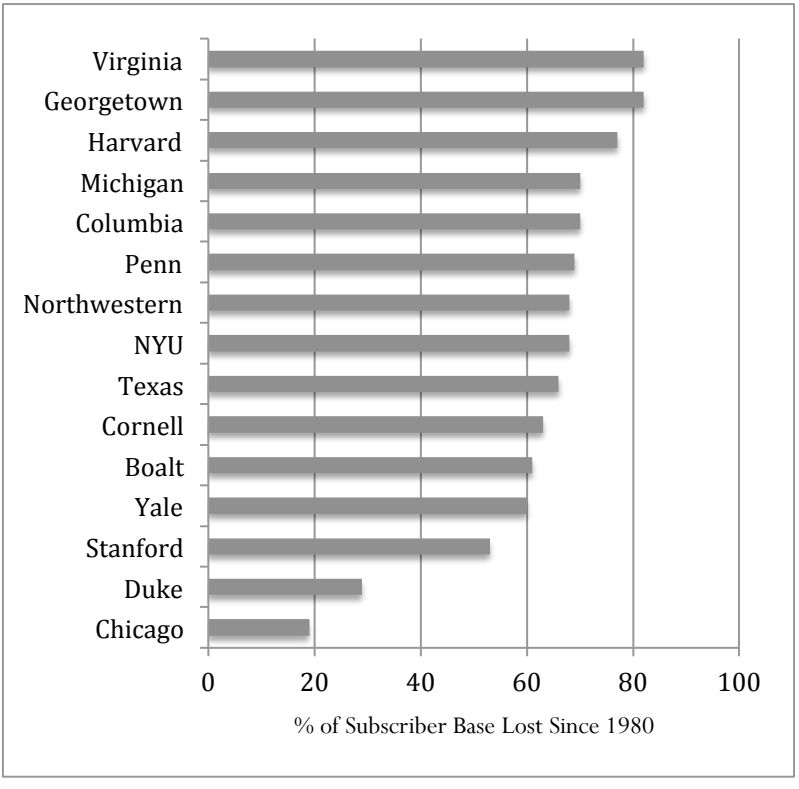
[1] *See The Dipping Point: Law Review Circulation 2010*, 2011 GREEN BAG ALM. 553.

[2] *See Law Review Circulation 2009: The Combover*, 2010 GREEN BAG ALM. 419.

[3] Actually, reporting is required only for journals that use a low-cost postage rate for periodicals. *See Law Review Circulation*, 2009 GREEN BAG ALM. 164. But it appears most law reviews do take advantage of the periodicals rate, and so once a year they should be completing and publishing in their pages a U.S. Postal Service Form 3526 that gives some basic publication and subscription information. *Id.*

experiences. Drop-offs in subscriptions have ranged from near-freefall to mere steep slide. Consider, for example, the declines since 1980 (or the nearest year for which there is a reported number) for flagship law reviews at the *U.S. News* top 15 law schools:

% OF PAID SUBSCRIBERS LOST SINCE 1980
BY FLAGSHIP LAW REVIEWS AT *U.S. NEWS* TOP 15 LAW SCHOOLS



3. But why the variety? Perhaps some of the differences in rates of decline can be attributed to different baselines. For example, the subscriber base of the *University of Chicago Law Review* (today still about 81% of what it was in 1980) seems much healthier than the *Harvard Law Review*'s (only about 23% of what it was in 1980), but in 1980 Chicago's law review had only 1,827 subscribers while Har-

vard's had 8,836. Suppose all the major law reviews are heading fairly quickly toward a common destination: a paid subscriber base consisting of a handful of institutional customers committed to comprehensive hard-copy collections, plus a small cadre of loyal alumni – in other words, just a few hundred subscriptions. If that is the case, then the relatively steep angle of the *Harvard Law Review*'s descent makes perfect sense. But that cannot be the whole story. For example, it does not explain the difference between the Chicago and Virginia law reviews, which were in the same ballpark in 1980 (1,827 and 2,396 subscribers respectively), but are much farther apart today (1,485 and 428 respectively). Nor can the differences between the top journals with notably healthier subscriber bases (Chicago and Duke, for example) and those with seemingly weaker subscriber appeal (Virginia and Georgetown, for example) be explained by the general hostility to law reviews captured in Chief Justice John Roberts's widely noted comment, "Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria."[4] Unless, that is, there is a causal relationship between differing subjects covered in different law reviews and those law reviews' differing experiences of abandonment by subscribers. This is a topic that is ripe for further navel-gazing.

4. Additions, subtractions, and revisions. Last year we added several leading law reviews to our circulation tables. This year we subtracted two fine specialty journals (the *Tax Law Review* and *Law & Contemporary Problems*), and added a couple of very respectable flagship journals (the *Hastings Law Journal* and the *American University Law Review*). We also corrected a few errors in earlier versions of the tables and filled in a few blanks, an exercise that will doubtless be repeated more than once over time. We hope to go further in the future.

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[4] Chief Justice John Roberts, *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN, www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/ (June 25, 2011); Richard Brust, *The High Bench vs. the Ivory Tower*, ABA JOURNAL, Feb. 2012 (quoting Roberts); *see also* Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, www.concurringopinions.com (July 1, 2011).

Stanford Law Review

ABOUT

The *Stanford Law Review* was organized in 1948 (see Warren Christopher's 1948 President's Page from Volume 1 of the *Review*). Each year the *Law Review* publishes one volume, which appears in six separate issues between November and July. Each issue contains material written by student members of the *Law Review*, other Stanford law students, and outside contributors, such as law professors, judges, and practicing lawyers. Beginning in 2011, the *Stanford Law Review Online* supplements the *Law Review*'s print editions by publishing short, original, and timely pieces of legal scholarship on this website (see Introducing the *Stanford Law Review Online*).

The *Law Review* has two principal functions: to educate and foster intellectual discourse among the student membership, and to contribute to legal scholarship by addressing important legal and social issues. *Law Review* participants select, edit, and publish articles and notes on the cutting edge of legal scholarship. Through these activities, they develop important research, editorial, administrative, and teaching skills. Editors are trained to critically and comprehensively evaluate submissions. Through a team-editing process, they address the work's analysis, writing style, research, organization, and accuracy. In addition, student authors who submit notes for publication receive extensive editorial assistance that helps them write more clearly and persuasively.

The *Law Review* is operated entirely by Stanford Law School students and is fully independent of faculty and administration review or supervision. The organization is self-supporting and derives its income principally from subscriptions and copyright royalties. Approximately 2,600 libraries, attorneys, judges, law firms, government agencies, and others subscribe to the print edition of the *Law Review*, and its articles are available in several online databases.

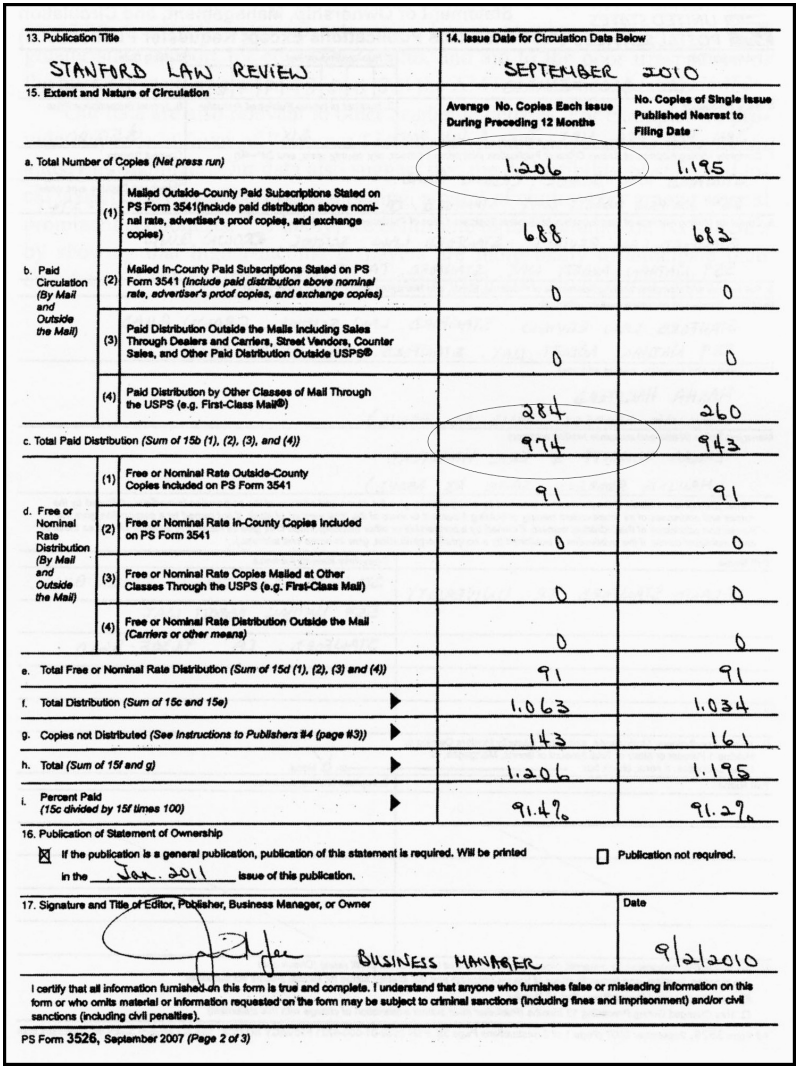
For a concise account of the beginnings of the *Law Review*, see, e.g., John R. McDonough, *The Stanford Law Review: In the Beginning*, 20 STAN. L. REV. 401 (1968).

For more information, please contact a member of the *Stanford Law Review*'s executive board.

AND NOW, BACK TO STANFORD

According to the *Stanford Law Review* website, "Approximately 2,600 libraries, attorneys, judges, law firms, government agencies, and others subscribe to the print edition of the *Law Review* . . . ."[5] However, according to the U.S. Postal Service Form 3526[6] printed in the December 2010 issue of the print edition of the *Stanford Law Review* (reproduced at right), the journal has a "Total Paid Distribution" of only 974. In fact, according to its Form 3526,

[5] *See* www.stanfordlawreview.org/about (vis. Jan. 24, 2012).
[6] *See Law Review Circulation*, 2009 GREEN BAG ALM. 164.



13. Publication Title			14. Issue Date for Circulation Data Below	
STANFORD LAW REVIEW			SEPTEMBER 2010	
15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)			1.206	1.195
b. Paid Circulation (By Mail and Outside the Mail)	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	688	683
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0	0
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	284	260
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))			974	943
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1)	Free or Nominal Rate Outside-County Copies included on PS Form 3541	91	91
	(2)	Free or Nominal Rate In-County Copies included on PS Form 3541	0	0
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail)	0	0
	(4)	Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	0	0
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))			91	91
f. Total Distribution (Sum of 15c and 15e)			1.063	1.034
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))			143	161
h. Total (Sum of 15f and g)			1.206	1.195
i. Percent Paid (15c divided by 15f times 100)			91.4%	91.2%

16. Publication of Statement of Ownership

☒ If the publication is a general publication, publication of this statement is required. Will be printed in the JAN. 2011 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner — BUSINESS MANAGER — Date: 9/2/2010

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form 3526, September 2007 (Page 2 of 3)

the "Total Number of Copies (net press run)" it has been printing is just 1,206. In other words, the *Stanford Law Review* claims to be selling more than twice as many copies of itself as it has copies to sell.

What might explain the *Stanford Law Review*'s claim that it has approximately 2,600 paying subscribers when in reality it has far fewer than half that many?

It seems fair to begin by setting aside the improbable possibilities that this is either a joke or an announcement that the *Stanford Law Review* is defrauding approximately 1,626 of its paying customers.

We can probably also eliminate the easiest of the excuses available to the *Harvard Law Review* and the *Virginia Law Review* when we challenged their puffery: that the inflated subscriber counts on their websites were wistful exaggerations echoing years past when they used to really have as many subscribers as they were inaccurately claiming to have in the present. The *Stanford Law Review*, in contrast, appears to have peaked at 2,350 paid subscribers in 1982-83, well below the approximately 2,600 the journal claims today.

But the *Stanford Law Review* might have secret knowledge of a time when it had more paying subscribers. Two facts make this an open question. First, Stanford did not publish a Form 3526 between 1983 and 1999, or in 2000-01, and so it may be that while other law reviews were suffering sharp declines in the 1980s and '90s, the *Stanford Law Review* was bucking the trend. Second, in 1999-2000 it broke silence to report 8,850 paid subscriptions, giving it more than twice as many subscribers as the *Harvard Law Review* at that time. If the 8,850 number is accurate, then the fall thereafter was truly precipitous, because in 2001-02 its paid circulation was just 1,434. Under these odd circumstances, the burden surely belongs on the *Stanford Law Review* to share a credible source for both the 8,850 number for 1999-2000 and the 2,600 approximation for the present day.

Finally, while it is true that the numerals that make up "1,206" (the average number of copies the *Stanford Law Review* has been printing recently) can be rearranged to make "2,601" – a number that is "Approximately 2,600" (the number of copies of itself the law review claims to be selling) – it would be disrespectful to suggest that the editors of a reputable scholarly journal would engage in such silliness or transparent chicanery merely to inflate a measure of the popularity and influence of their publication. Besides, the actual reported number of paid subscribers – 974 – shares nothing (not a single zero, one, two, or six) with any of those other numbers.

And so the source of the 2,600 approximation on the *Stanford Law Review* website must remain a mystery, at least for now.

