On Being a Lone Dissenter

DONALD GRANBERG[1]
Department of Sociology
University of Missouri

BRANDON BARTELS
Department of Politial Science
Ohio State University

Asch's (1956) research on group pressure to conform implied that it is difficult to be a lone dissenter. Extending this to the analysis of voting patterns in the U.S. Supreme Court's 1953-2001 terms, it was found that of 4,178 decisions, the 8-1 split was the least common (10%). Unanimous decisions were most common (35%), followed by 5-4 splits (21%), 6-3 splits (20%), and 7-2 splits (14%). Large differences were found among the 29 Justices serving during this period as to how often they were lone dissenters, led by Justice William Douglas, who issued lone dissents on about 6% of the decisions on which he voted.

The seminal work of Solomon Asch (1955, 1956, 1965) on conformity to group pressure has served as a model for much subsequent work in the area of social influence. Asch (1956) reported that many of his student subjects buckled under pressure and gave conforming answers when faced with the unanimously incorrect judgments made by shills. Overall, 37% of the judgments made by naïve subjects facing a unanimous majority on 12 critical trials were in error.

Whittaker and Meade (1967) replicated Asch's (1956) study in several countries and obtained results similar to those reported by Asch, with the interesting exception of the Bantu of Zimbabwe who conformed more. Using a method similar to that of Asch, Milgram (1961) observed significantly higher levels of conformity in Norway than in France.

Several of Asch's (1956) findings resonate with the experience of people in group situations. One such finding has to do with the difficulty of being a lone dissenter. When Asch (a) added a second naïve subject, or (b) when one of his shills deliberately did not conform, the rate of conformity of the naïve participants decreased drastically, from about 32% down to about 10% or 5% for (a) and (b), respectively. This illustrates the fact that it is very difficult—though, of course, not impossible—to be a lone dissenter. That difficulty is exemplified by George Homans (1984), describing his experience at a meeting of Harvard's Social Relations Department.

[1]Correspondence concerning this article should be addressed to Donald Granberg, 1810 East Downington, Salt Lake City, UT 84108. E-mail:granbergd@missouri.edu.

Journal of Applied Social Psychology, 2005, **35**, 9, pp. 1849-1858.
Copyright © 2005 by V. H. Winston & Son, Inc. All rights reserved.

> Parsons himself laid the yellow book [*Toward a General Theory of Action*] before a meeting of the whole department . . . urging us all to read it and implying . . . that it ought to be adopted as the official doctrine of the department to guide future teaching and research. I was going to have none of that . . . I spoke up and said in effect: "There must be no implication that this document is to be taken as representing the official doctrine of the department, and no member shall be put under any pressure to read it." . . . A *dreadful silence* followed my attack, and I thought no one was going to support me. But finally Sam Stouffer . . . spoke up . . . and somewhat reluctantly declared that the yellow book ought not be treated as departmental doctrine. There the matter dropped. . . . No further official effort was made to integrate theory for the Department of Social Relations. (Homans, 1984, p. 303; cf. Johnston, 2001; *emphasis* added)

Stated rhetorically, it is easier to stand up for the truth as you see it if there is at least one other person in the group who sees things your way.

A more recent example of the lone dissenter came shortly after terrorists attacked the United States on September 11, 2001. The Senate voted 98-0, and the House of Representatives voted 420-1, in favor of authorizing President Bush to use all necessary force against anyone associated with the attack. When Barbara Lee, a Representative from California, voted against this resolution, it called to mind the vote of Jeanette Rankin as the lone dissenter against the United States' declaration of war against Japan in 1941. (She also had voted against the Declaration of War in 1917, but she was not a lone dissenter then.) Lee's vote brought "gridlock to the telephone system in her office and threats that led D.C. police to assign plainclothes officers to guard her 24 hours a day" (Joiner, 2002, p. D-4). People may know intuitively that acting as a lone dissenter can evoke strongly negative reactions and serious consequences (Schachter, 1951).

Without stretching the metaphor too far, the U.S. Supreme Court can be viewed as a small group, albeit one that is highly selective and possesses great power. Decision making by the Supreme Court provides a context in which a nine-member group processes information and engages in a brief discussion with each Justice stating his or her position. Then there is an informal, nonsecret vote. The Chief Justice votes first, followed by the Associate Justices voting in turn, from the most senior Justice to the Justice with the least seniority. Then drafts are circulated as tentative majority and minority positions, while informal attempts at influence are common. The final decision is made when the Justices have signed onto the majority or minority position (Baum, 1998; Murphy, 1964; Snyder, 1958; Woodward & Armstrong, 1979).

