

*Summer 2013*

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#### Recommended Citation

Laurel A. Rigertas, *The Supreme Court and Recusals: A Response to Professor Lubet*, 47 Val. U. L. Rev. 57 (2013).

Available at: <https://scholar.valpo.edu/vulr/vol47/iss4/4>

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## THE SUPREME COURT AND RECUSALS: A RESPONSE TO PROFESSOR LUBET

Laurel A. Rigertas\*

I would like to thank Valparaiso University Law School for the opportunity to participate in its scholarly roundtable discussion following Steven Lubet's lecture at the annual Tabor Institute on Legal Ethics lecture series. This essay is in response to Professor Lubet's lecture and his corresponding article, *Stonewalling, Leaks and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, which addresses the Supreme Court's failure to adopt a code of conduct.<sup>1</sup> While this is a broad topic that covers many areas, such as confidentiality, public speaking, and the acceptance of gifts, this essay focuses on the area that Lubet addressed—recusals. Lubet argues that the Supreme Court should adopt a comprehensive code of conduct that would, among other areas, address recusals. In particular, Lubet argues that the full Supreme Court should review an individual Justice's decision regarding recusal.

I agree with two main points that Lubet makes in his article. First, the Supreme Court's rationale for not adopting a code of conduct—as recently set out by Chief Justice Roberts—is unpersuasive.<sup>2</sup> Second, the current recusal practice—where each Justice decides on his or her own behalf whether recusal is warranted without explanation or review—makes it difficult for the public to understand recusal decisions and to know what to expect from the Justices in future cases.<sup>3</sup> In short, the current practice lacks standards, transparency, and accountability.<sup>4</sup> Lubet's proposal that the full Supreme Court review recusal decisions would address some of these issues, but it raises some concerns about the public's perception of the institution, which this essay explores briefly.

As Lubet points out, the Supreme Court is the only court in the United States that has not adopted a code of conduct.<sup>5</sup> In the past couple of years this aberration has received some public scrutiny, which

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<sup>1</sup> Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883 (2013).

<sup>2</sup> *Id.* at 888.

<sup>3</sup> *Id.* at 890-91.

<sup>4</sup> See James J. Alfini, *Supreme Court Ethics: The Need for Greater Transparency and Accountability*, 21 PROF. LAW. 10, 10-13 (2012) (discussing the Supreme Court's need for greater transparency and accountability, particularly in the area of recusals); Sherrilyn A. Ifill, *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331, 336 (2012) (noting how the Supreme Court's lack of transparency makes it difficult for litigants and the public to understand the Court's decisions).

<sup>5</sup> Lubet, *supra* note 1, at 886-87.

resulted in academics and members of Congress making some efforts, albeit unsuccessful ones, to correct this deficiency.<sup>6</sup> No action was ever taken on the Supreme Court Transparency and Disclosure Act of 2011 (HR 682), which proposed reforms. Chief Justice Roberts addressed these efforts in his *2011 Year-End Report on the Federal Judiciary*.<sup>7</sup> In that report, Roberts set forth his justifications for the Supreme Court's decision not to adopt the *Code of Judicial Conduct* that has been adopted by the Judicial Conference of the United States and applies to every other federal judge in the United States.<sup>8</sup> Roberts reasoned, in short, that there were other sources that could guide the Justices, that a code could not answer all ethical questions (particularly those unique to the Supreme Court), and that "no compilation of ethical rules can guarantee integrity."<sup>9</sup>

Lubet's article persuasively explains why each of those observations, while accurate enough, does not justify the Supreme Court's choice to operate without a code of conduct.<sup>10</sup> Are there other reasons unstated by Roberts that explain the Court's resistance to enacting a code of conduct? Perhaps the real reason for the reluctance to adopt a code of conduct is that it would lead logically to the question of how it would be enforced, a question that the Justices do not want to answer.<sup>11</sup> The Supreme Court has a long tradition of preserving not only its independence as an institution, but the independence of each Justice's decisions.<sup>12</sup> Adopting