"TOTAL PAID CIRCULATION"

1963-2011 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Yale	Harvard	Stanford	Columbia	NYU	Boalt	Chicago	Penn	Michigan	N'western
1963-64		10895		3396						
1964-65		10779		*						
1965-66		11147		*						
1966-67		10061		*						1557
1967-68	4235	10300		*						*
1968-69	*	10095		*						*
1969-70	4240	10828		*						2180
1970-71	4200	9486		3965					2921	*
1971-72	*	9771		3943					2869	*
1972-73	4200	9608		*					*	1885
1973-74	4200	*	1795	3907		2723	2009		2947	1865
1974-75	4250	10193	*	3831	2222	*	1975		*	1918
1975-76	4275	9374	*	3828	2179	2734	1951	2000	3038	1840
1976-77	4273	9559	*	3780	2143	2716	2033	2000	3069	1821
1977-78	4330	10100	*	3746	*	2637	2068	2200	3020	1846
1978-79	4462	9064	1546	4014	2105	2497	2068	2250	2998	1826
1979-80	*	8760	*	3795	2100	2549	2068	2176	2950	1771
1980-81	4051	8836	*	3790	2173	2342	1827	2150	2979	1610
1981-82	4126	9767	2056	3790	2092	2342	1993	2150	2985	1520
1982-83	4199	8389	2350	3561	2074	2342	2150	1900	2844	1416
1983-84	4092	8762	*	4046	2069	2200	2300	2080	2771	1440
1984-85	3950	7390	*	3227	*	2168	2617	1996	2727	1354
1985-86	3755	7705	*	3164	*	2014	*	*	2657	1251
1986-87	3755	7694	*	2938	*	1990	*	1708	2604	1268
1987-88	3700	7325	*	2947	*	1990	*	1762	2535	1264
1988-89	3700	6995	*	2337	*	1816	*	1628	2481	1223
1989-90	3700	7016	*	2913	*	*	2229	1864	2426	1178
1990-91	3700	7768	*	2676	*	1740	2205	1719	2382	951
1991-92	3700	6517	*	2798	*	1694	2454	1781	2332	*
1992-93	3600	6070	*	2525	*	1690	*	1673	2263	887
1993-94	3500	6018	*	2463	*	1701	1979	1673	2256	*
1994-95	3300	5204	*	2381	*	1696	2048	1551	2227	723
1995-96	3300	5029	*	2497	*	1595	1959	1446	2125	*
1996-97	3300	5454	*	2365	*	1507	1922	1408	*	*
1997-98	3300	4367	*	2273	1362	1422	1875	1334	1925	*
1998-99	3300	4574	*	2227	1222	1639	1872	1347	2010	*
1999-00	2705	4223	8850	2147	1200	*	1870	1191	1841	*
2000-01	2705	4013	*	2082	1183	1305	2062	1043	1697	*
2001-02	2677	3735	1434	2069	1159	1253	1769	1293	1654	*
2002-03	2577	3491	1280	2029	1211	1196	1845	1233	1571	1017
2003-04	2579	3451	1112	1875	1209	1045	*	1180	1419	997
2004-05	2712	2945	1112	1743	867	1040	*	1056	1207	660
2005-06	2296	2837	1112	1638	999	992	*	1101	925	466
2006-07	1782	2853	1089	1578	990	1178	*	1093	862	575
2007-08	1915	2610	1008	*	*	884	1525	923	783	584
2008-09	1725	2029	961	1364	763	820	1525	844	711	566
2009-10	1615	2021	974	1140	706	910	1485	669	902	514
2010-11	1520	1896	*	1076	662	719	*	569	777	*

* Form 3526 report not found for this year.

"TOTAL PAID CIRCULATION"
1963-2011 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Virginia	Cornell	Duke	G'town	Vanderbilt	UCLA	Texas	USC	Wash. U.	BU
1963-64	2950									
1964-65	2900									
1965-66	2650									
1966-67	2650									
1967-68	2650									
1968-69	2949									
1969-70	2997									
1970-71	2987			1301						
1971-72	2948			1590						
1972-73	*			*	1700					
1973-74	3249	3496	1200	1743	1775	1750				
1974-75	3000	3378	1200	1766	2100	1850	2000	1402		4882
1975-76	2850	3410	*	1981	1984	*	2150	1446	1170	4844
1976-77	2750	3650	1200	1973	1995	1900	2275	1370	980	4699
1977-78	2650	3350	1215	2100	1995	1351	2135	1326	980	4790
1978-79	2506	3350	1326	3130	2046	1520	2220	1355	971	*
1979-80	*	3350	1326	3197	1995	1536	2349	1614	1091	4691
1980-81	2396	3350	1296	3058	2046	1563	2349	1519	1190	4559
1981-82	2387	*	1411	2950	2046	1277	2347	1532	1096	3749
1982-83	2443	3603	1440	3100	1995	1251	2396	1435	1120	3540
1983-84	2400	*	1378	3200	1995	1361	2396	1333	1107	3433
1984-85	2161	*	1412	3000	2001	1400	*	1204	1106	3961
1985-86	*	3682	1445	1116	2020	1400	1960	1082	508.5	2274
1986-87	2200	*	1469	1116	1996	*	1684	1054	701	2801
1987-88	2029	*	1335	*	1550	1192	*	1199	706	2767
1988-89	1958	*	1295	*	1359	1192	*	1133	714	2617
1989-90	*	*	1268	3043	1253	1192	*	1133	725	3340
1990-91	1882	*	1255	2782	1281	1134	1548	1215	502	2701
1991-92	*	*	1253	2260	1330	1192	1489	830	490	2574
1992-93	1840	*	1187	3955	1220	1083	1407	980	490	183
1993-94	1680	3250	*	1514	1252	940	1261	772	490	1860
1994-95	1670	3252	*	1462	1252	940	881	795	490	1636
1995-96	1550	2958	*	*	1267	990	1137	4770	560	784
1996-97	1552	2890	*	1536	1287	1000	1123	*	560	602
1997-98	1536	2803	*	1487	1265	1000	1645	*	672	550
1998-99	*	2805	*	1471	1165	1000	1628	795	660	621
1999-00	*	2859	*	*	952	921	1526	760	644	549
2000-01	*	2845	*	1398	960	922	1488	4100	*	879
2001-02	1849	2816	*	*	855	695	1449	680	*	547
2002-03	1068	2288	*	*	*	650	1372	698	*	538
2003-04	644	1766	*	*	800	563	1125	680	*	538
2004-05	616	1827	*	*	850	648	1056	670	*	538
2005-06	483	1712	*	1027	850	520	963	700	*	538
2006-07	526	1497	*	924	850	521	963	720	*	538
2007-08	530	1458	957	1068	850	684	941	740	*	538
2008-09	542	1319	790	*	850	632	860	540	*	533
2009-10	443	1237	917	546	650	435	804	530	*	533
2010-11	428	1183	583	*	650	542	748	*	*	483

* Form 3526 report not found for this year.

"TOTAL PAID CIRCULATION"

1963-2011 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

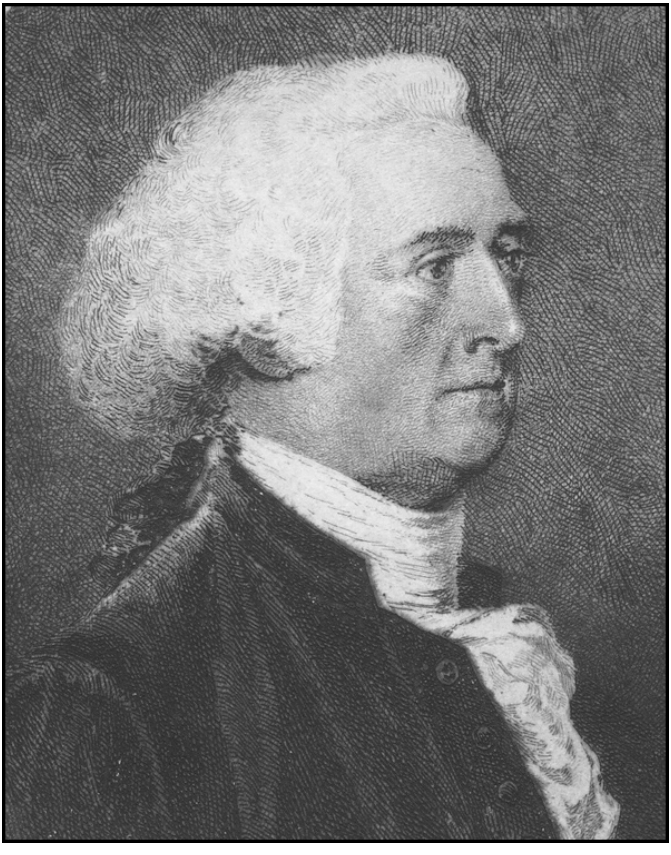
	Emory	Minn	Indiana	Illinois	ND	BC	Iowa	Wm&M	GW	Fordham
1963-64										
1964-65										
1965-66										
1966-67										
1967-68										
1968-69										
1969-70										
1970-71										
1971-72										
1972-73										
1973-74		2130								
1974-75		2342				1005				
1975-76		1732				*				
1976-77		1724				1087				
1977-78		1608				*				
1978-79		1621				1090				
1979-80	*	1527	1014	*	1066	1115	2500	808	*	1180
1980-81	*	1501	1016	*	1050	907	2500	808	*	1556
1981-82	1640	1513	1016	*	1050	886	2250	513	*	1374
1982-83	*	1421	1013	*	1061	715	2250	506	*	1660
1983-84	625	1378	992	*	1204	886	2250	*	911	*
1984-85	1425	1373	940	1370	1229	975	2250	503	*	*
1985-86	1425	1345	947	*	1236	*	2250	670	1065	*
1986-87	638	1282	991	*	1046	687	2200	670	*	*
1987-88	786	1258	912	1217	1029	680	2250	717	*	*
1988-89	750	1262	872	*	*	655	2200	719	*	1403
1989-90	750	1230	919	1120	1039	640	2200	761	*	1342
1990-91	750	1217	916	1086	893	640	2200	780	*	1366
1991-92	800	1251	849	1022	842	640	2200	747	*	*
1992-93	792	1202	797	*	826	600	2200	780	*	*
1993-94	792	1163	796	944	*	600	2000	778	*	*
1994-95	792	1023	753	908	1067	600	1800	781	*	*
1995-96	792	1184	741	868	1194	600	1800	751	*	*
1996-97	2600?	1053	706	834	1361	600	1800	751	*	*
1997-98	*	1014	673	808	939	600	1700	751	*	*
1998-99	6680?	947	752	*	1078	600	1700	751	*	*
1999-00	6680?	782	708	*	1027	818	1700	705	*	*
2000-01	6680?	757	708	700	977	507	1700	628	*	*
2001-02	6680?	868	680	656	984	593	1400	*	*	*
2002-03	6680?	802	647	630	951	594	1350	*	692	*
2003-04	*	768	622	595	836	661	1210	*	645	*
2004-05	*	728	613	567	670	540	1150	*	660	*
2005-06	*	1778	612	538	559	555	1150	*	*	*
2006-07	*	732	523	544	645	484	1100	*	624	*
2007-08	*	690	483	543	645	422	1000	*	590	*
2008-09	*	661	498	550	696	439	883	*	573	*
2009-10	*	609	471	493	644	503	883	*	544	*
2010-11	*	581	*	460	*	526	876	*	*	*

* Form 3526 report not found for this year.

"TOTAL PAID CIRCULATION"
1963-2011 FOR FLAGSHIP LAW REVIEWS AT MANY FINE SCHOOLS

	Alabama	UNC	U Wash	W&L	Ohio St	Davis	Georgia	Wisc	Hastings	American
1963-64										
1964-65										
1965-66										
1966-67										
1967-68										
1968-69										
1969-70										
1970-71										
1971-72										
1972-73										
1973-74										1500
1974-75										*
1975-76										1500
1976-77										1523
1977-78										1350
1978-79										1200
1979-80	*	2253	1846	1432	*	*	1943	1700	2860	1200
1980-81	*	1913	1827	1542	1809	*	1876	*	2890	1200
1981-82	*	2112	1885	1633	1822	*	1907	*	2800	1400
1982-83	*	*	1795	1562	1485	*	1867	1700	2300	*
1983-84	*	1961	1665	1543	1390	*	1837	1900	2250	1400
1984-85	*	1763	1711	?	1157	*	1050	1740	2341	700
1985-86	*	2101	1624	?	1072	*	1075	1730	2236	1500
1986-87	*	1533	1601	?	*	*	1070	1730	2236	1500
1987-88	*	1499	1588	1588	1052	*	1065	1800	1737	1500
1988-89	*	*	1593	1662	957	*	1065	1800	1500	1500
1989-90	*	*	1574	1662	907	*	855	1800	1600	1500
1990-91	*	*	1200	1662	*	*	876	1800	1658	1500
1991-92	*	*	1670	1675	*	*	849	1769	1521	1500
1992-93	*	*	1254	1675	*	*	847	1326	1524	1500
1993-94	*	*	1254	1268	*	*	915	*	1424	680
1994-95	*	*	1254	1200	*	*	915	1512	*	625
1995-96	*	*	1254	1200	*	620	915	1200	1127	*
1996-97	*	1075	1118	873	*	620	922	1300	1151	630
1997-98	*	1018	958	882	*	620	739	1328	1213	*
1998-99	*	1011	909	859	*	550	702	1328	1109	*
1999-00	*	926	939	855	*	*	687	1360	1069	*
2000-01	*	926	902	860	*	*	652	*	1071	575
2001-02	*	854	873	860	*	*	602	1035	1145	3320
2002-03	*	839	821	870	*	*	431	1035	1045	550
2003-04	*	785	822	836	*	*	554	1035	953	800
2004-05	*	766	755	492	*	527	501	1035	832	800
2005-06	*	749	734	546	*	527	442	*	711	800
2006-07	*	694	714	546	*	527	454	680	710	800
2007-08	*	658	720	546	*	527	540	*	532	800
2008-09	*	625	668	535	*	323	384	*	583	450
2009-10	*	585	698	471	*	331	356	*	490	452
2010-11	*	540	*	*	*	*	352	*	442	352

* Form 3526 report not found for this year.



John Rutledge, Chief Justice by recess appointment,
August 12 – December 15, 1795.

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James C. Ho & Trevor W. Morrison, editors

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RECESS RUCKUS

James C. Ho[†] *& Trevor W. Morrison*[*]

On December 17, 2011, the Senate prepared to end its business for the year. But rather than simply recess until January, the Senate instead unanimously agreed that, once every few days, it would convene a series of "pro forma sessions only, with no business conducted" – typically lasting 30 to 40 seconds each.[1]

What explains this curious behavior – and the constitutional struggle that has subsequently unfolded between President Barack Obama and various Republican Senators over the legal effect of these pro forma sessions? The answer can be found in a decades-old struggle between the executive and legislative branches of government over the proper meaning of the Recess Appointments Clause.

• • •

Article II of the Constitution gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[2] Such appointments require no Senate confirmation, so they are naturally viewed by Senators with suspicion.

In particular, Senators have dueled with Presidents over one particular question: What kind of Senate "recess" can give rise to a recess appointment? Is the power limited to the recess between different sessions of Congress? Or can recess appointments occur when

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[1] 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).
[2] U.S. Const. art. II, § 2, cl. 3.

the Senate takes a break in the middle of a session of Congress – commonly known as "intra-" (as opposed to "inter-") "session recesses"?

For decades, the Executive Branch has taken the view that the power applies during intra- as well as inter-session recesses. But there is a potential *reductio ad absurdum* problem here: If intra-session breaks can trigger the recess appointments power, does *every* such break do so? Could the President make recess appointments when the Senate adjourns for the evening? Or for lunch?

The way to avoid a slippery slope is to identify a principled limit. Towards that end, the Executive Branch has historically turned to another provision of the Constitution. According to Article I, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than *three days*."[3] Invoking this provision, the Justice Department concluded as early as 1921 that intra-session recess appointments are generally valid – but not for recesses of three days or less.[4]

In light of this assurance, the Senate has over time come to accept the legitimacy of intra-session recess appointments.

To be sure, many Senators howled when, during an 11-day intrasession recess in 2004, President George W. Bush gave a recess appointment to then-Alabama Attorney General William H. Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Over 40 Senators blocked a vote on his nomination – thereby motivating President Bush to grant the recess appointment. But only one Senator, Edward M. Kennedy, actually went to the trouble of filing amicus briefs questioning the constitutionality of his recess appointment.

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[3] U.S. Const. art. I, § 5, cl. 4 (emphasis added).

