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# OPINION ASSIGNMENT ON THE REHNQUIST COURT

Rehnquist's opinion assignments reflected his ability to balance both the Court's organizational needs and, occasionally, strategic policy considerations.

by **FORREST MALTZMAN**  
and **PAUL J. WAHLBECK**

**W**hen William H. Rehnquist replaced Warren E. Burger as chief justice in 1986, administration of the Supreme Court changed markedly. In his 17 years on the job, Chief Justice Burger was reputed to act strategically to advance his policy objectives. Critics complained that he cast “phony votes” and manipulated the assignment of opinions to his brethren.<sup>1</sup> For example, Justice William O. Douglas charged the chief with attempting to “bend the Court to his will by manipulating assignments” when Chief Justice Burger assigned the task of writing the majority opinion in *Roe v. Wade* to his colleague, fellow Nixon appointee Harry A. Blackman.<sup>2</sup>

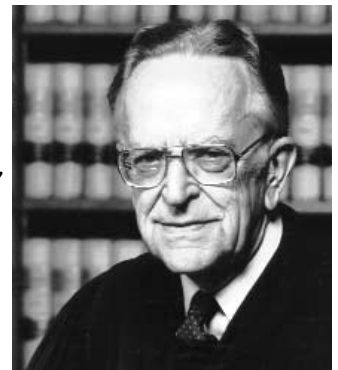
As chief justice, Rehnquist claimed that he approached the task of opinion assignment in a strikingly different manner. “This is an important responsibility,” Rehnquist once observed, “and it is desirable that it be discharged carefully and fairly.”<sup>3</sup> Quantitative analysis of patterns in Rehnquist's assignment of opinions confirms that he administered this task largely consistent with the goal of facilitating the smooth operation of the Court, albeit not entirely devoid of strategic calculations.

The picture of Rehnquist's opinion assignment decisions that emerged from our own examination of opinion assignment decisions during the 1987, 1988, and 1989 terms found that concerns for the equitable distribution of assignments across the bench appear to have motivated his assignments. Moreover the chief justice used each justice in his or her domain of legal expertise and assigned opinions disproportionately to justices who

completed their work efficiently.<sup>4</sup> Rehnquist's preference for allowing the Court's administrative needs to guide his opinion assignments was especially pronounced as the end of the term approached.

Our account certainly comports with Rehnquist's own description of the factors he weighed in making assignments: “I tried to be as evenhanded as possible as far as numbers of cases assigned to each justice, but as the term goes on I take into consideration the extent to which the various justices are current in writing and

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**Justice Harry A. Blackmun, whose papers contain the assignment sheets that the chief justice circulated at the close of every oral argument.**

1. Timothy R. Johnson, James F. Spriggs, II, and Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349-377 (2005).

2. William O. Douglas papers, Library of Congress, Draft Memorandum Opinion, 6/2/1972. According to Douglas, both Burger and Blackman had been in the minority at the Court's post-argument conference, leading to Douglas's severe criticism of the chief.

3. William H. Rehnquist, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 297 (New York: Quill, 1987).

4. Forrest Maltzman and Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421-443 (1996).

circulating opinions that have previously been assigned.”<sup>5</sup> As he further elaborated in a memo to his brethren,

During the past three terms, the principal rule I have followed in assigning opinions is to give everyone approximately the same number of assignments of opinions for the Court during any one term. But this policy does not take into consideration the difficulty of the opinion assigned or the amount of work that the ‘assignee’ may currently have backed up in his chambers.<sup>6</sup>

He then mentioned three additional factors that would be accorded greater weight: the timely completion of majority opinion drafts, dissenting opinions, and the casting of votes.

In this article we expand our analysis of Chief Justice Rehnquist’s opinion assignments to examine the Court’s terms from 1986 through 1993, using the papers of former Justice Harry A. Blackmun. We pay particular attention to the impact of *organizational* forces like equity and workload, the key factors emphasized by Rehnquist as central to his decision making. We also investigate the role of *strategic* factors, including Rehnquist’s ideological proximity to the justices, the case’s importance, and the majority coalition’s size at the Court’s post-argument conference.