In this process, the goal of unanimity is not viewed with indifference. Many people believe that a unanimous decision by the Supreme Court will command

more respect than a split vote, even though the legal status is technically the same (Epstein & Knight, 1998; Maltzman, Spriggs, & Wahlbeck, 2000; Murphy, 1964). This may be especially true on major issues. For example, even after he was assured of a majority, Chief Justice Earl Warren continued to lobby vigorously with his Supreme Court colleagues in a successful effort to make the momentous *Brown v. Board of Education* decision unanimous. That decision required the desegregation of public schools (Woodward & Armstrong, 1979). At a different level, the Chief Justice of New Jersey's Supreme Court put it this way,

> We take seriously the proposition that there is value in a unanimous opinion, and there is value in not dissenting unless a justice feels very strongly about it. There's a desire on the part of the justices to understand the point of view of the majority and see if the minority can, in good conscience, join the majority or concur in a separate opinion. (Hirsch, 2000)[2]

In the present article, we examine the actual frequencies of unanimous (9-0) and split decisions of the U.S. Supreme Court. We are also interested in the frequencies of each type of split (8-1, 7-2, 6-3, and 5-4). The latter (i.e., 5-4) lies at the other end of the consensus–dissensus continuum from the unanimous decision. The lone dissenter hypothesis implies that the 8-1 vote will be underrepresented, while 9-0 and 7-2 decisions will be overrepresented. A striving for consensus model posits that 9-0 and 8-1 decisions will be overrepresented, while 6-3 and 5-4 decisions will be underrepresented.

When terms such as *overrepresented* and *underrepresented* are used, it begs the question "In comparison to what?" Our preferred procedure is to simply compare the relative frequency of the five types of votes to a rectangular distribution. In this context, a *rectangular distribution* is one in which each of five types would be expected to occur with equal probability; that is, in 20% of the cases. In the *attitudinal model*, currently favored by many analysts of Supreme Court decision making (Segal & Spaeth, 1993), Justices study a case, take a position in light of their policy preferences and the facts of the case, and then

[2]While Supreme Court Justices may be under some pressure to form a consensus and avoid a split decision, they probably experience less pressure than does a jury in a criminal case. Such juries are often under considerable direct pressure from the judge and from their fellow jurors to come to a unanimous verdict, since that is commonly required in U.S. criminal trials. In their study of juries, Kalven and Zeisel (1966) found that in their first vote—following final arguments by the defense and prosecution, but before they began to discuss the case—31% of the juries were in unanimous agreement as to the guilt or innocence of the defendant. After deliberation, 95% of the juries were in unanimous agreement and were, therefore, able to render a verdict. The remaining 5% of the cases resulted in a hung jury. The jump from 31% to 95% bespeaks an impressive social-influence process. However, the 31% is also indicative of the strength of the case when compared to what might be expected to occur by the chance agreement of 12 people (.5 to the 12th power × 2, or $p = .0005$).

construct a rationale for their decision. In such a model, Justices vote in line with their attitudinal preferences. Absent knowledge of how these preferences may develop or be divided, it would seem that each of the five types of votes might be thought to be equally likely. Hence, the rectangular distribution is used as our standard.

An alternative approach is to use a chance model. Although this model is highly unrealistic, it does offer an alternative benchmark against which the actual data can be compared. The distribution of decisions in the chance model is based on an expansion of the binomial and the assumption that the Justices each decide their judgments by some random process. In percentage terms, the chance model implies that 9-0 decisions are least likely to occur (0.4%), followed (in order of increasing likelihood) by 8-1 decisions (3.5%), 7-2 decisions (14.1%), 6-3 decisions (32.8%), and 5-4 decisions (49.2%). The problem with the chance model is that it assumes that it is important to consider how many different ways a type of split could occur. That may not be important here.

Data Source

The data for this analysis are drawn from the *United States Supreme Court Database* (Spaeth, 2002), and we analyze cases from the 1953 to the 2001 U.S. Supreme Court terms. The database contains case characteristics, voting outcomes, and the behavior of each Justice for all cases before the Court from 1953 onward. Our analysis includes only cases on the Court's plenary docket; that is, cases in which the Court heard oral argument and issued a full opinion.[3] A large majority of the cases that the Court hears are of this variety.