[4] *See, e.g.,* 33 Op. Att'y Gen. 20, 24-25 (1921) ("If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) As I have already indicated, the term 'recess' must be given a practical construction. And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.").

He argued that the Constitution forbids *all* intra-session recess appointments, regardless of the length of the recess, an argument the Eleventh Circuit later rejected.[5]

Rather than join Kennedy's amicus effort, his Senate colleagues later banded together to protect Senate prerogatives in a different manner. Instead of protesting the legitimacy of all intra-session recess appointments, regardless of duration, the Senate responded by adopting defensive measures that presume that the three-day rule imposes meaningful limits on the recess appointment power. Shortly after Democrats won back a majority of the Senate in 2007, the new Senate leadership instituted the practice of conducting pro-forma sessions once every few days, in hopes of preventing the President from making recess appointments due to the three-day rule – a tactic the Bush Administration never publicly challenged.[6]

• • •

This pro-forma session strategy continues to this day – and has given birth to the latest constitutional controversy over Presidential appointments. On January 4, President Obama made four recess appointments – notwithstanding the fact that the appointments occurred during the three-day gap between pro forma Senate sessions on January 3 and 6.

Senate Republicans howled. Their objections were formally delivered to the Administration when Senate Judiciary Committee Republicans submitted a letter to Attorney General Eric Holder, demanding to know how the Administration could reconcile these appointments with the three-day rule.

Notably, the Obama Administration responded by releasing an Office of Legal Counsel opinion that specifically avoided attacking

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[5] *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

[6] *Cf.* Steven G. Bradbury & John P. Elwood, *Call the Senate's bluff on recess appointments*, Wash. Post, Oct. 15, 2010, *available at* www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html ("Although Bradbury was nominated as assistant attorney general in 2005, his nomination was never voted on by the full Senate. Individual senators put holds on the nomination, and Senate leaders instituted pro forma sessions to prevent a recess appointment.").

the three-day rule.[7] OLC instead concluded that the pro forma sessions were simply insufficient to interrupt an on-going recess. Under its view, the January 4 appointments took place in the midst of a 20-day recess between January 3 (the first day of the new session of Congress) and January 23 – rather than a mere three-day recess between January 3 and January 6.

• • •

However the controversy over pro forma sessions is ultimately resolved, one lesson emerges: The three-day rule has come to earn a certain measure of respect by both executive and legislative branch officials from both major political parties.

Yet remarkably, this respect has occurred not as a result of judicial decision, but rather through the work of the political branches.

What's more, a number of key documents in this area have not previously been the subject of formal publication. Indeed, the briefs we publish here have been cited by scholars, commentators, and public officials on various occasions – yet based on our research have never been made available to ordinary citizens on the Internet or through Westlaw, LEXIS, or any other source.

These two ingredients make this latest controversy perfect fodder for *Pub. L. Misc.*[8] In the pages that follow, readers will find two federal district court briefs filed by the Justice Department in 1993 in the matter of *Mackie v. Clinton* – one was recently cited by Senate Republicans, the other by OLC. We also include here the amicus brief submitted to the Eleventh Circuit by Senator Kennedy in 2004, along with the recent letter from Senate Judiciary Committee Republicans protesting the January 4 recess appointments by President Obama. All of these documents are published here for the benefit of scholars, practitioners, and other interested observers.

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[7] *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, Jan. 6, 2012, *available at* www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

[8] *See generally* James C. Ho & Trevor W. Morrison, *Introducing* Pub. L. Misc., 1 J.L. (1 PUB. L. MISC.) 13 (2011).

Perhaps the most significant legal document in the current controversy is the OLC opinion addressing the President's authority to make the January 4 recess appointments. We published a similarly prominent OLC opinion in our last issue, addressing the President's power to order the use of military force in Libya.[9] But because OLC's published opinions are formally archived and readily accessible, we have decided as a matter of policy no longer to reproduce them in *Pub. L. Misc.* Instead, we will focus on less readily available materials, like correspondence between the executive and legislative branches, trial court briefs filed by the Justice Department, and so on. Perhaps someday those materials will be just as carefully organized and easily accessible as OLC opinions, rendering an effort like *Pub. L. Misc.* obsolete. Nothing would please us more.

[9] *See* Letter from Caroline D. Krass to Eric H. Holder, Jr., *Presidential Powers – Hostilities and War Powers*, 1 J.L. (1 PUB. L. MISC.) 260 (2011).

RECESS APPOINTMENTS

Brief by Stuart E. Schiffer (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

June 21, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT II

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[*Editors' note*: The table of contents and some superfluous front matter have been omitted.]

[*1] INTRODUCTION

This case concerns the validity of the January 8, 1993 recess appointment of Thomas Ludlow Ashley to be a Governor of the United States Postal Service.

The Recess Appointments Clause to the Constitution grants to the President "Power to fill up all Vacancies that may happen during the Recess of the Senate . . . ." U.S. CONST., art. II, § 2, cl. 3. There are thus three elements that must exist to trigger the President's recess appointment authority: there must be (1) a "Vacancy" which (2) "happens" during (3) a "Recess of the Senate." All three elements are present in this case.

First, the position to which Governor Ashley was appointed was vacant: although Governor Ashley's predecessor, Crocker Nevin, was authorized to continue in office temporarily pursuant to the holdover provision of the Postal Reorganization Act, 39 U.S.C. § 202(b), his term had expired on December 8, 1992. See Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979). Second, the vacancy existed and was filled during the Senate's recess from [*2] January 7 to January 20, 1993. Third, the January 1993 recess was a "Recess" within the meaning of the Recess Appointments Clause. The Senate had plainly adjourned; there was no duty for its members to attend as a body, and the Senate had no ability during that period to act on presidential nominations. The Constitution does not by its terms limit the recess appointment power to recesses between sessions of Congress or impose any lower limit on the length of a recess to which the Recess Appointments Clause applies. Indeed, as shown below, many Presidents have made recess appointments during intrasession recesses and recesses of comparable length to the one at issue in this case.

Finally, the fact that the Postal Reorganization Act permitted Mr. Nevin to continue in office until his successor had "qualified" does not pose a bar to Governor Ashley's appointment. There is nothing in the Act which suggests that an appointee does not qualify within its terms by a recess appointment so long as the Senate is not in session, and this Court may not presume that Congress intended

to restrict the President's recess appointment powers without a more explicit indication.

In sum, the President validly exercised his constitutional authority to fill vacancies that happen during Senate recesses and Mr. Nevin's holdover status did not restrict the President's recess appointment power. Accordingly, summary judgment should be granted for defendants.

[*3] STATEMENT OF FACTS

1. This case originally began as a suit to enjoin the President from removing certain members of the Postal Service Board of Governors. See Complaint, Count I. After Governor Ashley's recess appointment, the Complaint was amended to restate Count I and to include a challenge to the recess appointment. See Amended Complaint, Counts I and II. The parties have reached an agreement by which Count I may be resolved. Accordingly, only Count II is addressed by this motion.

2. On August 15, 1986, Crocker Nevin was appointed a Governor of the United States Postal Service for a term that expired on December 8, 1992. Amended Complaint ¶ 6. On January 8, 1993, Mr. Nevin was serving as Governor pursuant to section 202(b) of Act, which provides that "[a] Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year." 39 U.S.C. § 202(b). Id.

3. On January 5, 1993, Senator Mitchell introduced a "concurrent resolution (S. Con Res. 3) providing for a recess . . . [which] "[R]esolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The [*4] motion was agreed to, and the Senate, at 8:10 p.m. recessed . . . ." 139 Cong. Rec. S53 (daily ed. January 7, 1993).

4. On January 8, 1993, former President Bush appointed Thom-

as Ludlow Ashley to the Postal Service Board of Governors. 29 Wkly Comp. Pres. Doc. 29 (1993).

ARGUMENT

[*Editors' note*: Parts I and II of the Argument have been omitted.]

[*7] III. THE SENATE'S RECESS FROM JANUARY 7 TO JANUARY 20, 1993 TRIGGERED THE PRESIDENT'S RECESS APPOINTMENT POWER

A. The Ordinary Meaning Of The Term "Recess" Establishes That The Senate Was In Recess On January 8, 1993

The recess appointment power, by the terms of the clause, must be exercised during a "Recess of the Senate." That phrase should be interpreted according to its ordinary meaning, unless the Constitution clearly prescribes otherwise. United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their ordinary meaning as distinguished from technical meaning. Where the intention is clear there is no room for construction and no excuse for interpolation or addition."). Webster's Dictionary, published in 1828, defines "recess" as, among other things, a "Remission or suspension of business or [*8] procedure; as, the house of representative has a recess of half an hour." II N. Webster, An American Dictionary of the English language 51 (1828). There is no dispute that there was a break in the Senate's session between January 7 and January 20, 1993, during which the business of the Senate as a body was suspended. Hence, the Senate was in "recess" on January 8, 1993, as the meaning of that term is ordinarily understood.

B. The Senate Was In "Recess" On January 8, 1993, Under The Senate's General Definition Of The Term

The Senate also was in recess as that term is defined by the Senate itself. The term "recess" as used in the Recess Appointments

Clause is defined in a Senate Judiciary Committee report issued in 1905. The report states that the word "recess is one of ordinary, not technical signification and it is evidently used in the constitutional provision in its common and popular sense." The committee concluded that "recess" refers to "the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions . . .'" id. at 24 (quoting S. Rep. No. 4389, 58th Cong., 3d Sess. (1905) (emphasis in original).

Thus, under the Senate's definition of the term "recess," the President plainly was authorized to exercise his recess appointment authority to appoint Governor Ashley. There can be no dispute that the Senate was not sitting in regular or extraordinary session for any purpose on January 8, 1993, when Mr. Ashley was appointed Governor. [*9]

C. The Senate Characterized Its January 1993 Break In Session As A Recess

On January 5, 1993, the Senate considered a concurrent resolution "PROVIDING FOR A RECESS OR ADJOURNMENT OF THE SENATE AND THE HOUSE" 131 Cong. Rec S11. (daily ed. Jan. 5, 1993). It was introduced by Senator Mitchell as "A concurrent resolution (S. Con Res. 3) providing for a recess or adjournment of the Senate from January 6 or 7, 1993 to January 20, 1993 . . . ." Id. (emphasis added). Moreover, the concurrent resolution itself "Resolved that when the Senate recesses or adjourns on Wednesday, January 6, or Thursday January 7, 1993 . . ., it stand recessed or adjourned until 3:00 p.m. on Wednesday, January 20, 1993 . . . ." Id. (emphasis added). On January 7, 1993, Senator Dole moved that "the Senate stand in recess as provided under Senate Concurrent Resolution 3, until 3 p.m., Wednesday, January 20, 1993. The motion was agreed to, and the Senate, at 8:10 p.m., recessed until Wednesday, January 20, 1993, at 3:00 p.m." 131 Cong. Rec. S53 (daily ed. Jan. 7, 1993) (added emphasis).

Accordingly, that the Senate was in recess on January 8, 1993, is not subject to dispute.

D. The Term "Recess" Is Not Limited To Intersession Recesses Under The Recess Appointments Clause

It might be argued that the use of the term "the Recess of the Senate" in the Recess Appointments Clause limits the President's recess appointment powers to the recess of the Senate between the two sessions of Congress, and not within a session of Congress, as here. But the Constitution does not impose a single [*10] "Recess" on the Senate. On the contrary, there is no limit on the number of sessions that a Congress may have. The first Congress, for example, held a third session from Dec. 6, 1790 to Mar. 3, 1791, and the 67th Congress held a fourth session from Dec. 4, 1922 to Mar. 3, 1923. Congressional Quarterly's Guide to Congress (4th ed.), at 113-A and 116-A. Nor is there is any evidence that the Framers intended the use of the word "the" to have any substantive effect on the scope of the clause.

Moreover, there would be grave practical objections to an interpretation limiting the recess appointment powers to intersession recesses. In the first place, such an interpretation would interfere with the "substantial purpose" animating the Clause, which was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823). The Senate is equally unable to act on Presidential nominations when it is in recess between sessions of Congress, or within a single session. To permit recess appointments only in one instance but not the other would mean that vacancies would necessarily remain unfilled, contrary to the Framers' intent. Indeed, it would leave the President's recess appointment powers at the mercy of the Senate's schedule; and to the extent that the Senate, as in the modern era, decides to rely more heavily on intrasession recesses rather than recesses between sessions, the power to fill offices as provided by the Constitution would be diminished. [*11]

1. Attorneys General Opinions

In 1921, the Attorney General was asked to determine whether the President had the power to make appointments during an intrasession recess of the Senate lasting from August 24 to September 21, 1921. 33 Op. Att'y Gen. 20 (1921). The opinion concluded

that there is no constitutional distinction between an intersession recess and an adjournment during a session, and that a "recess" for purposes of the Clause need only be a practical break in the Senate's session such that its advice and consent to the appointment cannot be obtained. Id. at 21.[4]

In reaching this conclusion, the Attorney General was persuaded by a long line of Attorneys General opinions interpreting the recess appointment power broadly. In 1823, for example, the Attorney General had addressed the question of whether the President could fill a vacancy that arose when the Senate was in session. He opined that:

> the substantial purpose of the Constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy thus circumstanced, the powers are inadequate to the purpose, and the substance of the [*12] Constitution will be sacrificed to a dubious construction of its letter.

1 Op. Att'y Gen. 632, 633 (1823). On the same question, in 1866, the Attorney General stated:

> the true theory of the Constitution [is] that as to the Executive power, it is always to be in action, or in capacity for action; and that to meet this necessity, there is a provision against a vacancy in the chief Executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone.

12 Op. Att'y Gen 32, 35 (1866).

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[4] The opinion expressed doubts about whether the power could be exercised during adjournments lasting "5 or even 10 days" but fails to give the analysis or authority for that statement. As noted above, nothing in the terms or legislative history of the clause suggests that there is any bottom limit for the length of a recess before the power can properly be exercised. In any event, the Attorney General further stated that the question did not lend itself to an absolute limit, and that it was up to the President to exercise his discretion in the matter. Id.; see also 3 Op. Off. Legal Counsel at 315.

The President's authority to make recess appointments during intrasession recesses has been reaffirmed on numerous occasions by the Department of Justice,[5] and by the opinion of the Comptroller General. See 28 Comp. Gen. 30, 34-36 (1948).[6] "While opinions of the Attorney General of course are not binding [on the courts], they are entitled to some deference, especially where judicial decisions construing a statute are lacking." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 n.6 (D.C. Cir. 1984) (concurring opinion of Judge Edwards). [*13]

2. Past Presidential Practice

There is also a long-standing practice of making recess appointments during intrasession recesses. For example, intrasession judicial recess appointments include Samuel Blatchford (S.D.N.Y.), appointed in the 1867 intrasession recess; Roy Harper (D. Mo.), Edward A. Tamm (D.D.C.), Samuel H. Kaufman (S.D.N.Y.) and Paul P. Rao (Customs Ct.), appointed during an intrasession in 1948; and William M. Byrne (S.D. Ca.), Oliver J. Carter (N.D. Ca.) and Walter M. Bastian (D.D.C.), appointed during an intrasession recess in 1950. Exhibit 3, p. 1.[7]

Intrasession recess appointments to regulatory agencies have included: John Esch, appointed to the Interstate Commerce Commission in 1928; John H. Fahey, J. Alston Adams, and Nathaniel Dyke,

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[5] See, e.g., 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 41 Op. Att'y Gen. 463, 468 (1961). This view also is supported by the court's opinion in Gould v. United States, 19 Ct. Cl. 593, 595 (1867) (service during intrasession recess appointment included in calculation of pay).