## The assignment process

Political scientists devote an unusual amount of attention to the chief justices’ opinion assignments. This is not surprising. The nature of the chief’s assignments influences both the Court’s operations and the direction of public law. In fact, writing the Court’s opinions is the justices’ core function. How this responsibility is divided inevitably influences the Court’s ability to produce quality opinions in a timely manner, while also affecting the personal relationships among the justices. As Justice Frankfurter once explained, “perhaps no aspect of the ‘administrative side’ that is vested in the Chief Justice is more important than the duty to assign the writing of the Court’s opinion.”<sup>7</sup>

The assignments made by the chief justice are also likely to influence the law’s character. How an opinion is crafted determines both the nature and scope of the law. Indeed, the content of the opinion arguably has a greater impact on the law than the Court’s disposition of the case (that is, whether the Court affirms or reverses a lower court). As Justice Abe Fortas once observed, “If the Chief Justice assigns the writing of the Court to Mr. Justice A, a statement of profound consequence may emerge. If he assigns it to Mr. Justice B, the opinion of the Court may be of limited consequence.”<sup>8</sup> Which justice writes an opinion is thus highly consequential for the legal choices made by the Court. Hence, the chief justice’s ability to pursue a particular vision of the law is exercised in part through his choice of authors for each opinion.

Two explanations dominate political science accounts of opinion assignment decisions: the strategic application of policy considerations and the pursuit of the Court’s organizational needs. Most political scientists who study decision making on the Court attribute primacy to the justices’ policy preferences. For example, in explaining opinion assignment, Rohde and Spaeth

argue, “the rational strategy for the assignor is to assign the opinion to the justice whose views are most like his own.”<sup>9</sup> Yet, policy calculations are not applied consistently across all cases. While policy views are accentuated in especially salient cases,<sup>10</sup> the chief justice may assign a case to a justice closer to the dissenting coalition when faced with a narrow conference majority or even a plurality.<sup>11</sup>

In contrast, the organizational needs model suggests that the chief justice is constrained by norms dictating a departure from policy-based assignments. Instead, the chief uses the opinion assignment power to enhance the legitimacy of the Court’s opinions, promote harmony on the bench, and ensure that the Court completes its work in a timely fashion. According to many studies, these goals can be and are met by paying heed to the justices’ share of the Court’s workload, efficiency in completing their assigned opinions, and issue specialization.<sup>12</sup> While Rehnquist claimed to pay particular attention to these considerations, he was not unique in the care he gave them. Assignments made by Chief Justices Earl Warren and Warren Burger suggest that his predecessors, too, on occasion took these factors

5. Rehnquist, *supra* n. 3, at 297.

6. Thurgood Marshall papers, Library of Congress, Memorandum to the Conference, 11/24/1989.

7. Felix Frankfurter, “The Administrative Side” of Chief Justice Hughes, 63 HARV. L. REV. 1-4, at 3 (1949).

8. Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L.J. 405-412, at 405 (1975).

9. David W. Rohde and Harold J. Spaeth, *SUPREME COURT DECISIONS*, 174 (San Francisco, CA: Freeman, 1976). See also Walter Murphy, *ELEMENTS OF JUDICIAL STRATEGY* (Chicago: University of Chicago Press, 1964); S. Sidney Ulmer, *The Use of Power on the Supreme Court: The Opinion Assignments of Earl Warren, 1953-1960*, 30 J. PUB. L. 49-67 (1970); David W. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 MID. J. POL. SCI. 652-682 (1972).

10. Rohde, *supra* n. 9; Ulmer, *supra* n. 9; Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignments from Taft to Burger*, 23 AM. J. POL. SCI. 60-77 (1979).

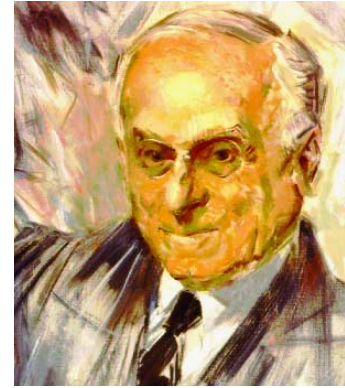
11. David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court*, in Jahnige and Goldman, eds., *THE FEDERAL JUDICIAL SYSTEM* 147-160 (New York: Holt, Rinehart, and Winston, 1968); William P. McLauchlan, *Research Note: Ideology and Conflict in Supreme Court Opinion Assignment, 1946-1962*, 25 W. POL. Q. 16-27 (1972); Maltzman and Wahlbeck, *A Conditional*