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<sup>6</sup> *Id.* at 887. Over 100 law professors wrote to Congress asking it to enact legislation that would require the Supreme Court to follow the Judicial Conference's *Code of Conduct*, which applies to all other federal judges. *Id.* Following this letter, the Supreme Court Transparency and Disclosure Act of 2011 (HR 862) was introduced, which would have required the Supreme Court to follow the Judicial Conference's *Code of Conduct*. *Id.* Neither of these efforts yielded any results. *Id.*

<sup>7</sup> Lubet, *supra* note 1, at 887-88; see also CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 31, 2011), <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>8</sup> ROBERTS, *supra* note 7, at 3-5.

<sup>9</sup> *Id.* at 4-5, 11.

<sup>10</sup> Lubet, *supra* note 1, at 888-91.

<sup>11</sup> A letter from over 100 law professors to congressional committees urged the adoption of a code of conduct for the Supreme Court and further urged the establishment of "a set of procedures to enforce the Code's standards as applied to Supreme Court justices." Letter from 138 Law Professors to the House and Senate Judiciary Comms. 1, 3 (Mar. 17, 2011), available at [http://www.afj.org/judicial\\_ethics\\_sign\\_on\\_letter.pdf](http://www.afj.org/judicial_ethics_sign_on_letter.pdf). (emphasis added). As Lubet writes, the Justices "appear to regard with near horror" the idea that they have been held accountable for noncompliance with standards. Lubet, *supra* note 1, at 890.

<sup>12</sup> See Stephen Breyer, Assoc. Justice of the U.S. Supreme Court, *An Independent Judiciary: In Honor of the Sesquicentennial Anniversary of the Massachusetts Superior Court* (Sept. 22, 2009), [http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp\\_09-22-09.html](http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_09-22-09.html). In a 2009 speech that Justice Breyer gave regarding judicial

a process to review an individual Justice's recusal decision would be antithetical to this tradition. That concern may be the real reason the Supreme Court has not enacted a code of conduct.

Roberts's *Year-End Report* provides some support for this theory. The Report correctly notes that the *Code of Conduct*, as adopted by the Judicial Conference of the United States, applies only to lower federal court judges:

That reflects a fundamental difference between the Supreme Court and the other federal courts. Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.<sup>13</sup>

Roberts then goes on to assert that the Members of the Court do refer to the Judicial Conference's *Code of Conduct*. They are guided by it, however, in the same spirit as the first code of conduct that was drafted for judges—the 1924 *Canons of Judicial Conduct*.<sup>14</sup> As Roberts points out, “The 1924 Canons were advisory.”<sup>15</sup> In other words, they were not enforceable standards. If the Justices are only guided by advisory sources and not bound by a definitive code, then the problems of accountability and enforcement do not need to be addressed.

The enforcement problem is a particularly troublesome one for the Supreme Court in the area of recusals. As Roberts points out, “There is no higher court to review a Justice's decision not to recuse in a particular case . . . . [T]he Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case.”<sup>16</sup> So if a code of conduct was adopted and addressed recusals, who would review a Justice's decision regarding recusal?

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independence, he used the concepts of the independence of the judiciary and the independence of judges interchangeably. *Id.*

<sup>13</sup> ROBERTS, *supra* note 7, at 3–4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 2. Later Roberts states that “the Code remains the starting point and key source of guidance for the Justices as well as their lower court colleagues.” *Id.* at 5.

<sup>16</sup> *Id.* at 8–9.