[6] The Comptroller General agrees that recess appointments are permissible when the Senate is recessed long enough so as to be unavailable as a practical matter. Id.

[7] The press of time has prevented defendants from obtaining a complete list of recess appointments. Most of the examples referenced in this memorandum were derived from a alphabetical listing of judicial recess appointments up to 1982, filed in Woodley v. United States, 726 F.2d 1328 (9th Cir. 1983), rev'd, 751 F.2d 1008 (1985) (en banc), and a list of recess appointments filed in Bowers v. Moffett, No. 82-0195 (D.D.C. 1982). The Woodley and Bowers lists are attached hereto as Exhibits 1 and 2, respectively. For the Court's convenience, all intrasession recess appointments from these lists, and others that defendants were able to uncover, have been collected into a single list attached as Exhibit 3.

Jr. appointed to the Federal Home Loan Bank Board during a 1947 intrasession recess; Byron D. Woodside and Philip A. Loomis, Jr. to the SEC in 1960 and 1971, respectively. See Exhibit 3, p. 6.

President Nixon made at least 6 recess appointments during a 1970 intrasession recess and President Carter made at least 17 [*14] intrasession recess appointments. President Reagan made at least 22 such appointments in 1981. See Exhibit 3, pp. 2-5.

Evidence of the manner in which the power has been exercised in practice is traditionally accorded considerable weight by the Supreme Court in interpreting the Constitution. See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915) (acknowledging the rule that "in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself – even when the validity of the practice is the subject of the investigation"); Accord Udall. v. Tallman, 380 U.S. 1, 17 (1965). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J. concurring). The above examples establish intrasession recess appointments as a long and consistent presidential practice.

E. There Is No Lower Time Limit That A Recess Must Meet To Trigger The Recess Appointment Power

The language of the Recess Appointments Clause does not require that the Recess of the Senate last for any minimum length of time. Hence, nothing in the Clause prevented the President from making recess appointments during the 13 day recess in January 1993.

There also is a long-standing practice of making recess appointments during recesses of comparable durations. President Coolidge made a recess appointment during a 14-day recess;[8] [*15] President Franklin Roosevelt made recess appointments during a recess lasting

[8] On January 3, 1928, John Esch was appointed to the ICC during the recess lasting from December 21, 1927 until Jan. 4, 1928. See Exhibit 2, p. 6; Congressional Quarterly's Guide to Congress (4th ed.) [hereinafter cited as "Cong. Quarterly"), at 116-A (listing the sessions of Congress from 1789 to 1991). For the Court's convenience, defendants have attached the relevant pages of the Cong. Quarterly at Exhibit 4.

15 days;[9] President Truman made a recess appointment during a 4 day recess,[10] and an 18 day recess.[11] President Johnson recess appointed Judge Spottswood Robinson during an 8 day recess.[12]

Moreover, President Nixon appointed the first Board of Governors for the Postal Service under the Postal Reorganization Act during a 19 day recess from January 2, 1971 to January 21, 1971.[13] President Carter made seven recess appointment during a 13 day recess.[14] Six of these appointments were made on the morning of the day the Senate reconvened.

[*16] More recently, in a situation directly analogous to the present case, President Reagan made two recess appointments during the 14-day recess between the convening of Congress and the President's inauguration in 1985.[15] President Bush had previously made a recess appointment during an 18-day recess in January, 1992.[16] The January 1992 recess was approved by OLC. See 16 OLC Op. (Prelim. Print) 15 (1992).

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[9] Paul A. Porter was appointed to the FCC on December 20, 1944, during the recess from December 19, 1944 to January 3, 1945. See Exhibit 3, p. 6; Cong. Quarterly, p. 117-A.

[10] On January 4, 1949, President Truman appointed Oswald Ryan to the Civil Aeronautics Board during the recess from December 31, 1948 to January 3, 1949. See Exhibit 2, p. 23; Cong. Quarterly at p. 117-A.

[11] John Alston Adams and William K. Divers were appointed to the Federal Home Loan Bank Board on December 20, 1947 during a recess from December 19, 1947 to January 6, 1948. Exhibit 2, p. 26; Cong. Quarterly, p. 117-A.

[12] See Exhibit 1. This recess lasted from December 30, 1963 until January 7, 1964. Cong. Quarterly, p. 117-A.

[13] See Exhibit 2, p. 7; Cong. Quarterly, p. 118-A.

[14] See Exhibit 2, p. 12; Cong. Quarterly, p. 119-A.

[15] During the recess from January 7, 1985 to January 21, 1985, President Reagan appointed John A. Bohn, Jr., First Vice President of the Export-Import Bank, and Richard H. Hughes Director, Export-Import Bank. See 21 Wkly Comp. Pres. Doc. 85 (1985); 131 Cong. Rec. 586 (1985).

[16] On January 15, 1992, President Bush appointed Daniel Evans Chairperson, and Marilyn R. Seymann, Lawrence V. Costiglio, and William C. Perkins, members of the Federal Housing Finance Board; and Albert V. Casey, Chief Executive Officer of the Resolution Trust Corp., during a recess from January 3, 1992 to January 21, 1992. 28 Wkly. Comp. Pres. Doc. 129-30 (January 15, 1992); 138 Cong. Rec. S1 (daily ed. Jan. 3, 1992).

The length of a recess is not a ground upon which the Court may distinguish between and among recesses. The Constitution provides no basis for a court to conclude, for example, that a 30 day recess is sufficiently long or that a 5 day recess is too short. Moreover, any lower limit would have to be applied to intersession and intrasession recesses alike because there is no basis for distinguishing between the two. Everyone appears to agree however that intersession recesses are subject to no restrictions. Indeed, there is a long standing presidential practice of making recess appointments within days or even hours of the end of an intersession recess. Yet, this situation is [*17] functionally indistinguishable from making a recess appointment at anytime during a short recess.

In 1789, for example, George Washington appointed Judge William Paca to the bench 13 days before the Senate reconvened from an intersession recess lasting almost 100 days and in 1819, Judge Roger Skinner was appointed 12 days before the end of an intersession recess.[17] This is functionally equivalent to the situation we have here, where the recess appointment was made on the first full day of a 13 day recess. More recently, Spottswood Robinson and A. Leon Higginbotham were appointed 1 day before the end of an intersession recess in 1964 (Exhibit 1) and President Nixon appointed Donald T. Regan and others to the Securities Investor Protection Corp., on the day the intersession recess ended in 1971. Exhibit 2 at p. 7. These are just a few of the many examples that show that this practice has been consistently repeated.

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[17] See alphabetical list of judicial recess appointments attached at Exhibit 1. Evidence that this practice occurred during the time when the Framers were still active in government establishes that the practice is consistent with their understanding of how the Constitution should work. See, e.g., Marsh v. Chambers, 463 U.S. 783, 786-92 (1983). See also Mistretta v. United States, 109 S. Ct. 647, 669-70 (1989); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936); J.W. Hampton. Jr. & Co. v. United States, 276 U.S. 394, 412 (1928). In the context of the Recess Appointments Clause itself, the Ninth Circuit relied upon the historical practice of Presidents making judicial recess appointments, to uphold President Carter's recess appointment of a district judge against a challenge based on Article III of the Constitution. United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc).

These recess appointments also refute the proposition that the President's power to act during a short recess is limited to [*18] exceptional or emergency situations. As the Court recognized in Staebler, "recess appointments traditionally have not been made only in exceptional circumstances, but whenever Congress was not in session." 464 F. Supp at 597. Moreover, "[t]here is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment to be used only in cases of extreme necessity." Id. This construction of the clause is borne out by the historical practice regarding the recess appointment power since its first use.

F. No Further Limitations On The Recess Of The Senate Constitutionally May Be Implied

As demonstrated above, Congress plainly was in recess in January 1993, pursuant to the ordinary meaning of the term. There is no basis to provide that the recess must meet any additional requirements. Indeed, the Court in Staebler refused to impose additional restrictions on the language of the Recess Appointments Clause. Staebler v. Carter, 464 F. Supp. at 597. After reviewing the language of the Recess Appointments Clause and its sparse legislative history, the Court opined:

> [T]wo limitations on the applicability of the Recess Appointments Clause are part of the Clause itself that it may be invoked only when the Senate is in recess, and that the President's recess commissions 'shall expire at the End of (the next congressional) Session. * * * There is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language.'

Staebler, 464 F. Supp. at 597.

[*19] The only constitutional restriction upon the Senate's ability to adjourn its sessions is that adjournments for more than three days require the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4.[18] Apart from this 3 day limitation, the Constitution

[18] It could be argued that the proscription against Senate adjournments for more

provides no basis upon which the Court could approve certain recesses and disapprove others.

G. There Is No Principled Basis Upon Which A Line Might Be Drawn To Invalidate 13 Day Recesses

The courts have no authority to add restrictions to the Constitution. See Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993); Powell v. McCormick, 395 U.S. 486, 550 (1969). But even if this legal bar did not exist, it would be very difficult indeed to determine how or where a line might be drawn to distinguish between recesses. As discussed above, recesses cannot be approved or disapproved based upon their length. And, as the Court in Staebler recognized, nothing confines the exercise of the recess appointment power to emergency or exceptional situations. Furthermore, anything less than a bright line would encourage litigation over the validity of the appointment and could force an agency to delay important decisions until the litigation is resolved. It is difficult, [*20] however, to conceive how the court could determine where a line would be drawn. See Nixon, 113 S. Ct. at 736 (word used in Impeachment Clause "lacks sufficient precision to afford any judicially manageable standard of review").

The clause does impose limits and these certainly can be enforced by this Court. As shown above, however, those limits are only that a "vacancy" "happen" during the "recess" of the Senate, all of which are met in this case. Any further refinement of the recess power therefore should proceed only through constitutional agreements between the Legislative and Executive Branches of government.

[*Editors' note*: Part IV of the Argument has been omitted.]

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than three days without House consent manifests the Framer's intent to attach lesser importance to one, two, or three day recesses. However, the Court need not reach that issue. Even assuming arguendo that the recess appointment could not be exercised during adjournments of less than three days, that fact would not invalidate Governor Ashley's appointment.

[*25] CONCLUSION

As demonstrated above, all of the prerequisites for the exercise of the recess appointment power were in existence when former President Bush recess appointed Mr. Ashley to the Postal Service Board of Governors and the Act, as properly construed, did not prohibit the President from issuing the recess appointment. Accordingly, summary judgment should be granted for defendants.

Respectfully Submitted,

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RECESS APPOINTMENTS

Brief by Frank W. Hunger (additional counsel listed in brief) before the U.S. District Court for the District of Columbia

July 2, 1993

Civil Action 93-0032-LFO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT H. MACKIE, et al.,
Plaintiffs,

v.

WILLIAM J. CLINTON, et al.,
Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Respectfully submitted,

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[*Editors' note*: A superfluous heading has been omitted.]

[*1] INTRODUCTION

This suit challenges the validity of the recess appointment of Thomas Ludlow Ashley to the Postal Service Board of Governors.[1] Mr. Ashley was appointed to succeed Crocker Nevin who at the time was serving temporarily, after his term had expired, pursuant to the holdover provision of the Postal Reorganization Act ("Postal Act" or "The Act").

Three elements trigger the recess appointment power: a 1) "vacancy" must 2) "happen," during 3) a Senate "recess." Only the first and third elements are at issue in this case. Plaintiff's challenge to these elements fails for the following reasons.

[*2] First, the decision in Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979), proves that a vacancy existed in Mr. Nevin's position on the date his statutory term of office ended. Plaintiff contends that the holdover provision of the Postal Act creates not a present vacancy that can be filled by recess appointment, but a prospective one to be filled by presidential appointment after Senate confirmation.[2] However, the Postal Act originally defined a vacancy as occurring upon the expiration of a Governor's term and there is no evidence that the holdover provision was intended to change this definition. Moreover, even if the vacancy were to be considered a prospective one, plaintiff cannot prevail unless he also proves that the vacancy can only be filled by an appointee who has been confirmed by the Senate. Because the Postal Act contains no such restriction, plaintiff's prospective vacancy theory fails.

Second, the plaintiff does not contend that the Senate was not in recess on January 8, 1993, when Mr. Ashley was recess appointed. Instead, plaintiff asserts that this recess was not the "type of recess" contemplated by the recess clause. While plaintiff suggests that "recess" is confined to those occurring between sessions of Congress,

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[1] As noted in their opening brief, defendants challenge the standing of all plaintiffs other than Crocker Nevin, whom defendants refer to as the plaintiff herein.

[2] President Clinton has announced his intention to nominate Einar Dyhrkopp to the Postal Service Board of Governors. See Star Tribune, June 29, 1993 (State ed.), available in LEXIS, Nexis Library, Majpap File. If Mr. Dyhrkopp is confirmed and appointed, plaintiff's recess appointment challenge would be moot.

the terms of the Constitution impose no such limitation. Furthermore, plaintiff's [*3] interpretation is contrary to the purpose of the recess clause and would upset the balance of power allocated under the Constitution. Plaintiff argues, alternatively, that even if intrasession recesses generally are accepted, this particular intrasession recess was too brief to count. As demonstrated in defendants' opening brief, as well as below, there is no basis in the Constitution for the Court to draw such distinctions.

ARGUMENT

[*Editors' note*: Part I of the Argument has been omitted.]

[*17] II. THE PRESIDENT PROPERLY EXERCISED HIS RECESS APPOINTMENT POWERS DURING THE SENATE'S JANUARY 1993 RECESS

Plaintiff here does not argue that Congress was not in "recess" from January 7, to January 20, 1993. Instead, plaintiff contends that the January recess was not the "type" of recess contemplated by the Recess Appointments Clause. Plaintiff's Brief at 23. According to plaintiff, only an intersession recess is the right kind of recess. Plaintiff's implied limitation on the unqualified language of the Constitution would thwart the purposes of the recess clause and upset the balance of power between the branches. Accordingly, interpreting "recess" to include both intersession and intrasession recesses is more reasonable.

A. The Terms Of The Recess Appointments Clause Permit A Finding That "Recess" Means Both Intersession And Intrasession Recesses

The recess clause provides that:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Art. II, § 2, cl. 3.