The *per curiam* opinion, in which no Justice's name appears on the opinion, is a unique type of formally decided case that deserves special mention. In our analysis, 323 out of 4,501 formally decided cases (7%) were of the *per curiam* variety. Given that this type is an "opinion of the court," one might presume that these cases are almost always unanimous. In fact, about 60% of the *per curiam* cases analyzed here were unanimous. Since this is a significantly higher rate of unanimity than that of the remaining formally decided cases (35%), we will present separate analyses for (a) formally decided cases excluding *per curiam* decisions, and (b) formally decided cases including *per curiam* decisions.

Also, we analyze only those cases in which nine Justices participated. Thus, we treat as missing data the occasional cases in which Justices recused themselves or in which there were fewer than nine members on the Court as a result of an unfilled vacancy (e.g., the 1969 term).

[3]To gather these cases, we kept all records where the variable DEC_TYPE = 1 or 6 or 7 (type of case before the Court), and where the variable ANALU = 0 (which selects *citation* as the unit of analysis). These constraints exclude all cases that were not decided in a formal manner by the Court. Formally decided *per curiam* cases are those where DEC_TYPE = 6.

Table 1

Percentage of Voting Splits on Cases Formally Decided by the U.S. Supreme Court (1953-2001): Excluding Per Curiam Cases

	Decade						Combined	
Split	1950s	1960s	1970s	1980s	1990s	2000s	%	*N*
9-0	28.8	35.0	28.5	35.4	43.0	37.9	34.7	1,449
8-1	7.7	16.9	10.8	9.6	7.8	7.9	10.4	435
7-2	15.9	15.1	14.6	11.1	15.0	7.9	13.7	572
6-3	23.2	18.7	23.3	20.1	15.0	15.7	19.8	826
5-4	24.4	14.3	22.7	23.9	19.2	30.7	21.4	896
N	427	657	951	1,165	838	140	—	4,178

Note. Entries are column percentages.

Results

Table 1 shows the overall results for all formally decided cases, excluding the *per curiam* decisions, for the 1953-2001 terms, and a breakdown by decade. The lone-dissenter hypothesis gains support in that 8-1 was the least frequently occurring split, found in only 10% of the decisions. In a goodness-of-fit analysis, the overrepresentation of the 9-0 split (35%) is the largest departure from an equal probability model, while the 8-1 split is the largest underrepresentation. When the *per curiam* decisions are included (Table 2), the results are quite similar. In that analysis, 37% of the decisions were unanimous, while 11% of the decisions involved a lone dissenter.

On the other hand, the lone dissents are not underrepresented relative to the chance model. It appears that the striving for consensus model is supported in that 9-0 and 8-1 decisions are overrepresented, compared to the chance model, while 5-4 and 6-3 decisions are underrepresented. The frequency of 7-2 decisions is very close to the expected frequency in the chance model.

To choose between these two different interpretations, the rectangular model and the chance model were each compared to the actual data by a goodness-of-fit analysis. In both cases, the data depart significantly from the model ($df = 4$, $p < .001$), but the chi-square value is much larger for the chance model (124, 208.69) than for the rectangular model (729.98). These results imply that the rectangular model provides a more realistic standard in this context. Consequently, it can be inferred that the 8-1 split occurs in fewer cases than expected, thus providing support for the lone-dissenter hypothesis.

Table 2

Percentage of Voting Splits on Cases Formally Decided by the U.S. Supreme Court (1953-2001): Including Per Curiam Cases

	Decade						Combined	
Split	1950s	1960s	1970s	1980s	1990s	2000s	%	*N*
9-0	34.6	37.2	30.5	36.6	43.9	39.7	36.6	1,646
8-1	8.0	17.1	11.3	9.4	7.6	7.5	10.5	474
7-2	14.2	14.5	13.7	10.8	14.8	7.5	13.1	590
6-3	21.6	17.9	22.9	19.7	14.8	15.1	19.3	867
5-4	21.6	13.4	21.7	23.5	18.9	30.1	20.5	924
N	514	739	1,037	1,207	858	146	—	4,501

Note. Entries are column percentages.

The breakdown by decade indicates that lone dissents occurred most rarely in the 1950s, but most frequently in the 1960s. This could be a result, in part, of the 1950s being a relatively quiescent decade and the 1960s a time of great turbulence. Since the 1960s, there has been a slight but rather steady decline in lone dissents.