*Model of Opinion Assignment on the Supreme Court*, 57 POL. RES. Q. 551-563 (2004). Nevertheless, the empirical evidence that such assignments meaningful affect the probability of defections is questionable. Saul Brenner, *Strategic Choice and Opinion Assignment on the U.S. Supreme Court: A Reexamination*, 35 W. POL. Q. 204-211 (1982); Saul Brenner and Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72-81 (1988).

12. Sue Davis, *Power on the Court: Chief Justice Rehnquist’s opinion assignments*, 74 JUDICATURE 66-72 (1990); Harold J. Spaeth, *Distributive justice: Majority opinion assignments in the Burger Court*, 67 JUDICATURE 299-304 (1984); Elliot Slotnick, *The Equality Principle and Majority Opinion Assignment on the United States Supreme Court*, 12 POLITY 318-332 (1979); Saul Brenner and Jan Palmer, *The time taken to write opinions as a determinant of opinion assignments*, 88 JUDICATURE 179-184 (1988); Saul Brenner and Harold J. Spaeth, *Issue Specialization in Majority Opinion Assignment on the Burger Court*, 39 W. POL. Q. 520-527 (1986); Saul Brenner, *Issue Specialization as a Variable in Opinion Assignment*, 46 J. POL. 1217-1225 (1984).

13. Maltzman and Wahlbeck, *supra* n. 11. For a study showing that Burger gave significant weight to these organizational concerns, see Forrest Maltzman, James F. Spriggs, II, and Paul J. Wahlbeck, *CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME* (New York: Cambridge University Press, 2000).

**AS JUSTICE FELIX FRANKFURTER ONCE SAID, "PERHAPS NO ASPECT OF THE ADMINISTRATIVE SIDE THAT IS VESTED IN THE CHIEF JUSTICE IS MORE IMPORTANT THAN THE DUTY TO ASSIGN THE WRITING OF THE COURT'S OPINION."<sup>11</sup>**



into consideration.<sup>13</sup>

Inevitably, the Court's organizational needs and the chief justice's strategic policy considerations can conflict when it comes time for the chief to assign one of his colleagues the task of writing for the Court's majority. Unlike the chief justice, associate justices who make assignments do not have to balance these competing considerations, as they do not fill the institutional leadership role that the chief does. This leaves associate justices free to advance their policy goals through opinion assignment.<sup>14</sup> Although the conflict between the pursuit of policy goals and the safeguarding of the Court's organizational needs underlay much of the criticism of Burger's assignment decisions, Rehnquist publicly stated that he allowed the organizational needs of the Court to trump

strategic policy considerations. Did he live up to this claim?

### Exploring Rehnquist's assignments

To investigate the factors that influenced Chief Justice Rehnquist's opinion assignment decisions, we turn to the papers of former Associate Justice Harry A. Blackmun. His papers, housed at the Library of Congress, contain the assignment sheets that the chief justice circulated at the close of every oral argument session.<sup>15</sup> The assignment sheets list the cases assigned to each justice, as well as the identity of the justice who assigned the opinion if it was not the chief. The chief justice, after all, assigns only those cases in which he was in the majority at the post-argument conference where the justices discuss the merits of the case and cast their preliminary vote.

We also make use of two additional documentary sources in Blackmun's papers. To identify the set of justices who may receive the assignment, we

identified the conference majority from Blackmun's docket sheets.<sup>16</sup> Each justice maintains a record of positions taken at conference on their docket sheets, including votes on *certiorari*, the disposition of the case, and other miscellaneous motions. We also used Justice Blackmun's opinion logs, which document the circulation of opinion drafts and other correspondence such as joinder memos. These opinion logs allow us to track the workload of each justice. Because our data are derived from information contained in the retired justice's papers, we limit our analysis to the first eight years of Rehnquist's stewardship that pre-date Justice Blackmun's retirement.<sup>17</sup>

Tables 1 and 2 provide an overview of Chief Justice Rehnquist's opinion assignments between 1986 and 1993. During these eight years, as seen in Table 1, Rehnquist assigned 81 percent of the 976 majority opinion assignments.<sup>18</sup> Chief Justice Burger had controlled a slightly larger pro-

14. Maltzman, Spriggs, and Wahlbeck, *supra* n. 13.

15. Rehnquist commented that "sometimes the assignments come around during the weekend after the second week of oral argument, but sometimes they are delayed until early the following week." Rehnquist, *supra* n. 3, at 296.