Plaintiff contends that use of the term "the Recess" in the singular evidences the Framers' intent to limit use of the recess power to intersession recesses because the general practice has been for each Congress to have two sessions. Plaintiff's Brief at 25-26. Plaintiff asserts that "the Recess" therefore logically refers to the interval between these two sessions. The problem with such logic, as we have pointed out, is that nothing [*18] in the Constitution limits the number of sessions that a Congress may have. Congress often has held three sessions, as did the First, Fifth and Eleventh Congresses; indeed, a fourth session was held by the 67th Congress.[15]

Plaintiff relies on the language providing that a recess commission will "expire at the End of [Congress'] Next session" as further evidence that the Recess refers to intersession recesses only. Plaintiff asserts that extending the recess to intrasession recesses could make a recess appointment valid for nearly two years.[16] History shows that recess appointees have been granted commissions that would allow them to serve in that capacity for similar periods. For example, William Allen (S. D. Ill.) was recess appointed on April 18, 1887 for a term that would not have expired pursuant to the recess clause until October 20, 1888 – a period of 18 months. See Defendants' Brief, Exh. 1 at p. Al. Similarly, in 1849, Henry Boice was recess appointed on May 9, 1849 for a term that would have expired on September 30, 1850, almost 17 months later. Id. at p. A3. Indeed, the record indicates that Judge Boice would have actually served most of that period because he was not confirmed until August 2, 1850. Thus, the fact that Mr. Ashley's [*19] appointment conceivably could last for an extended period of time is no basis for disapproving his recess appointment.

Plaintiff contends that the Framers could not have intended to allow persons appointed at the beginning or middle of an intrasession recess "when the Senate's resumed availability for advice and con-

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[15] In fact, of the 103 Congresses, 25 have had three or more sessions.

[16] Last year, Congress adjourned sine die on October 8, 1992. Assuming a similar schedule next year, the maximum time the recess appointment could last is approximately 20 months. Obviously, if it adjourned earlier than October, the time would be less.

sent is imminent" to serve longer than those appointed during prolonged intersession recesses. Plaintiff's Brief at p. 28. This argument proceeds on the faulty premise that recess appointments made close to the time when the Senate will be resuming its session are somehow inappropriate or that some penalty should attach. However, as defendants have shown, many individuals have been recess appointed over the years during the last days of an intersession recess. Defendants' Brief at 17 and Exhs. 1, 2 & 4. Because such appointments were likewise made when the Senate's return to business was imminent, the situations are functionally equivalent. Application of the "end of their next session" language can produce the same results, whether the recess appointment is made during an intersession or an intrasession recess. Thus, this language is no evidence that "the Recess" refers only to intersession recesses.[17] [*20]

B. Limiting "The Recess" To Intersession Recesses Would Nullify The Purpose Of The Recess Clause

The "substantial purpose" of the Recess Appointments Clause was to "keep * * * offices filled." 1 Op. Att'y Gen. 632, 633 (1823); United States v. Woodley, 751 F.2d 1008, 1013 (9th Cir. 1985) (en banc). The latter part of this century has seen intrasession recesses become lengthier and more frequent. To prohibit the President from exercising his recess appointment power during these periods necessarily would mean that vacancies would go unfilled, contrary to the clause's purpose.

Ironically, plaintiff's interpretation would inhibit the President from filling vacancies even when the need to act without delay is

[17] Moreover, the fact that frequent intrasession recesses were uncommon in the early days of the Republic does not mean that Congress did not anticipate them. The Constitution provides no limitation on the Senate's ability to recess, apart from the requirement that the House consent to adjournments lasting more than three days. Surely, the Framers did not provide the Senate with expansive power to recess during its sessions without appreciating that intrasession recesses could occur with greater frequency in the future. The fact that early intrasession recesses were infrequent is no reason to assume that the Framers' only concern was keeping vacancies filled during intercession recesses.

plainly present. On August 10, 1991, for example, President Bush issued a recess appointment to reappoint Alan Greenspan as Chairman of the Federal Reserve Bank during an intrasession recess. 27 Wkly Comp. Pres. Doc. 1126 (1991). President Bush had nominated Mr. Greenspan on July 19, 1991; however, the Senate recessed on August 9, 1991 without acting on the nomination. See 27 Wkly Comp. Pres. Doc. 1051 (1991). Under plaintiff's view of the recess clause, the President would have been without authority to fill this important vacancy. The President has also appointed members of his cabinet by recess appointment. Neil Goldschmidt was first appointed Secretary of Transportation by recess appointment. See Defendants' Brief, [*21] Exh. 2 at p. 11. Donald P. Hodel also was recess appointed Secretary of Energy in November 1982, when the President accepted the resignation of Secretary James B. Edwards. See 18 Wkly Comp. Pres. Doc. 1438, 1508 (1982). The Court should reject any interpretation that would prevent the President from filling important vacancies that need to filled without delay.

C. Limiting "The Recess" To Intersession Recesses Would Upset The Balance Of Power Between The Branches

The Constitution must be interpreted in light of its underlying principle of checks and balances. Buckley v. Valeo, 424 U.S. at 120; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) (The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). As the Court in Staebler recognized, "if one construction would make it possible for a branch of government substantially to enhance its power in relation to another, while the opposite construction would not have such an effect, the principle of checks and balances would be better served by a choice of the latter interpretation." 464 F. Supp. at 599-600.

If the recess clause is interpreted as applying only during intersession recesses, Congress could easily eliminate the President's ability to make any recess appointments, even though Congress could still recess for substantial periods of time. In 1903, for exam-

ple, the 58th Congress convened an extraordinary session on November 9, 1903, that lasted until noon of December 7, 1903, the same day and hour fixed by law for the [*22] opening of the first regular session of the 58th Congress. See 37 Cong. Rec. 544; 38 Cong. Rec. 1. The Senate also eliminated the intersession recess when, on January 3, 1941, the third session of the 76th Congress ended at noon and the first session of 77th Congress began, see 86 Cong. Rec. 14059; and on December 2, 1867, when there was no gap between the first and second sessions of the 40th Congress, see 77 Cong. Globe 817; 78 Cong. Globe 1. Nothing prevents Congress from taking as many intrasession recesses as it chooses during the year. And, so long as its sine die adjournment was immediately followed by the beginning of the subsequent session, the President would be unable to make any recess appointments. On the other hand, if "the Recess" is construed to include intrasession recesses, this would simply acknowledge the manner in which Presidents have been exercising the recess appointment power since at least 1867.[18]

Plaintiff argues that recognition of intrasession recesses would allow the President to make recess appointments the primary method of filling offices by simply renewing the recess appointees' commissions at the end of every succeeding session [*23] of Congress. Plaintiff's Brief at 24. While such action by the President would be unlikely, the Senate is not without means to protect its prerogatives.[19]

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[18] Plaintiff disputes that there is a "consistent" historical practice because, notwithstanding the early intrasession appointments, this power has only been exercised regularly over the past 20-30 years. Plaintiff's Brief at 29. Plaintiff answers his own argument, however, by pointing out that the frequency at which Congress recesses during its session has dramatically increased in recent years. Obviously, intrasession recess appointments cannot be made regularly when intrasession recesses are infrequent. As we have noted above, the fact that Congress chose infrequently to recess during its sessions in the early days of the Republic does not evidence any intent to allow offices to remain unfilled during these periods.

[19] It also is significant that for scores of years Presidents have construed the clause as permitting recess appointments during intrasession recesses without "leveraging" it into the "primary method of filling federal offices" as plaintiff suggests.

For example, 5 U.S.C. § 5503 provides that if the President makes a recess appointment to fill a vacancy which existed while the Senate was in session and which can be filled permanently only with the advice and consent of the Senate such as Mr. Nevin's seat, payment for services rendered by the recess appointee may not be made from Treasury funds until the appointee is confirmed, unless one of three conditions are met: (1) the vacancy arose within 30 days before the end of the session; (2) a nomination to fill the vacancy was pending in the Senate at the time it went into recess; or (3) a nomination to fill the vacancy was rejected by the Senate within 30 days before the end of the session, and a different individual receives the recess appointment. 5 U.S.C. 5503(a). A nomination to fill a vacancy as described in (1), (2), or (3) above must be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate. Id. at 5503(b).

The Senate also could refuse to confirm the recess appointee, should the President submit his nomination, or refuse to confirm nominees for other offices, or refuse to pass key legislation proposed by the President. The prospect that the [*24] Senate could take such actions serves to discourage the President from exercising his recess appointment powers to the extreme. By contrast, should intrasession recesses be excluded, and should the Senate recess in such a way as to eliminate the President's recess appointment powers, there are no comparable ways for the President to protect himself. Thus, plaintiff's proposed limitation on "the Recess" would upset the balance in the allocation of power between the branches far more than would defendants' construction. Accordingly, plaintiff's construction should be rejected.

D. The Constitution Provides No Basis For Imposing Additional Requirements On Recess Appointments Made During Intrasession Recesses

1. Duration Of The Recess

Defendants have shown that the language of the recess clause does not require that the Recess of the Senate last for any minimum

time, and have shown that there is a long-standing practice of making recess appointments during recesses of comparable durations. See Defendants' Brief, at 14-18. Plaintiff apparently concedes that there are no time limits or other implied restrictions on intersession recesses. Plaintiff contends, however, that recess appointments made during intrasession recesses should be subjected to different treatment. Plaintiff's Brief at 29-34.

Plaintiff asserts that the recess was of insufficient duration to trigger the recess appointment powers, relying on several Attorneys General opinions that have cautioned against [*25] use of the power during short intrasession recesses. Plaintiff's Brief at 30. None of these opinions concluded that the President lacked the power to make appointments during a recess like the one here. Of course, the question of whether the recess appointment power exists is much different from the question of whether it should be used.

If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for more than three days without obtaining the consent of the House of Representatives. U.S. CONST., art. I, § 5, cl. 4. It might be argued that this means that the Framers did not consider one, two and three day recesses to be constitutionally significant. But that situation is not presented here because the recess lasted 13 days.[20] Moreover, no Attorney General or court has found that the President lacks the power to make recess appointments during 13-day recesses.[21]

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[20] In our brief, defendants have characterized the recess as lasting 13 days, because the Senate did not reconvene until 3:00 p.m. on January 20, 1993, and because the President could have exercised his recess appointment power up until the moment the Senate reconvened. Accordingly, there were 13 separate days between January 7, 1993 at 8:00 p.m. when the Senate recessed, and 3:00 p.m. on January 20, during which the President could have made recess appointments. Plaintiff has counted the recess as 12 days. Because none of defendants.' arguments turn on whether the recess is considered to have lasted 12 or 13 days, plaintiff's calculation of the length of the recess makes no difference.

[21] While one Attorney General did opine that the President could not make recess appointments during a Christmas recess, this was based on his view that the power could not be exercised during an intrasession recess and was not based on the

[*26] As the Court in Staebler held, "there is no justification for implying additional restrictions [on the recess appointment power] not supported by the constitutional language." Staebler, 464 F. Supp. at 597. Apart from the three-day requirement noted above, the Constitution provides no basis for limiting the recess to a specific number of days. Whatever number of days is deemed required, that number would of necessity be completely arbitrary.

2. Practical Considerations

Plaintiff argues that intrasession recess appointments should be confined by practical considerations. Plaintiff's Brief at 30-34. Insofar as this requires adding restrictions on the recess power not found in the Constitution, the Court has no authority to do so. Nixon v. United States, __ U.S. __, 113 S. Ct. 732, 736 (1993).[22] Plaintiff argues that Attorneys General [*27] have analyzed the validity of proposed recess appointments based on whether "in a practical sense, the Senate is in session that its advice and consent can be obtained," 33 Op. Att'y Gen. at 21-22. Even applying this standard, however, the recess appointment was valid because the Senate was

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length of the recess. See 23 Op. Att'y Gen. at 604. This view was repudiated by the Attorney General in 1921, in an opinion expressly approving intrasession recess appointments. 33 Op. Att'y Gen. 20 (1921). This latter interpretation has been followed by all subsequent Attorneys General and by Presidents through their practice. See Defendants' Brief at 11-14.

[22] The pocket veto decisions plaintiff relies upon are distinguishable. The constitutional provision at issue in those cases allows a bill passed by Congress to become law without the President's signature if the President does not return it to the originating house within ten days after presentment, "unless the Congress by their Adjournment prevent its Return . . . ." U.S. CONST., § art. I, § 7, cl. 2. That language was read as not prohibiting Congress from acting to lift the obstacles to returning the bill that an adjournment may have imposed. See Wright v. United States, 302 U.S. 583, 589 (1938). Thus, the courts have looked at the circumstances surrounding the adjournment to determine whether there were any obstacles that prevented the bill's return and, if so, whether Congress had satisfactorily removed them. See Barnes v. Kline, 759 F.2d 21, 32-35 (D.C. Cir. 1985). The language of the Recess Appointments Clause, however, is not comparable. There is no way for the Senate to advise and consent to a nomination unless it is in session.

not in a position to act on Mr. Ashley's nomination during the January recess.

The Senate was not sitting in a regular or extraordinary session from January 7 to January 20 and its members owed no duty of attendance. This is plain from the resolution providing for the Senate recess. Sen. Con. Res. 3, 139 Cong. Rec. S11 (daily ed. Jan. 5, 1993). In addition to specifying the dates of the recess, the resolution further provided for the leaders of the Senate and House to notify their members "to reassemble whenever, in their opinions, the public interest shall warrant it." Id. Obviously, such a provision in the resolution would be unnecessary if the members already were obligated to be present to conduct business as a legislative body. Because there was no opportunity for the Senate to consider and act on nominations during the January recess, the Senate's advice and consent to defendant Ashley's appointment could not be obtained.[23]

[*28] CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be granted and plaintiff's motion for summary judgment should be denied.

Respectfully submitted,

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Assistant Attorney General
J. RAMSEY JOHNSON
United States Attorney
MARY E. GOETTEN
Branch Director
SUSAN K. RUDY

[23] The fact that Senate committees might have met to conduct business during the recess does not alter this conclusion. A Senate committee cannot "advice and consent" to a presidential nomination on behalf of the full Senate body. Nor does the ceremonial submission of numerous nominations to the Senate by President Bush on his last day in office require a different result. Just because there is a recess does not mean that the President must make recess appointments. Rather, the President remains free to determine which offices, if any, should be filled by recess appointment and the offices for which a nomination should be sent forward.

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RECESS APPOINTMENTS

Brief by Edward M. Kennedy (additional counsel listed in brief) before the U.S. Court of Appeals for the Eleventh Circuit

June 6, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15783
Albert ADEFEMI,
Petitioner-Appellant,

v.

John ASHCROFT, et al.,
Respondents-Appellees

No. 02-12924
UNITED STATES,
Plaintiff-Appellee,

v.

Carl M. DRURY, Jr.,
Defendant-Appellant

No. 01-16485
UNITED STATES,
Plaintiff-Appellee,

v.

Deborah STANFORD
Claimant-Appellant

BRIEF OF *AMICUS CURIAE*, UNITED STATES SENATOR EDWARD M. KENNEDY, PRO SE, SUGGESTING LACK OF JURISDICTION ON THE GROUND THAT JUDGE PRYOR'S APPOINTMENT TO THIS COURT IS UNCONSTITUTIONAL

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Additional Counsel Listed in Signature Block

[*Editors' note*: Superfluous front matter and the tables of contents and authorities have been omitted.]