It is possible that the frequency of lone dissents is a function of the composition of the Court. For example, it is likely that Justice Scalia would have had more lone dissents on his record if Clarence Thomas had not become an Associate Justice in 1991, since they often vote in tandem. That interpretation, however, could be regarded as circular.

Table 3 presents the frequency and percentage of lone dissents for each of the 29 Justices who served during the 1953-2001 terms. Considered in terms of frequency (106) or percentage (5.9%), Justice Douglas leads the way in lone dissents. His record might imply that he was an ideological outlier. However, Justice Stevens follows rather closely with 95 lone dissents (3.5% of his judgments have been lone dissents). Justice Stevens is an interesting case. Having been nominated by President Ford, he started his service on the Court as a moderate conservative, but he became progressively more liberal over his years of service.

At the other end of the continuum, there are four Justices with no lone dissents, perhaps a result, in part, of the brevity of their service on the Supreme Court. Chief Justice Earl Warren, widely viewed as a unifying consensus seeker, had only one lone dissent out of 1,253 decisions.

Table 3

Lone Dissents by Supreme Court Justices

	Per curiam cases					
	Excluded			Included		
Justice (years served)	Lone dissents	Total cases	% of lone dissents	Lone dissents	Total cases	% of lone dissents
Douglas, William O. (1939-1975)	91	1,573	5.8	106	1,789	5.9
Stevens, John Paul (1975-present)	92	2,606	3.5	95	2,712	3.5
Harlan, John M. (1955-1971)	39	1,131	3.5	43	1,298	3.3
Black, Hugo L. (1937-1971)	23	1,179	2.0	28	1,358	2.1
Rehnquist, William H. (1972-present)	52	3,000	1.7	53	3,143	1.7
Reed, Stanley (1938-1957)	3	148	2.0	3	181	1.7
Whittaker, Charles E. (1957-1962)	6	407	1.5	6	478	1.3
Marshall, Thurgood (1967-1991)	25	2,313	1.1	25	2,453	1.0
Frankfurter, Felix (1939-1962)	5	555	0.9	6	659	0.9
Stewart, Potter (1958-1981)	16	1,877	0.9	16	2,080	0.8
White, Byron R. (1962-1993)	17	2,942	0.6	23	3,139	0.7
Blackmun, Harry A. (1970-1994)	16	2,493	0.6	17	2,628	0.7
Thomas, Clarence (1991-present)	5	879	0.6	5	904	0.6
Scalia, Antonin (1986-present)	5	1,127	0.4	8	1,460	0.6

(*table continues*)

Table 3 (Continued)

	Per curiam cases					
	Excluded			Included		
Justice (years served)	Lone dissents	Total cases	% of lone dissents	Lone dissents	Total cases	% of lone dissents
Clark, Tom C. (1949-1967)	5	987	0.5	6	1,144	0.5
Fortas, Abe (1965-1969)	1	260	0.4	1	283	0.4
Powell, Lewis F., Jr. (1972-1987)	5	1,719	0.3	6	1,823	0.3
Brennan, William J., Jr. (1956-1990)	11	3,079	0.4	11	3,346	0.3
Burger, Warren E. (1969-1986)	4	1,681	0.2	4	1,788	0.2
Souter, David H. (1990-present)	2	977	0.2	2	1,003	0.2
O'Connor, Sandra Day (1981-present)	4	2,037	0.2	4	2,101	0.2
Breyer, Stephen G. (1994-present)	1	603	0.2	1	620	0.2
Kennedy, Anthony (1988-present)	2	1,281	0.2	2	1,320	0.2
Ginsburg, Ruth Bader (1993-present)	1	684	0.2	1	703	0.1
Warren, Earl (1953-1969)	1	1,085	0.1	1	1,253	0.1
Jackson, Robert H. (1941-1954)	0	48	0.0	0	60	0.0
Burton, Harold (1945-1958)	0	264	0.0	0	320	0.0
Minton, Sherman (1949-1956)	0	122	0.0	0	151	0.0
Goldberg, Arthur J. (1962-1965)	0	270	0.0	0	311	0.0

Note. The Justices are presented in decreasing order of their % of lone dissents, *per curiam* cases included (right-hand column).

Discussion

While we have emphasized implicitly the similarity between the judgments made by subjects in the Asch (1956) experiment and the decisions made by Supreme Court Justices, we are mindful of some very important differences. In the Asch experiment, an ad hoc group makes inconsequential judgments on a task that elicits little interest or excitement until the third trial when the shills first create an incorrect norm. The Supreme Court, on the other hand, involves a formal group with distinctive norms and the expectation of further interaction over an extended future. Also, the Court has great power, and being a member must generate strong feelings of efficacy, especially since many of its decisions are by a narrow margin. By contrast, in the Asch experiment, the subject cannot influence the shills or the experimenter.