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Under current practice, a motion for recusal is referred to the Justice to whom the motion is directed. That Justice then makes his or her own decision about whether recusal is warranted.<sup>17</sup> When making this decision, the Justices are guided by Title 28, Section 455 of the *United States Code*, which states that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>18</sup> The Justices rarely explain their reasons for granting or denying a motion for recusal.<sup>19</sup> The Justices’ decisions are not reviewed and, therefore, can never be reversed.<sup>20</sup> As Roberts’s Report concludes, “I have complete confidence in the capability of my colleagues to determine when recusal is warranted. . . . We are all deeply committed to the common interest in preserving the Court’s vital role as an impartial tribunal governed by the rule of law.”<sup>21</sup> The issue is not, however, whether the Justices are committed to the institution; the issue is that the current system has three deficiencies that are inconsistent with the role and stature of the Supreme Court: it lacks clear standards, transparency, and accountability.<sup>22</sup>

## I. STANDARDS

With respect to standards for recusal, the Justices follow 28 U.S.C. § 455, which requires recusal when a Justice’s impartiality may be reasonably questioned. A code of conduct could help further elaborate on those standards.<sup>23</sup> What is missing from the Supreme Court, however, is a body of precedent that further develops and interprets the standards that Justices should apply when making recusal decisions. As stated before, it is rare for a Justice to provide a written decision that explains his or her reasoning regarding recusal. Indeed, as explained in Lubet’s article, some Justices actually seem to feel that it would

<sup>17</sup> *Id.* at 8; see also Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 680–81 (2005) (discussing the Court’s 1993 recusal policy); Lubet, *supra* note 1, at 894–99.

<sup>18</sup> ROBERTS, *supra* note 7, at 8; see 28 U.S.C. § 455(a)–(b) (2006) (providing the codification for when any Justice, judge, or magistrate judge shall disqualify himself). Section 455(b) also gives several specific circumstances warranting recusal, such as having personal knowledge of disputed evidentiary facts concerning the proceeding that would warrant disqualification. *Id.*

<sup>19</sup> Lubet, *supra* note 1, at 891–94.

<sup>20</sup> ROBERTS, *supra* note 7, at 8–9.

<sup>21</sup> *Id.* at 10.

<sup>22</sup> See Alfini, *supra* note 4, at 10–11 (discussing the Supreme Court’s need for greater transparency and accountability, particularly in the area of recusals).

<sup>23</sup> For example, the *Code of Conduct* adopted by the Judicial Conference could provide standards for the Supreme Court.

somehow be inappropriate to share their reasoning with their colleagues.<sup>24</sup> The lack of written decisions, however, is inconsistent with the role of the Supreme Court, which is in large part to provide precedent that will promote uniformity in future decisions.

## II. TRANSPARENCY

The current recusal procedures, and in particular the absence of written decisions, also lack transparency. This deficiency prevents the public from understanding why a Justice made a particular decision regarding recusal, which is inconsistent with the great pride that the institution usually exhibits in explaining to the public the reasons for its decisions. This lack of transparency can harm the perceived integrity of such an important institution and undermine the public's trust that it is operating in a non-partisan manner. While not discussing recusals, a 2009 speech by Justice Breyer addressing judicial independence supports the idea that the Supreme Court needs to do a better job of addressing the public's perception that Justices are pursuing personal agendas. This point applies with particular force to providing better information about recusal decisions. Justice Breyer stated:

A poll was conducted at the beginning of the decade that asked people whether they believed that judges decide cases impartially and according to law or whether they believe that judges do whatever they desire as soon as they don a judicial robe. When that poll was initially conducted, two-thirds of the respondents believed that judges decided cases impartially and one-third thought that judges simply decided cases according to their own preferences. When that same poll was conducted again five years later, however, close to half of the respondents indicated that judges' votes are driven by their personal predilections. . . .

All of my colleagues and I . . . fulfill our judicial duties by attempting to decide cases in a manner that is consistent with what the law requires.

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<sup>24</sup> Lubet, *supra* note 1, at 893. Lubet quotes journalist Tony Mauro who said that several Justices told him "that they don't explain their reasons because they would not want to pressure their colleagues into recusing in a similar situation." *Id.* (citing to Tony Mauro, *Justices in the Media*, SCOTUSBLOG (Nov. 9, 2011, 11:11 PM), <http://www.scotusblog.com/community/justices-in-the-media/>).