[*1] IDENTITY AND INTEREST OF THE AMICUS

Amicus Edward M. Kennedy has been a United States Senator from the Commonwealth of Massachusetts since his election in November 1962. He has remained in that office continuously since then, having been re-elected in 1964, 1970, 1976, 1982, 1988, 1994, and 2000. He is the second-most senior member of the Senate and has served on its Committee on the Judiciary continuously since becoming a Senator, serving as its Chairman from 1979-1981. In the Committee and on the Senate floor, he has participated in the constitutional "advice and consent" function with respect to the appointment of virtually every United States Judge since the start of the First Session of the 88th Congress.

Senator Kennedy has a longstanding and substantial interest in assuring that the constitutional roles and prerogatives of the Senate are not compromised, that the division and separation of powers among the Branches enshrined in the Constitution are preserved and protected, that the independence of the Judicial Branch from the Executive Branch guaranteed in Article III of the Constitution is not breached, and, in particular, that those who have not been appointed as judges of courts of the United States in accordance with the applicable constitutional and statutory provisions are not permitted to jeopardize and interfere with the proper operation of the courts by participating in cases that the Constitution prohibits them from deciding.

[*2] Amicus specifically participated actively in the Senate Judiciary Committee's consideration of the nomination of William Pryor, Jr., to this Court. He also participated in the Senate debate on whether, under the Senate's Rules, the Senate should proceed with that nomination, and, upon the votes to determine whether the Senate would do so, voted with the prevailing side against proceeding to confirm him.

SOURCE OF AUTHORITY TO FILE

Together with this brief, amicus has filed a motion for leave to file a brief amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

Whether an intra-session recess appointment of a judge to an Article III court violates the U.S. Constitution.

BACKGROUND

President Bush nominated William Pryor to fill a vacancy on this Court on April 9, 2003, early in the First Session of the 108th Congress. 149 Cong. Rec. S5101 (daily ed. Apr. 9, 2003). The Senate Judiciary Committee held a hearing on Judge Pryor's nomination on June 11, 2003. *See Judicial and Executive Nominations Before the S. Comm. on the Judiciary,* 108th Cong. (June 11, 2003), *available at* http://judiciary . senate.gov/hearing.cfm?id=802.

[*3] During the First Session of the 108th Congress, the Senate debated the nomination over the course of several days. A number of Senators opposed the nomination. *See* 149 Cong. Rec. S10,455 (daily ed. July 31, 2003); 149 Cong. Rec. S14,085 (daily ed. Nov. 6, 2003). Under Rule 22 of the Rules of the Senate, adopted pursuant to Article I, Section 5 of the Constitution, proponents of the nomination twice attempted to terminate debate and proceed to a vote on the nomination. Both attempts failed, *see* 149 Cong. Rec. 510,455 (daily ed. July 31, 2003); 149 Cong. Rec. 514,085 (daily ed. Nov. 6, 2003), and therefore the Senate did not confirm the nominee during its First Session. That Session ended on December 9, 2003, and the ensuing Senate Recess lasted until January 20, 2004.[1]

On the evening of Thursday, February 12, 2004, the Senate adjourned for ten days for the Presidents' Day holiday until Monday, February 23, a period encompassing five business days, a three-day holiday weekend, and a two-day weekend. 150 Cong. Rec. S1413 (daily ed. Feb. 12, 2004). President Bush announced Judge Pryor's recess appointment on the afternoon of Friday, February 20, 2004,

[1] The nomination was effectively withdrawn and a new nomination of Mr. Pryor made on March 11, 2004. *See President's Nominations Submitted to the Senate*, Weekly Comp. Pres. Doc. Vol. 40, Number 11, at 401 (Mar. 15, 2004). No steps to proceed with this re-nomination have been taken.

the last business day before the Congress returned from its ten-day adjournment. As discussed in the Argument below, that brief adjournment is by far [*4] the shortest intra-session "recess" during which a President has ever invoked the Recess Appointments Clause to appoint an Article III judge.

SUMMARY OF THE ARGUMENT

The appointment of Judge Pryor is unconstitutional. An intra-session adjournment is not "the Recess" to which the Recess Appointments Clause refers. Moreover, even if (contrary to our argument) the phrase "the Recess" is a "practical" rather than literal construction, there is *no* "practical" justification for construing "the Recess" to include an intra-session adjournment *for purposes of an appointment to an Article III judgeship*. Indeed, these appointments cause such profound harm to the judicial independence guaranteed by Article III that on any practical construction of the Recess Appointments Clause, which must account for *constitutional* principles and consequences, intra-session appointments of judges ought to be especially disfavored.

ARGUMENT

I. THE CONSTITUTION DOES NOT AUTHORIZE RECESS APPOINTMENTS – PARTICULARLY OF ARTICLE III JUDGES – DURING INTRA-SESSION SENATE ADJOURNMENTS

The text, original understanding, and purpose of the Recess Appointments Clause all demonstrate that an intra-session Senate adjournment is not "the Recess" [*5] to which the Clause refers. At the very least, the Clause does not authorize intrasession appointments of Article III judges.[2]

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[2] By authorizing the President to "fill up all Vacancies that may happen during the Recess of the Senate," the Recess Appointments Clause can be interpreted as authorizing recess appointments only to fill vacancies actually created-"happen" - during inter-session recesses. Although two federal courts have rejected this construction, see *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir.) (en banc), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269 (1985); *United States v. Allocco*,

A. The Text Of The Recess Appointments Clause

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during *the Recess* of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. I, § 2, cl. 3 (emphasis added). Any analysis of the Constitution must begin with the plain language of the text. *See, e.g., Solorio v. United States,* 483 U.S. 435, 447, 107 S. Ct. 2924, 2931 (1987). The Framers' use of the defmite article "the," and of the singular, rather than the plural, form of "Recess," both indicate that the Constitution refers to one specific "Recess" – that is, the recess that occurs between sessions of Congress (including the period *between* the Second Session of one Congress and the First Session of the next). If the Framers had [*6] intended to authorize the President to make appointments during breaks *within* a session, they could easily have drafted the Clause using the plural form "Recesses," the singular indefinite "a Recess," or another phrase altogether, such as "during adjournments" or "when the Senate is not in session."

However, the Framers chose not to use these alternatives because "Recess," the word they used, was a term of art that referred specifically to the break between the generally uninterrupted sessions of Congress. Indeed, elsewhere the Framers did use a different term – "adjourn" – to refer to a cessation of legislative business that occurs *during* sessions of Congress. Article I of the Constitution directs that "[n]either House, *during* the Session of Congress, shall, without the Consent of the other, *adjourn* for more than three days . . . ." U.S. Const. art. I, § *5,* cl. 4 (emphases added). By choosing the term "the Recess" in Article II, rather than referring to a period in which Congress was merely "adjourn[ed]," the Framers thus made

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305 F.2d 704, 709-14 (2d Cir. 1962), *cert. denied*, 371 U.S. 964, 83 S. Ct. 545 (1963), that conclusion is subject to serious challenge. *See, e.g.,* William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 21 Const. Comment. (forthcoming 2004), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=542902; Recent Case, *President Has Power to Issue Recess Commission to Federal Judge When Vacancy First Arises During Session of Senate*, 111 U. Pa. L. Rev. 364, 368 (1963).

clear that the Recess Appointments Clause was to be used only during the breaks that occur *between* sessions of Congress. *Cf. United States v. Verdugo-Urquidez,* 494 U.S. 259, 265-66, 110 S. Ct. 1056, 1060-61 (1990) (differentiating between "the people" and "person" or "accused" as used in various constitutional amendments). Interpreting the Recess Appointments Clause as authorizing appointments only during inter-session recesses is the only construction that gives [*7] meaning to the Framers' use of two different terms – "the Recess" and "Adjourn" – to describe the different kinds of breaks in the legislative schedule.

This reading of the Clause is confirmed by the Clause's provision that a recess appointee's commission "shall expire at the End of [the Senate's] next Session." Reading the Clause to permit intra-session appointments would mean that a recess appointment would be valid not only during the remainder of the session in which the appointment was made, but until the end of the following session. This would result in an absurd situation that the Framers could not have envisioned. Judge Pryor, for instance, was appointed in February 2004, very early in the Second Session of the 108th Congress. Reading "the Recess" to include the ten-day February adjournment, Judge Pryor's commission would last nearly *two years,* until the conclusion of the First Session of the 109th Congress at the end of *2005 – a* result that serves none of the purposes of the Clause and that the Framers certainly could not have intended, given their careful and deliberate decision to check the President's appointment power by requiring Senate consent, *see infra* Part I.B. By contrast, construing "the Recess" to refer only to an inter-session recess comports with common sense: The Framers intended a recess appointee to serve until the end of the "next Session" – that is, the new Senate session that begins at the end of "the Recess" during which the appointment was made. Such a process would provide the Senate, upon its return, with one full session in which to [*8] decide whether to consent to the President's nomination – certainly sufficient time for the Senate to play its constitutional role. By contrast, allowing a recess appointee to serve without Senate consent for virtually two full years serves no conceivable constitutional end.

B. Constitutional Purpose and Function

The purpose of the Recess Appointments Clause was to permit the President to temporarily appoint officers when "the Recess" – which at the time of the founding meant the lone, lengthy inter-session break – prevents the Senate from fulfilling its constitutional role in the usual appointments process. Because intra-session adjournments do not generally implicate the purpose of the Clause, there is no basis for construing the Clause to encompass such adjournments.

The Framers intended to give the Senate an important check on the President's power to appoint officers of the United States, including federal judges. U.S. Const. art. II, § 2, cl. 2. The Framers were determined "to limit the distribution of the power of appointment" – a power "deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag v. Comm'r of Internal Revenue,* 501 U.S. 868, 883-84, 111 S. Ct. 2631, 2641 (1991) (quoting Gordon Wood, *The Creation of The American Republic 1776-1787,* at 143 (1969)). The Constitution thus divides "the power to appoint the principal federal officers . . . between the Executive and Legislative Branches," *id.* at 884, by requiring "the [*9] Advice and Consent of the Senate" for the President's appointment of such officers, including federal judges, U.S. Const. art. II, § 2, cl. 2. This division was basic to the balance of powers envisioned by the Framers.

Against this general principle, the Recess Appointments Clause was intended to prevent a crisis in vacancies that might result if this procedure were required when the Senate was disabled from fulfilling its advice-and-consent function. Alexander Hamilton described the recess-appointment power as "nothing more than a supplement to" the ordinary appointment process for "cases to which the general method was inadequate." *The Federalist* No. 67, at 391 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton noted that the ordinary appointment process "is confided to the President and Senate *jointly,* and can therefore only be exercised during the session of the Senate." *Id.* The Recess Appointments Clause was required "as vacancies might happen *in their recess,* which it might be necessary for the public service to fill without delay." *Id.* Thus, the

recess-appointment power was crafted to ensure "convenience, promptitude of action, and general security" and to avoid the burden and expense of requiring "that the senate should be perpetually in session" to consider the President's appointments. 3 Joseph Story, *Commentaries on the Constitution* § 1551 (1833); *see also* 1 Op. Att'y Gen. 631, 632 (1823) (noting that the "meaning" of the Clause is that the President may fill a vacancy "which the public interests require to be [*10] immediately filled" when "the advice and consent of the Senate cannot be immediately asked, because of their recess").

In dealing with a provision, such as the Recess Appointments Clause, that departs from the Constitution's basic separation-of-powers framework, courts must interpret the provision in accord with the "specific purpose it is intended to serve." *Kennedy v. Sampson,* 511 F.2d 430, 437 (D.C. Cir. 1974) (construing the Pocket Veto Clause not to apply to an intra-session adjournment of Congress); *see also Wright v. United States,* 302 U.S. 583, 596, 58 S. Ct. 395, 400 (1938) (noting that the Pocket Veto Clause should be construed to effectuate its "two fundamental purposes"). The Recess Appointments Clause represents an "exception" to the general separation-of-powers framework of the Constitution, and of the Appointments Clause in particular. It authorizes the President to act in an exceptional manner when Congress's absence prevents it from performing its constitutional functions. It should therefore be construed to apply narrowly to an actual inter-session "Recess." Otherwise, the President will be able to aggrandize his power at the expense of the Senate by invoking an *exceptional* power – conferred upon him only for the rare situations in which the Senate cannot give advice and consent – and using it during brief Senate adjournments in which there is no such emergency need.

[*11] Modern intra-session Senate adjournments do not implicate the "specific purpose" of the Recess Appointments Clause because during such adjournments the Senate is not entirely "absent so that it can not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. 20, 25 (1921). Unlike inter-session recesses in the early Congresses, which

lasted for months, the "overwhelming majority of intra-session recesses last less than twenty days." Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?,* 92 Mich. L. Rev. 2204, 2240 (1994) (citing U.S. Gov't Printing Office, *1993-1994 Official Congressional Directory: 103d Congress* 580-90 (1993)). During the Second Session of the 107th Congress, for example, the Senate had six intra-session adjournments, none longer than eighteen days except for the summer recess of thirty-four days. *See* U.S. Gov't Printing Office, *2003-2004 Official Congressional Directory: 108th Congress* 525 (2004). "Only four intrasession recesses in history have exceeded sixty days, and none of these occurred in the past forty years." Carrier, *supra,* at 2240; *see also Sampson,* 511 F.2d at 441 ("[I]ntrasession adjournments of Congress have virtually never occasioned interruptions of [great] magnitude."). Moreover, as explained below, such adjournments do not interrupt the processing of nominations in the Senate. Modern intra-session adjournments do not undermine the President's ability to receive the advice and consent of the Senate, [*12] and therefore ought not be considered a "Recess" for purposes of the Recess Appointments Clause.

C. Department of Justice Opinions

With the exception of one minor and immaterial dictum, no court has addressed whether the President has the constitutional authority to make a recess appointment during an *intra-session* Senate adjournment that is not a formal recess.[3] Therefore, to defend such appointments, the Executive Branch has relied almost exclusively on (i) a 1921 Attorney General Opinion and (ii) the history of intra-session appointments. But neither of those sources provides credible authority for the constitutionality of Judge Pryor's intra-session appointment.

Most Attorneys General Opinions are written on behalf of the Executive to defend presidential prerogatives vis-à-vis Congress. As

[3] *Gould v. United States*, 19 Ct. Cl. 593, 596 (1884) (commenting that the legality of the intra-session recess appointment was "immaterial" to the question presented).

such, a court should accord them no precedential value and should consider them only to the extent that they are persuasive. *Cf. Crandon v. United States,* 494 U.S. 152, 177-78, 110 S. Ct. 997, 1011-12 (1990) (Scalia, J., concurring in the judgment); *see also* Henry M. Hart, Jr., Letter, Harv. L. Sch. Rec., Oct. 8, 1953, at 2 [hereinafter Hart Letter], *reprinted in Recess Appointments to the Supreme Court – Constitutional But* [*13] *Unwise?,* 10 Stan. L. Rev. 124, 127 n.12 (1957) ("[O]ccasional practice backed by mere assumption cannot settle a basic question of constitutional principle.").