Nevertheless, Supreme Court Justices behave in a way that corresponds with what would be expected from a sociological model of small-group dynamics. There is pressure to conform, and Justices apparently find it easier to be in the minority if there is at least one other Justice seeing things their way. The Justices could be subject to social influence at either the time of the initial vote or later during the time when draft opinions are being circulated. The latter is what Howard (1968) termed *voting fluidity.*

Maltzman and Wahlbeck's (1996) finding of asymmetry reinforces the thesis of the present article. They reported that switching from the majority view to the minority view occurred only 4.6% of the time, while switching from the minority view to the majority view occurred 18.1% of the time.

It must be acknowledged that what we have been analyzing is the outcome of the social-influence process, rather than the process itself of becoming a lone dissenter. Nonetheless, our comparison of the percentage of cases resulting in a unanimous judgment versus the percentage with a lone dissenter (35% vs. 10%) yields evidence that is quite compelling. Comparing the percentage of decisions that were lone dissenters versus cases with a 7-2 split (10% vs. 14%) yields somewhat weaker evidence, but it is at least in the direction predicted by the lone-dissenter hypothesis. Our interpretation is that cases that are headed initially toward an 8-1 split are more likely to change in the direction of 9-0 than toward a 7-2 split.

References

Asch, S. (1955). Opinions and social pressure. *Scientific American*, *193*(5), 31-35.

Asch, S. (1956). Studies of independence and conformity: A minority of one against a unanimous majority. *Psychological Monographs*, *70*(9, Whole Number 416).

Asch, S. (1965). Effects of group pressure upon the modification and distortion of judgments. In H. Proshansky & B. Seidenberg (Eds.), *Basic studies in social psychology* (pp. 393-401). New York, NY: Holt, Rinehart, and Winston.

Baum, L. (1998). *The Supreme Court* (6th ed.). Washington, DC: CQ Press.

Epstein, L., & Knight, J. (1998). *The choices justices make.* Washington, DC: CQ Press.

Hirsch, J. S. (2000). *Hurricane: The miraculous journey of Rubin Carter.* New York, NY: Houghton-Mifflin.

Homans, G. C. (1984). *Coming to my senses: The autobiography of a sociologist.* New Brunswick, NJ: Transaction.

Howard, J. W. (1968). On the fluidity of judicial choice. *American Political Science Review, 62*, 43-56.

Johnston, B. (2001). The contemporary crisis and the Social Relations Department at Harvard: Case study in hegemony and disintegration. *American Sociologist, 29*(3), 26-42.

Joiner, R. (2002, December 4). Author who lives up to his principles outlines risk, reward of ethical choices. *St. Louis Post-Dispatch*, p. D-4.

Kalven, H., & Zeisel, H. (1966). *The American jury.* Boston, MA: Little, Brown and Company.

Maltzman, F., Spriggs, J. F., & Wahlbeck, P. J. (2000). *Crafting law on the Supreme Court: The collegial game.* New York, NY: Cambridge University Press.

Maltzman, F., & Wahlbeck, P. J. (1996). Strategic policy considerations and voting fluidity on the Burger Court. *American Political Science Review, 90*, 581-592.

Milgram, S. (1961, December). Nationality and conformity. *Scientific American*, 45-51.

Murphy, W. F. (1964). *Elements of judicial strategy.* Chicago, IL: University of Chicago Press.

Schachter, S. (1951). Deviation, rejection, and communication. *Journal of Abnormal and Social Psychology, 46*, 190-207.

Segal, J. A., & Spaeth, H. J. (1993). *The Supreme Court and the attitudinal model.* New York, NY: Cambridge University Press.

Snyder, E. C. (1958). The Supreme Court as a small group. *Social Forces, 36*, 232-238.

Spaeth, H. J. (2002). *United States Supreme Court judicial database, 1953-2001 terms.* East Lansing, MI: Program for Law and Judicial Politics, Michigan State University.

Whittaker, J. O., & Meade, R. (1967). Social pressure in the modification and distortion of judgment: A cross-cultural study. *International Journal of Psychology, 2*, 109-113.

Woodward, B., & Armstrong, S. (1979). *The brethren: Inside the Supreme Court.* New York, NY: Simon and Schuster.