But a serious discrepancy between our own view of our own efforts and the view of a large segment of the public is cause for concern in a democracy. . . . [T]he judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy.<sup>25</sup>

Consistent with the sentiments in Justice Breyer's speech, perhaps the most important change that the Court could make regarding recusals would be to require a written opinion from any Justice to whom a motion for recusal is directed.<sup>26</sup> This change would not necessarily require the adoption of a code of conduct. It could simply be made part of the Supreme Court's rules or internal policies. Written decisions would serve two key functions. First, they would develop a body of precedent that would help develop standards, and thus uniformity, among the Justices' recusal decisions. Second, written decisions would aid the public's understanding of why a Justice chose to participate in a case under circumstances in which a party to the litigation questioned that Justice's impartiality. The public may disagree with a Justice's decision, as many did with Justice Scalia's decision not to recuse himself in *Cheney v. District Court*, despite his duck hunting trip with the vice president several weeks after the Supreme Court decided to hear the case.<sup>27</sup> Understanding a Justice's reasons, however, at least allows for public discourse about the matter, which is an important component of democracy. The requirement for a written decision was contained in H.R. 862 and urged by over 100 law professors who wrote to the House and Senate Judiciary Committees.<sup>28</sup> It is a requirement that the Supreme Court should adopt.

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<sup>25</sup> Breyer, *supra* note 12.

<sup>26</sup> Court rules could limit motions to parties to the litigation so that other interested players, such as amici curie are not included. This would limit the number of motions that would be filed, as parties to a suit pending before the Supreme Court are likely to be judicious in filing such motions.

<sup>27</sup> 541 U.S. 913 (2004); see also Editorial, *Recusals and the Court*, N.Y. TIMES (Oct. 7, 2010), [http://www.nytimes.com/2010/10/08/opinion/08fri1.html?\\_r=0](http://www.nytimes.com/2010/10/08/opinion/08fri1.html?_r=0) (stating that many disagreed with Justice Scalia's decision not to recuse himself).

<sup>28</sup> H.R. 862, which was introduced in the House of Representatives on March 1, 2011, stated in part:

If a justice of the Supreme Court denies a motion brought by a party to a proceeding before the Court that the justice should be disqualified from the proceeding under section 455 of such title, the justice shall disclose in the public record of the proceeding the reasons for the denial of the motion.

H.R. 862, 112th Cong. § 3(a)(2) (2011). The bill also required a Justice to disclose in the public record reasons for disqualification when a Justice decides to recuse him or herself. *Id.* § 3(a)(1).

## III. ACCOUNTABILITY

A key aspect of Lubet's proposal would be to have the remaining eight Justices review a Justice's recusal decision. Through this mechanism, if an individual Justice did not have the objectivity to accurately assess his or her impartiality, the remaining eight Justices would be able to review and overrule that decision.<sup>29</sup> This proposal would provide a method of accountability in the cases, which may not be common, when a Justice does not accurately assess his or her own objectivity. It could also increase the integrity of the institution by providing a means of review for these important decisions.<sup>30</sup> It does, however, raise some concerns about whether the public would construe such a review process as a way for a group of Justices to exclude a Justice for the purpose of pursuing a perceived partisan agenda. Lubet makes a good point that individuals are not necessarily the best arbiters of their own objectivity.<sup>31</sup>

As a further point, § 455 does not require that a Justice actually be biased to warrant recusal. It states that a Justice "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."<sup>32</sup> The statute is somewhat vague in that it does not identify who would reasonably question the Justice's impartiality. In his annual report, Roberts states that the "objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts."<sup>33</sup> The other eight Justices are individuals who are knowledgeable about the legal process and familiar with the relevant facts,<sup>34</sup> so their review would aid

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<sup>29</sup> Another proposal by Stephen Gillers would be to send recusal motions to the Justice involved and the Chief Justice. If the Justice decided not to recuse, the Chief Justice would then act as a gatekeeper and decide if the motion warranted review by the full court. Editorial, *A Way Forward on Judicial Ethics*, N.Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/opinion/a-way-forward-on-judicial-ethics.html>.