This is especially true when, as here, those Opinions are inconsistent. Because there was with one exception virtually no use of the recess-appointment power before the Twentieth Century, the Executive's first known consideration of the question occurred in 1901, when Attorney General Knox stated that the recess-appointment power is limited to *inter-session* appointments, i.e., those made *between* sessions of Congress. 23 Op. Att'y Gen. 599, 600 (1901).

In 1921, however, Attorney General Daugherty "overruled" the Knox opinion, *see* 3 Op. Off. Legal Counsel 314, 315 (1979), concluding that the President could make recess appointments during an intra-session adjournment. 33 Op. Att'y Gen. 20 (1921). Attorney General Daugherty conceded that he was making a "practical construction" of the Constitution. *Id* at 22. He did not even attempt to justify his conclusion in light of the plain language, structure, or history of Article II. The 1921 Opinion was limited in its assertion of presidential authority. The "real question," in Attorney General Daugherty's view, was "whether *in a practical sense* the Senate is in session *so that its advice and consent can be obtained." Id.* at 21-22 (emphasis added). He concluded that an intra-session adjournment could be deemed a "recess" only in circumstances in which the Senate is "absent so that it can not receive communications from the President [*14] or participate as a body in making appointments." *Id.* at 25. "[L]ooking at the matter from [such] a practical standpoint," Daugherty reasoned that "no one" would view an adjournment "for 5 or even 10 days" as satisfying that prerequisite. *Id.*

Subsequent opinions of an Acting Attorney General and of the Office of Legal Counsel have uncritically followed the 1921 Daugherty Opinion without offering any additional significant constitutional defense of intra-session recess appointments and by consistently avoiding textual analysis of the Recess Appointments Clause.[4] *See* Carrier, *supra,* at 2236-38. In particular, those Opinions have offered no explanation beyond Executive expediency as to why the President should act in accord with Daugherty's questionable Opinion rather than following the sounder conclusion that General Knox reached in 1901, a conclusion that comports with the text, history, and purpose of Article II.

Even on their own terms, these Attorneys General Opinions would not justify Judge Pryor's appointment: They explicitly permit intra-session recess appointments only when it is *practically impossible* for the President to obtain the Senate's advice and consent because the Senate cannot receive presidential communications and cannot "participate" in its constitutionally assigned functions. [*15] *See, e.g.,* 1996 OLC Memo, *supra,* at *122 n.102; 16 Op. Off. Legal Counsel 15, 15-16 (1992); 41 Op. Att'y Gen. 463, 467 (1966). Even a much longer adjournment than the ten days at issue here would not have the disabling "practical" effect that Daugherty feared, because today's Senate can receive presidential nominations during adjournments, and the Senate Committees can and do commence or continue the advice-and-consent process during such adjournments.[5] *See* Carrier, *supra,* at 2241-43. Thus, whether it is to-

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[4] E.g., Off. Legal Counsel, *The Constitutional Separation of Powers Between the President and Congress*, 1996 OLC LEXIS 6, at *121 (1996), *available* at http://www.usdoj.gov/olc/delly.htm [hereinafter 1996 OLC Memo]; 41 Op. Att'y Gen. 463, 466-69 (1960).

[5] The Senate has authorized its Secretary to receive messages from the President, including nominations, which the Secretary then refers to the appropriate committee. *See* 149 Cong. Rec. S8 (daily ed. Jan. 7, 2003). A committee that receives a nomination during an intra-session recess can initiate the advice-and-consent process during the recess if necessary. The Senate rules authorize each committee "to hold . . . hearings," to require "the attendance of . . . witnesses," and "to take . . . testimony" during the "sessions, recesses, and adjourned periods of the Senate." Senate Standing Rule 26.1. For example, during the intra-session recess

day incorrect to assume that adjournments of "substantial" length – such as a month-long summer adjournment or a two-month election-related adjournment – could ever meet Attorney General Daugherty's test under certain circumstances, surely Daugherty was correct in concluding that a ten-day adjournment, such as in the present case, does *not* suffice, *see* 33 Op. Att'y Gen. 20, 25 (1921). It would be frivolous to argue that such an adjournment is "protracted enough to prevent [the [*16] Senate] from performing its functions of advising and consenting to executive nominations." 41 Op. Att'y Gen. 463, 466 (1966); *see also id.* at 469.

In the current case, the February recess in fact did not prevent the Senate from performing its function of advice and consent for Executive nominations. On the contrary, the Pryor nomination was communicated to the Senate ten months earlier; had been the subject of Judiciary Committee inquiries, hearings, and action; had been debated on the Senate floor twice; and had twice failed to obtain enough votes to go forward under Senate rules. Beginning on the very next business day after the purported recess appointment, the proponents of the nomination could have immediately resumed the Senate's "participation" in the constitutional process. Plainly, what prompted this recess appointment was not the Executive's disappointment that the Senate could not "participate" because of the holiday recess, but rather the Executive's effort to bypass the Senate's constitutionally assigned role. In the present case, the Pryor appointment was made on Friday when the Senate was returning to session on the following Monday. The Senate is rarely in session on a Saturday or Sunday. If the current appointment is upheld, this Court will be ruling that a recess appointment made after the Senate adjourns on any Friday would be valid even if the Senate is only in recess for the weekend, and the advice-and-consent function of the Senate would be a dead letter.

[*17] To the extent that the constitutional calculus should, as Attorney General Daugherty suggested, take account of the "practical"

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from January 7 to January 20, 1993, Senate committees "considered nearly every one of President-elect Clinton's cabinet nominations." Carrier, *supra*, at 2242 (citing 139 Cong. Rec. D46-48 (daily ed. Jan. 20, 1993)).

effects of an intra-session "recess" appointment, surely those practical effects must necessarily include constitutional consequences. As explained in Part II, recess appointments to Article III judgeships result in profound harm to the judicial independence guaranteed by Article III. In cases such as this, in which the President appoints a judicial nominee whom the Senate has already refused to confirm, such appointments directly undermine the Senate's advice-and-consent function. Thus, far from alleviating a situation in which the Senate is, by virtue of its absence, unable to perform its advice-and-consent function, the intra-session recess appointment here undermines that function. It empowers the President to use any long weekend or holiday when the Senate is not in session as an excuse to install temporary judges in office even when the Senate has declined to confirm them – judges who have therefore not taken office pursuant to the democratic checks and balances that the Constitution prescribes.

D. The History Of Recess Appointments

Nor can the Department of Justice plausibly rely on the "[p]ast practice" of intra-session recess appointments to sustain the constitutionality of the practice. *See, e.g.,* 16 Op. Off. Legal Counsel 15, 16 (1992). Use of the recess-appointment power during short intra-session adjournments has no venerable historical pedigree. Like the legislative veto [*18] invalidated in *INS v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764 (1983), the intra-session recess appointment has become an all-too-common phenomenon – but the history of its use is both recent and sporadic. Indeed, it is a practice that has only flourished in recent years precisely *because* of, and pursuant to, the post-1920 Opinions of the Attorneys General.

As of 1901, when the Executive Branch first considered – and *rejected – the* constitutionality of the practice, records reveal only a handful of instances of nonmilitary intra-session recess appointments, all made by President Andrew Johnson in 1867. *See* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3, 5 (Apr. 23, 2004) [hereinafter 4/23/04 CRS Report]. Even after the 1921 Daugherty Opinion opened the door to the practice, Presi-

dents made fewer than a dozen intra-session appointments between 1921 and *1947 – none* of them to an Article III judgeship. *Id.* at 3, 7-9. During the period between 1947 and 1954, a small cluster of intra-session appointments (including a dozen judges) took place, but even then, the adjournments in question ranged from five weeks to twenty-one weeks in duration. *Id.* at 9-20; *see also* Henry B. Hogue, Cong. Res. Serv., *Intrasession Recess Appointments to Article III Courts* 2 (Mar. 2, 2004) [hereinafter 3/2/04 CRS Report]. Only since the 1970s have recess appointments during intra-session adjournments become a more recurrent, rather than a sporadic and extraordinary, practice. A practice "of such recent vintage," *Printz v. United* [*19] *States,* 521 U.S. 898, 918, 117 S. Ct. at 2376 (1997), cannot serve to justify the constitutionality of an otherwise unconstitutional practice.

Even the *recent* history does not support Judge Pryor's nomination. From 1954 until the Pryor nomination, Presidents made *no* intra-session appointments to Article III judgeships. *See* 3/2/04 CRS Report, *supra,* at 2. What is more, Judge Pryor's appointment came during a ten-day adjournment that is by far the shortest intra-session "recess" during which any Article III appointment has been made.[6] *Id.* This appointment is therefore an historical anomaly, not business as usual.

II. THE PRESIDENT MAY NOT MAKE RECESS APPOINTMENTS OF ARTICLE III JUDGES UNDER THE CIRCUMSTANCES PRESENT HERE

By filling offices with judges who lack the Article III protection of life tenure, recess appointments of federal judges, under any cir-

[6] The next-shortest adjournment for an Article III intra-session appointment occurred in 1948, when President Truman made several appointments at the beginning of a break scheduled to last more than six months but that in fact lasted only five weeks. *See* 41 Op. Att'y Gen. 463, 468 (1966); 4/23/04 CRS Report, *supra*, at 16. Even beyond judges, intra-session recess appointments within short recesses are exceedingly uncommon. Before the current President, only two of the nearly 300 intra-session appointments were made during recesses of under ten days, and only twenty-seven during recesses of between 11 and 20 days. *Id.*

cumstances, dilute Article III's guarantees of judicial independence. Given the grave constitutional doubt that any intra- [*20] session recess appointments are constitutional, the intra-session appointments to Article III judgeships clearly transgress constitutional bounds.

A. Principles of Judicial Independence

The Constitution envisions a federal judiciary composed of judges whose "jealously guarded" independence is assured by the "clear institutional protections" of life tenure and guaranteed salary. *N Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 60, 102 S. Ct. 2858, 2866 (1982). This independence is a fundamental part of the constitutional design. One of the charges that the Declaration of Independence leveled against the King was that he had "made Judges dependent on his Will alone, for the tenure of their Offices, and the Amount and Payment of their Salaries." The Declaration of Independence para. 11 (U.S. 1776). To remedy these defects, the Framers established "permanency in office" and a guaranteed salary as "indispensable ingredient[s] in [the] constitution" that could protect the judicial "firmness and independence" that served "as the citadel of the public justice and the public security." *The Federalist* No. 78, at 538 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ; *see also* Hart Letter, *supra,* at 2 ("On few other points in the Constitutional Convention were the framers in such complete accord as on the necessity of protecting judges from every kind of extraneous influence upon their decisions."); *cf.* 106 Cong. Rec. 18,130 (1960) [*21] (statement of Sen. Ervin) (describing the harm that could be done to judicial independence by recess appointments to the Supreme Court).

To ensure judicial independence, the Supreme Court has emphasized that federal judges exercising full Article III powers should have Article III's basic protections. In *Glidden Co. v. Zdanok,* 370 U.S. 530, 82 S. Ct. 1459 (1962), a majority of the Court affirmed the decisions of appellate panels comprised partly of judges from the Court of Claims and the Court of Customs and Patent Appeals only because those judges were protected by Article III. By contrast, in

Northern Pipeline, the Court invalidated a statute that authorized bankruptcy judges lacking Article III protections, 458 U.S. at 60-61, 102 S. Ct. at 2866, to exercise Article III power over a "broad range of questions," *id.* at 74. Recess-appointed judges sit on Article III courts such as this one, and exercise the full authority of Article III judges, yet they are deprived of Article III's protections of judicial independence. First, by the express words of the Recess Appointments Clause, they serve only temporary terms. Second, their salaries, if any, are at the mercy of Congress. *See, e.g.,* Act of Feb. 9, 1863, ch. 26, § 2, 12 Stat. 642, 646 (1863) (prohibiting payment of recess appointees until confirmation by the Senate); 5 U.S.C. § 5503 (2004) (detailing circumstances under which recess appointees may not be paid); Act of Jan. 23, 2004, Pub. L. No. 108-199, § 609, 118 Stat. 3 (2004) (depriving payment to recess appointees once their nominations are rejected).

[*22] The absence of protections for judicial independence subjects recess-appointed judges to political pressure from both the Legislative Branch and the Executive Branch. Recess-appointed judges are vulnerable to the President because he has the power to withdraw the judge's nomination (if the candidate is already nominated) or to withhold the judge's nomination (if the judge has not yet been nominated). More important, because Congress has power over such a judge's salary and his ultimate appointment, the judge may consciously or unconsciously calibrate decisions to appease Senators who would subject such decisions to close scrutiny at subsequent confirmation hearings.

Justice Brennan, who received a recess appointment to the Supreme Court in 1956, was aggressively questioned about his views on communism by Senator Joseph McCarthy during his subsequent confirmation hearings. *See Woodley,* 751 F.2d at 1015 (Norris, J., dissenting); *cf. Recess Appointments to the Supreme Court, supra,* at 141-42 (suggesting that concerns about such questioning led the Supreme Court to delay issuing two decisions written by Justice Brennan).

Similarly, Judge Pryor himself is already scheduled to sit on at least one case involving a highly controversial issue concerning the

qualified immunity of prison guards, with respect to which Senators have previously criticized him after the Supreme Court rejected his arguments (made in his capacity as Alabama's Attorney General) in *Hope v. Pelzer,* 536 U.S. 730, 122 S. Ct. 2508 (2002). *See* [*23] Jonathan Ringel, *11 th Circuit to Rehear Strip-Search Case En Banc,* Fulton County Daily Report, Apr. 12, 2004 (describing then-Attorney General Pryor's advocacy and explaining how a case to be heard en banc by the Eleventh Circuit, *Evans v. City of Zebulon,* 351 F.3d 485, 490, 497-98 (11th Cir. 2003), *reh'g en banc granted,* 364 F.3d 1298 (2004), involves a similar question); 149 Cong. Rec. S 14,085 (daily ed. Nov. 6, 2003) (statement of Sen. Kennedy) (criticizing Pryor's argument in *Hope v. Pelzer);* 149 Cong. Rec. 514,085 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer) (same); 149 Cong. Rec. S10,251 (daily ed. July 30, 2003) (statement of Sen. Durbin) (same). It is certain that Congress will closely consider any vote or opinion by Judge Pryor on this issue when it later considers his nomination. Such scrutiny may place serious pressures on Judge Pryor's decisions, making him a judge who decides cases with "one eye over his shoulder on Congress." Professor Paul A. Freund, Harv. L. Sch. Rec., Oct. 8, 1953, *reprinted in* House Comm. on the Judiciary, 86th Cong. 1st Sess., *Recess Appointments of Federal Judges* (Comm. Print Jan. 1959).

Politically vulnerable judges undermine the rights of individual litigants "to have claims decided before judges who are free from potential domination by other branches of government." *CFTC v. Schor,* 478 U.S. 833, 848, 106 S. Ct. 3245, 3255 (1986) (quoting *United States v. Will,* 449 U.S. 200, 218, 101 S. Ct. 471, 482 (1980)). No one, whether litigants or non-parties, will "believe the decision is that [*24] of judges 'as independent as the lot of humanity will admit,' if the decisive vote is cast by a [judge] whose job depends, among other things, on his surviving thereafter the raking fire of confirmation hearings," or the political inclinations of the President who controls the nomination. Hart Letter, *supra,* at 2. When a recess-appointed judge is subject to such external pressures, individual litigants lose the protections that Article III guarantees.