16. We used a conservative standard in identifying the conference majority. If there was any question about whether a person was in the majority coalition, such as a notation next to their vote at variance with a majority, we did not place that justice in the majority coalition.

17. Based upon these data, we model the probability of each justice being assigned the majority opinion during the 1986-1993 period. The models demonstrate that Rehnquist's assignments are primarily based upon his understanding of the Court's administrative needs. A multivariate model illustrates that during the 1986-1993 period Rehnquist was able to strategically steer the majority opinion to his colleagues on cases that were either particularly salient or where the majority coalition was particularly fragile. Results are available from the authors. The figures below present bivariate relationships between the model's key independent variables and each justice's probability of receiving an opinion.

**Table 1. Justices who assigned majority opinions, 1986-1993 terms**

Assigning justice	Number assigned	Percent of total
William Rehnquist	791	81
William Brennan	102	11
Byron White	41	4
Harry Blackmun	27	3
John Paul Stevens	10	1
Sandra Day O'Connor	4	0.4
Thurgood Marshall	1	0.1
<b>Total</b>	<b>976</b>	<b>100</b>

**Table 2. Justices who received assignments, 1986-1993 terms**

Justice	Number of assignments for cases where in majority	Number of assignments made by Rehnquist	Number of assignments made by associate justices	Percent of eligible assignments
William H. Rehnquist	123 (13%)	123 (16%)	0 (0%)	15
William J. Brennan, Jr.	65 (7%)	26 (3%)	37 (20%)	19
Byron R. White	114 (12%)	91 (12%)	23 (12%)	16
Thurgood Marshall	72 (7%)	58 (7%)	14 (8%)	18
Harry A. Blackmun	93 (10%)	68 (9%)	25 (14%)	14
Lewis F. Powell	20 (2%)	18 (2%)	2 (1%)	16
John Paul Stevens	116 (12%)	89 (11%)	27 (15%)	18
Sandra Day O'Connor	120 (12%)	106 (13%)	14 (8%)	16
Antonin Scalia	103 (11%)	89 (11%)	14 (8%)	13
Anthony M. Kennedy	77 (8%)	61 (8%)	16 (9%)	12
David H. Souter	39 (4%)	32 (4%)	7 (4%)	12
Clarence Thomas	28 (2%)	26 (3%)	2 (1%)	12
Ruth Bader Ginsburg	8 (0.8%)	4 (0.5%)	4 (2%)	12
<b>Total</b>	<b>976 (100)</b>	<b>791 (100%)</b>	<b>185 (100%)</b>	

portion of the majority assignments (86 percent). Still, Rehnquist clearly had ample opportunity to attempt to use the assignment process to indirectly affect the scope and nature of the Court's opinions.

Chief Justice Rehnquist maintained that one of the principal criteria he employed was equity. Indeed, he commented that he gave "everyone approximately the same number of assignments" during any one term.<sup>19</sup> The data, however, do not show that he accomplished this goal by favoring justices who received fewer assignments than their brethren.

First, one could look at the number of assignments each justice received during a term to examine the gap between the most prolific author and the least utilized justice. Between the 1986 term and the 1993 term, there was a difference of at least four opinions between the justice who received the most assignments and the justice with the fewest assignments in every term, which amounts to as much as a 33 percent difference.

Second, the probability of receiving any one assignment might be a function of the justice's assignment totals to date in a term. However, there is not a statistically significant

difference in the chance of receiving additional assignments when a justice is running below the Court's average number of assignments compared to being above the Court's average.<sup>20</sup> This finding is robust even withstanding controls for the justice's current workload and the time in the term.

Even though Chief Justice Rehnquist does not appear to ensure that every justice has approximately the same number of assignments in a term, he was nevertheless attentive to the equitable distribution of the Court's majority opinions. The concern with equity, however, operated within each set of assignments included on a single assignment sheet, not by term.<sup>21</sup> Chief Justice Rehnquist was clearly aware of the expectation that justices will receive the same number of assignments each period. He himself commented on the probability of obtaining an

opinion assignment, saying "Since there are nine candidates to write twenty-four opinions, the law of averages again suggests that each chambers will ordinarily receive three assignments."<sup>22</sup> The importance of taking into consideration the senior associate justice's (SAJ's) assignments when making his own assignments was also emphasized by Rehnquist's predecessor. Chief Justice Burger once asserted that "Even one change in [opinion assignments] has a domino impact on all other assignments."<sup>23</sup>

Figure 1 highlights Rehnquist's desire to account for the decisions by the SAJs. The likelihood that a justice will receive an assignment when he or she was in the majority and did not receive any assignments from the SAJ, as seen in Figure 1, is 17 percent. If that justice already had two SAJ assignments noted on a particular assignment sheet, the probability

18. Our unit of analysis is the case citation. If two or more cases were consolidated and decided in a single opinion, we only included one assignment. We use The U.S. Supreme Court Judicial Database to identify consolidated cases (Harold J. Spaeth, THE ORIGINAL U.S. SUPREME COURT JUDICIAL DATABASE 1953-2003 TERMS, accessed at <http://www.as.uky.edu/polisci/ulmerproject/scdata.htm> on 8/1/2005). We exclude all original cases.

19. Rehnquist, *supra* n. 3.

20. Justices who have more than the Court's average when an assignment is being made

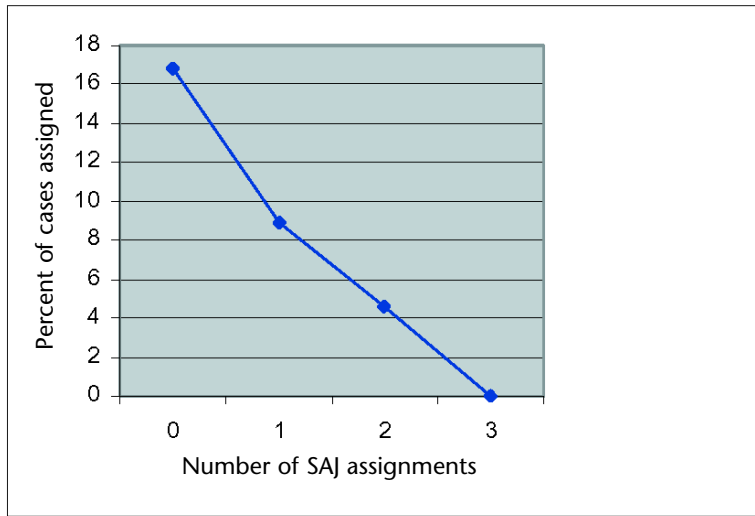
received 14.5% of the chief's assignments. Those with fewer than the Court average received 14.2% of the assignments in the next assignment cycle.

21. During these eight years, Chief Justice Rehnquist circulated 62 assignment sheets. These sheets made on average 15.7 assignments. Some assignments were denoted as being made by the senior associate justice.

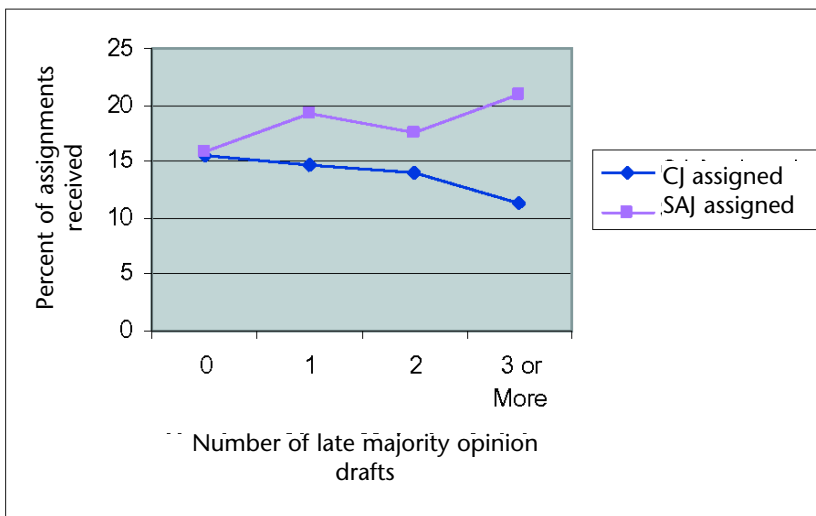
22. Rehnquist, *supra* n. 3, at 296.