Even if an individual recess-appointed judge is not *in fact* influ-

enced by the political branches, the fact that a federal judge appears to be vulnerable to politics threatens the public perception of the judiciary as a legitimate institution. *Cf.* 28 U.S.C. § 455 (2004) (requiring the recusal of judges for the appearance of bias). The public perception of the illegitimacy of Judge Pryor's decisions will harm the judiciary even if Judge Pryor himself is in fact judging without fear or favor.

B. Prior Precedent

It is true that the only two courts of appeals to have addressed this issue have upheld recess appointments of federal judges. *Allocco,* 305 F.2d at 708-09; *Woodley, supra.* Judge Norris's dissenting opinion in *Woodley* presents a comprehensive and carefully reasoned analysis of the issue and compellingly demonstrates the fundamental weaknesses in both cases. At the very least, his opinion demonstrates vividly why those who would apply the recess-appointment power broadly have a heavy burden to meet.

[*25] Neither *Allocco* nor *Woodley* relied upon the text or structure of the Constitution. Indeed, the *Woodley* court acknowledged that the text of Articles II and III provides no basis for favoring one over the other in attempting to reconcile the inevitable tension between the two Articles on the question of recess appointments of federal judges. 751 F.2d at 1010. In choosing to subordinate Article III to Article II, both courts relied virtually exclusively upon "historical practice, consensus, and acquiescence." *Id.; Allocco,* 305 F.2d at 709, 713-14. In particular, each majority emphasized that President Washington made recess judicial appointments without any objection from Congress or from Framers who were members of Washington's cabinet (Hamilton, Jay, and Randolph), and that the practice has continued unabated, allegedly with "unbroken acceptance," *Woodley,* 751 F.2d at 1011, throughout the nation's history. *See id.* at 1010-12; *Allocco,* 305 F.2d at 709.

The four-judge dissent in *Woodley* demonstrated why both courts were mistaken in assuming that history resolves the question. Of course, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." *Marsh v. Chambers,*

463 U.S. 783, 790, 103 S. Ct. 3330, 3335 (1983).[7] Early Presidents did *not* adopt the practice of judicial recess appointments [*26] after considered, reasoned deliberation as to the constitutional question. 751 F.2d at 1026-28 (Norris, J., dissenting); *cf. Marsh,* 463 U.S. at 791, 103 S. Ct. at 3336 (explaining that the First Congress "considered carefully" objections to legislative prayer based upon the First Amendment, which was debated and approved that same week). Moreover, Presidents have *unilaterally* adopted the practice in question, *without* any congressional input or approval – indeed, without even any *opportunity* for the legislature to weigh in. 751 F.2d at 1026. Thus, the historical precedent, no matter how longstanding, cannot resolve the constitutional impasse. The dissenters correctly concluded that because history – like text, structure, and evidence of the Framers' intent – does *not* provide a resolution to the "extraordinary situation" of "a direct conflict between two provisions of the Constitution," *id.* at 1017 (Norris, J., dissenting), it is necessary to evaluate and balance the competing constitutional values at stake, *id.* at 1015 (Norris, J., dissenting). They then proceeded to demonstrate that the recess appointment of judges seriously undermines the constitutional command "'that the independence of the Judiciary be jealously guarded,'" *id* at 1022 (Norris, J., dissenting) (quoting *Northern Pipeline,* 458 U.S. at 60, 102 S. Ct. at 2866).[8]

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[7] *See also id*. ('"It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'") (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)).

[8] The court in *Allocco* further relied on the questionable empirical assumption that political pressures on judges were at best a "hypothetical risk," 305 F.2d at 709, an assumption explicitly cited by the court in *Woodley*, 751 F.2d at 1014. Thus, both decisions fail to appreciate the far-reaching consequences of their arguments in an era where Congress closely scrutinizes the judiciary and the federal courts decide highly charged political issues. The *Allocco* court also underestimated another significant cost of permitting recess appointments of judges when it casually dismissed the argument that a President could use "the recess power to avoid the necessity of securing consent of the Senate whenever he found that advisable," and that "[b]y waiting until the Senate adjourns [the President] could fill judicial and other high offices with men unacceptable to the Senate," thus "present[ing] the Senate, after it reconvenes, with a fait accompli, forcing it to confirm his choice

[*27] The dissenters also demonstrated that in this context "[t]he concerns for efficiency, convenience, and expediency that underlie the Recess Appointments Clause pale in comparison." *Id.* at 1024. As explained above, brief Senate adjournments do not in any material respect diminish the capacity of the Senate to fulfill its constitutionally assigned advice-and-consent role. Even if President Bush were correct that this Court "need[ed] more judges to do its work with the efficiency the American people deserve and expect," White House Statement on Appointment of William H. Pryor, Jr., February 20, 2004, *available at* http://www.whitehouse.govinews/releases/2004/02/20040220-6.html, it was inappropriate to alleviate any harm to the judicial process as a result of the continuing vacancy by resort to the Recess Appointments Power, which was *not* designed to permit the President to install judges that the Senate has declined to confirm.

[*28] Finally, neither *Woodley* nor *Allocco* considered the constitutionality of intra-session recess appointments of federal judges, the principal issue here. For the reasons discussed above, such appointments pose different and troubling questions well beyond the difficulties posed by recess appointments generally.

C. Circumvention of the Senate's Role Under the Constitution

The reasoning of *Allocco* and *Woodley* cannot justify President Bush's recess appointment of Judge Pryor, which raises particular concerns under Article III. The circumstances surrounding Judge Pryor's nomination plainly demonstrate that this recess appointment was used to circumvent the Senate's advice-and-consent role and the requirements of Article III. The fact that a vacancy remained open on this Court as of the date of Judge Pryor's appointment was not in any respect the result of the Senate's brief holiday recess; it

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or to ignore a man already in office." 305 F.2d at 714. The court, noting that the Senate has confirmed almost all recess appointees to the bench, concluded that "history is eloquent proof' that such abuses are unlikely to occur. *Id* That confidence, however, is belied by recent recess appointments, including that of Judge Pryor.

was, instead, a function of the fact that the Senate, acting *in* its constitutionally assigned role, *already had declined* to confirm Judge Pryor, and of the President's failure to nominate for confirmation someone whom the Senate would be more likely to confirm pursuant to its longstanding rules. In these circumstances, invoking that short adjournment as a justification for circumventing the Senate's constitutional role is a manifest charade.

[*29] Judge Pryor's recess appointment stands in stark contrast with earlier uses of the recess-appointment power, which raised far fewer concerns with respect to Article III because there was little reason to believe that the Senate would not confirm the judges in question. As a recent report notes, most judicial recess appointees "were uncontroversial, with the recess appointment serving merely as a mechanism of convenience to allow the appointee to take office sooner rather than later." Stuart Buck et al., *Judicial Recess Appointments: A Survey of the Arguments* 13 (2004), *available at* http://fairjudiciary.com/cfl_contents/press/recessappointments.pdf. Thus, it is not surprising that the Senate has confirmed the "vast majority" (approximately eighty-five percent) of recess-appointed judges. *See id.* Unlike these earlier uses of the recess-appointment power, the President's appointment of Judge Pryor was not merely a "mechanism of convenience" but rather an effort to circumvent the Senate's confirmation process. Mayton, *supra, at* 41.

None of the factors that have been invoked as allegedly making the Pryor recess appointment distinctive, and thus as preventing that appointment from serving as a precedent for countless others, withstands analysis. If the concerns supposedly justifying President Bush's recess appointment in this case constitute sufficiently exigent circumstances to validate an intra-session recess appointment, then almost every future recess appointment could be made during extremely short [*30] Senate recesses on the same basis. If the Pryor nomination is validated, it would become an invitation to the current or any future President to use the Recess Appointments Clause to bypass Article II's advice-and-consent requirement, during any or all of the numerous weekend and holiday adjournments that characterize every Senate session.

CONCLUSION

For the foregoing reasons, the Court should declare, as a jurisdictional matter, that Judge Pryor's recess appointment is unconstitutional and that he may not participate in these cases as a circuit judge.

Respectfully Submitted,

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RECESS APPOINTMENTS

Letter from Charles Grassley (additional signers listed in letter) to Eric Holder

January 6, 2012

[on stationery of the United States Senate, Committee on the Judiciary]

January 6, 2012

Via Electronic Transmission

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

On Wednesday, President Obama deviated from over 90 years of precedent established by the Department of Justice (Department), and the Department's Office of Legal Counsel (OLC), by recess appointing four individuals to posts in the Administration, namely Richard Cordray as the director of the Consumer Financial Protection Bureau and three members of the National Labor Relations Board, despite the fact that the Senate has not adjourned under the terms of a concurrent resolution passed by Congress. This action was allegedly based upon legal advice provided to the President by the Office of White House Counsel. We write today seeking information about what role, if any, the Department or OLC played in developing, formulating, or advising the White House on the decision to make these recess appointments. Further, we want to know whether the Department has formally revised or amended past opinions issued by the Department on this matter.

In 1921, Attorney General Daugherty issued an opinion to the President regarding recess appointments and the length of recess required for the President to make an appointment under Article II

Section 2 of the U.S. Constitution. The Attorney General opined that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment [of 2 days] is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution."[1] The reasoning of the 1921 opinion was given affirmative recognition in subsequent opinions issued by the Department, including opinions issued in 1960,[2] 1992,[3] and 2001.[4]

The Department has also weighed in on the applicable time period for recess appointments in legal filings in federal courts. In 1993, the Department filed a brief in the federal district court for the District of Columbia arguing, "If the recess here at issue were of three days or less, a closer question would be presented. The Constitution restricts the Senate's ability to adjourn its session for [*2] more than three days without obtaining the consent of the House of Representatives."[5] Additionally, the Department, via the Office of the Solicitor General, argued in a 2004 brief to the Supreme Court, "To this day, official congressional documents define a 'recess' as 'any period of three or more complete days – excluding Sundays – when either the House of Representatives or the Senate is not in session."[6] This exact argument was also filed by the Solicitor General in another case during 2004.[7] Most recently, the Deputy Solicitor General ar-

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[1] 33 U.S. Op. Atty. Gen. 20, 25 (1921).

[2] 41 U.S. Op. Atty. Gen. 463, 468 (1960) (stating "I fully agree with the reasoning and with the conclusions reached in that opinion.").

[3] 16 U.S. Op. Off. Legal Counsel 15, (1992) (concluding that the President could make a recess appointment during an intrasession recess from January 3, 1992, to January 21, 1992).

[4] 2001 OLC LEXIS 27.

[5] Memorandum of Points and Authorities in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment, at 24-26, *Mackie v. Clinton*, 827 F.Supp.56 (D.D.C. 1993), *vacated as moot*, 10 F.3d 13, (D.C. Cir. 1993).

[6] Brief for the United States in Opposition, *Miller v. United States*, No. 04-38 (2004) *available at* http://www.justice.gov/osg/briefs/2004/0responses/2004-0038.resp.pdf (last visited Jan. 5, 2012) (citing

[7] *See* Brief for the United States in Opposition, *Evans v. Stephens*, No. 04-828 (2004) *available at* http://www.justice.gov/osg/briefs/2004/0responses/2004-0828.resp.pdf (last visited Jan 5, 2012).

gued before the Supreme Court in 2010 that "the recess appointment power can work in – in a recess. I think our office has opined the recess has to be longer than 3 days."[8]

Taken together, these authorities by the Department clearly indicate the view that a congressional recess must be longer than three days – and perhaps at least as long as ten[9] – in order for a recess appointment to be constitutional. These various authorities have reached this conclusion for over 90 years and have become the stated position of the Executive Branch, including multiple representations before the Supreme Court, regarding the required length of time for a recess in order for the President to make a recess appointment.

Given the Department's historical position on this issue and the President's unprecedented decision to unilaterally reject the years of Department precedent and Executive Branch practice, we ask that you provide responses to the following questions:

(1) Was the Department asked to provide legal advice to the President regarding the decision to issue recess appointments of Cordray, Block, Flynn, and Griffin? If so, was a formal opinion from the Department prepared? If so, which office at the Department prepared the advice? If such advice was prepared, when will it to be made public?

(2) If a formal opinion was prepared, provide a copy of that opinion.

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[8] *New Process Steel v. Nat'l Labor Relations Bd.*, No. 08-1457 pg. 50 (March 23, 2010), statement of Deputy Solicitor General Neil Katyal *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf (last visited Jan. 5, 2012).

[9] It is noteworthy to add that according to the Congressional Research Service, prior to President Obama's recent recess appointments, no president in the past 30 years dating back to President Reagan, had made a recess appointment in a shorter recess than 11 days for an intersession recess and 10 days for an intrasession appointment. *See* Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions*, pg. 3, Dec. 12, 2011.

(3) Attorney General Opinions, such as the one offered in 1921, are essentially the forerunner to opinions that today come from the Office of Legal Counsel, providing legal advice to the President and executive branch on questions of law. Such OLC opinions are accorded, in the words of one former head of OLC, a "superstrong stare decisis presumption." Was the 1921 Attorney General Opinion withdrawn to make way for this new opinion of law that a recess appointment could be exercised when the Senate is in recess for only three days? [*3]

(4) Has the Department formally withdrawn any other prior opinions issued by the Attorney General or OLC regarding the length of time a recess must extend prior to the President making a recess appointment? If so, which ones were withdrawn or overturned? Provide the basis for withdrawing or overturning those opinions.

(5) Given this unprecedented maneuver of recess appointments taking place while the Senate stood in recess for only three days, would it be the Department's position that the President could make a recess appointment during the weekend or when the Senate stands in recess from the evening of one weekday to the morning of the next weekday?

(6) In 2010, the Deputy Solicitor General argued before the Supreme Court that "recess has to be longer than 3 days" for the President to use the recess appointment power. Does the Department continue to support this position? If not, why not?

(7) In the event that the Department has not withdrawn or overturned any of the prior opinions issued by the Attorney General or OLC, how does the Department reconcile those opinions with the decision of the President to make recess appointments while the Senate remained

in Session? If you believe the positions can be reconciled, provide a legal basis supporting this position.

(8) Do you believe the President's decision to make these recess appointments notwithstanding the absence of an adjournment resolution is constitutional? Please explain.

Thank you for your prompt attention to this matter and for responding no later than January 20, 2011. We look forward to your detailed response.

Sincerely,

[signed by Senators Charles E. Grassley, Orrin G. Hatch, John Kyl, Jeff Sessions, Lindsey O. Graham, John Cornyn, Michael S. Lee, and Tom Coburn]

CUMULATIVE INDEX 1: CHRONOLOGICAL

Date; Cite	Author	Recipient	Topic
1973-3-7; 1 J.L. (1 Pub. L. Misc.) 239	Bingham, Jonathan; Javits, Jacob	House Foreign Affairs Committee	Presidential Powers – Hostilities and War Powers
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