23. Thurgood Marshall papers, Library of Congress, Memorandum to the Conference, 4/28/1978.

**Figure 1. Effect of SAJ assignments on CJ assignments, 1986-1993 terms**



**Figure 2. Effect of efficiency on assignments, 1986-1993 terms**



quist simultaneously ended up with a pattern that had meaningful differences across chambers and that he and his colleagues saw as fair. Inevitably, part of this perception stems from the fact that justices who disproportionately received opinions on a term basis are not consistently his ideological allies.

Beyond equity concerns, Chief Justice Rehnquist gave weight to whether a justice was “current” with his or her work. Although Rehnquist outlined three specific workload criteria, majority opinions, dissenting opinions, and votes, only one of these, the circulation of majority opinion drafts, reaches statistical significance. With respect to this factor, Rehnquist stated in his 1989 memo that when making assignments he would “put more weight than I have in the past” on whether “a chamber has one or more uncirculated majority opinions that were assigned more than four weeks previously.”

In Figure 2, we calculate the probability of receiving a majority opinion assignment based upon the number of opinions that meet Rehnquist’s criteria of being one month late.<sup>24</sup> One’s probability of receiving an assignment from the chief decreases along the number of uncirculated drafts. That the SAJ does not appear to discriminate against those justices who are not “current” in their work illustrates the unique administrative responsibilities of the chief justice.

### The role of ideology

Chief Justice Rehnquist made it a priority to ensure an equal distribution of the Court’s workload and to ensure the timely completion of the Court’s work, but he also recognized the strategic importance of assignments. In contrast to the senior associate justices, Rehnquist did not appear to make assignments disproportionately to his allies. In fact, in an average case, justices who were not particularly close to Rehnquist were more likely to gain the assignment than his closest allies. The sen-

of receiving an assignment from Rehnquist drops to 5 percent. Jus-

ices who received three assignments from the SAJ never received an assignment from the chief. By tolerating a small case variance across chambers in each assignment period and not taking that into consideration during the next period, Rehn-

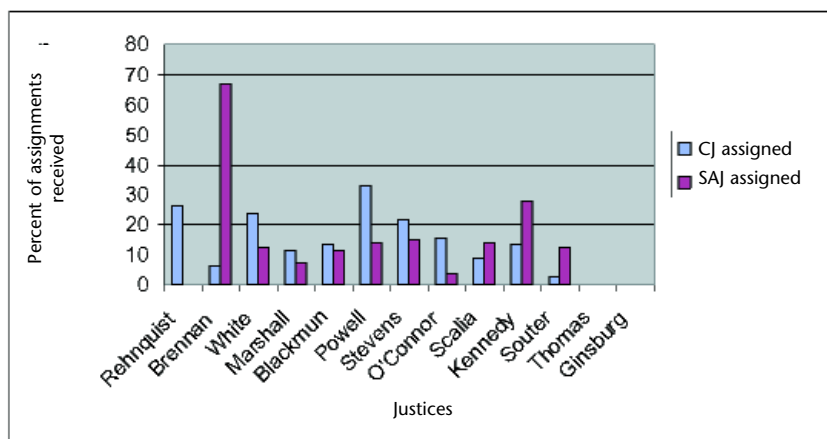
24. This figure is based upon a period that includes both before and after the 1989 memo. There was no discernible difference before, versus after the memo, as to whether Rehnquist put more emphasis on the timely completion of opinions.

ior associate justices, however, are significantly more likely to assign opinions to themselves or to their stalwart allies.

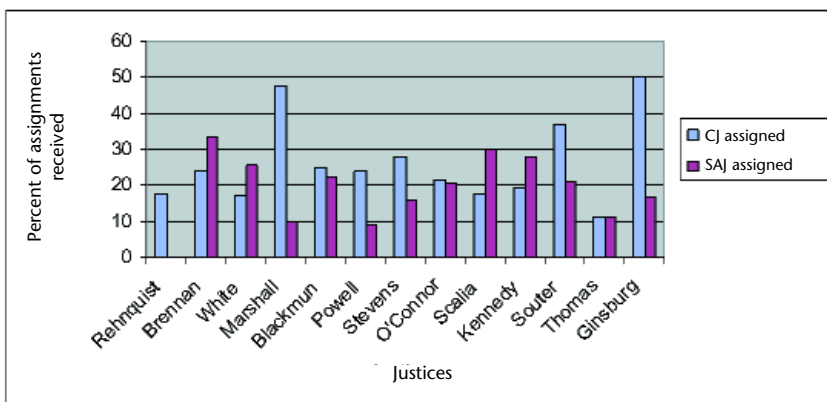
Even though Rehnquist did not typically assign more opinions to his closest allies, ideology played a prominent role under two conditions: important cases and close cases. As Figure 3 makes clear, Rehnquist disproportionately assigned salient cases to Byron R. White, Lewis F. Powell, and to himself. Indeed, 58 of the 120 (48 percent) opinions assigned in important cases by Chief Justice Rehnquist went to White, Powell, or himself.<sup>25</sup> Although Justice William Brennan, as the senior associate justice, assigned himself a higher proportion of important cases than did Rehnquist, the chief disproportionately saved important cases for his own chambers. As Rehnquist himself once noted, “The Chief Justice is expected to retain for himself some opinions that he regards as of great significance.”<sup>26</sup> Still, each justice, except Clarence Thomas and Ruth Bader Ginsburg, received important case assignments for about 10 percent of the cases in which they voted with the majority.<sup>27</sup>

The other condition under which Chief Justice Rehnquist utilized ideology were close cases. When the margin at conference was minimally a majority or a plurality, Rehnquist more often assigned the case to the liberal justices voting in the majority. Justices Ginsburg, Thurgood Marshall, David H. Souter and John Paul Stevens more often received an assignment from the chief when they voted with the majority in a close case than did their more conservative brethren. Why might Rehnquist assign such cases to a more liberal justice rather than to a conservative ally? Most likely, the pattern reflects a strategic calculation: giving a liberal justice the opportunity to write the majority opinion was more likely to preserve the original winning coalition, thus helping to secure the chief’s preferred outcome.

**Figure 3. Assignments in important cases, 1986-1993 terms**



**Figure 4. Assignments in close cases, 1986-1993 terms.**



**Achieving a balance**

Rehnquist’s opinion assignments reflected his ability to balance both the organizational needs of the Court and, occasionally, strategic policy considerations. As Rehnquist made clear on a number of occasions, he wanted to ensure that each justice had ample opportunity to craft the majority opinion. At the same time, he used his power over assignments to entice the justices to

circulate their opinions in a timely manner. The smooth, and by all

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25. “Important” cases are those reported on the front page of the *New York Times*. Data were obtained from <http://epstein.wustl.edu/research/salience.html> (accessed on 8/1/2005).

26. Rehnquist, *supra* n. 3, at 297.

27. The absence of important cases assigned to Justices Thomas and Ginsburg undoubtedly reflects the fact that they had joined the bench shortly before the end of the period included in our data.

**Maltzman and Wahlbeck,  
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accounts collegial, running of the Court no doubt stemmed in part from Rehnquist's treatment of his colleagues (regardless of their position on the ideological scale) when it came time to assign the majority opinion.

Still, there are two classes of opinions for which strategic considerations appear to have influenced Rehnquist's assignments. First, on

important cases in which Rehnquist was in the majority, he favored colleagues with whom he was most ideological compatible. Second, in cases with the tightest of margins at conference, Rehnquist appears to have favored justices furthest from him—a clear effort to hold together a controversial opinion. Limiting his strategic use of assignments to a narrow range of cases enabled Rehnquist to balance successfully his competing goals of shaping the law and managing the Court's organiza-

tional needs. Rehnquist's ability to maintain this balance also helps explain why he was so highly regarded across an ideologically diverse bench. ❧

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