<sup>30</sup> For example, Lubet describes how Justice Kagan set up her own screening process while she was at the Justice Department to shield herself from information about the government's strategy in the health care litigation. Then, as a Justice, she was the sole arbiter of whether her screening process was sufficient. Lubet, *supra* note 1, at 891-93. Perhaps her assessment was correct, but the integrity of the process would benefit if her assessment was subject to an outside review, even if the outcome was the same.

<sup>31</sup> Lubet, *supra* note 1, at 897-98.

<sup>32</sup> 28 U.S.C. § 455 (2006); Bassett, *supra* note 17, at 674-76.

<sup>33</sup> ROBERTS, *supra* note 7, at 7 (emphasis added).

<sup>34</sup> It is also not clear what the "relevant facts" are. If they relate to the facts regarding the Justice's potential bias, in the absence of a written decision by the Justice who is considering recusal, perhaps no one knows all of the potentially relevant facts other than that Justice.

assessing whether recusal is warranted in a particular case under the standard in § 455.

Lubet addresses the concern about review of recusal decisions being used as a tool for outcome manipulation.<sup>35</sup> In his report, Chief Justice Roberts stated that review by the full court “would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.”<sup>36</sup> As Lubet explains, if a majority of the Court—meaning five out of eight Justices—is needed to overrule the ninth Justice’s decision to sit, then those five Justices necessarily have a majority to control the outcome of the case regardless of whether or not the ninth Justice sits.<sup>37</sup> There is no danger of outcome manipulation. Roberts’s reasoning is unpersuasive on that point.

That being said, there is still a concern that a full court review could create a public perception that the majority of Justices were acting in a partisan way to manipulate outcomes. While Lubet’s explanation is perfectly logical, this might be too subtle a point for much of the public who may not be familiar enough with the workings of the Court to understand this reasoning. Only one-third of Americans can name all three branches of government.<sup>38</sup> In one survey, only 37 percent of Americans knew there were nine Justices on the Supreme Court.<sup>39</sup> Only one in seven Americans can name the Chief Justice.<sup>40</sup> A 2005 survey found that only 57 percent of Americans could name any Supreme Court Justice.<sup>41</sup> If much of the public does not have a basic understanding of the Court, it may not understand that the majority does not need to exclude a Justice in order to control the outcome of a case. Instead, they may cynically view review by the whole Court as partisan outcome

<sup>35</sup> Lubet, *supra* note 1, at 896–98.

<sup>36</sup> ROBERTS, *supra* note 7, at 9.

<sup>37</sup> Lubet, *supra* note 1, at 897.

<sup>38</sup> Scott Warren, Iris Chen & Eric Schwarz, *The Threat to American Democracy that Romney and Obama Aren’t Talking About*, CHRISTIAN SCI. MONITOR (July 16, 2012), <http://www.csmonitor.com/Commentary/Opinion/2012/0716/The-threat-to-American-democracy-that-Romney-and-Obama-aren-t-talking-about>. Former Supreme Court Justice Sandra Day O’Connor has been advocating a return to stronger civics education in a web-based project. *What Is iCivics?*, ICIVICS, <http://www.icivics.org/About> (last visited Jan. 31, 2013).

<sup>39</sup> *Many Americans History, Civics-Challenged: Poll*, CBS NEWS (Mar. 22, 2011), [http://www.cbsnews.com/2100-500202\\_162-20045778.html](http://www.cbsnews.com/2100-500202_162-20045778.html).

<sup>40</sup> Francine Kiefer, *Back to Basics by Getting Back to Civics Education*, CHRISTIAN SCI. MONITOR (May 28, 2010), [http://www.csmonitor.com/Commentary/Editorial-Board-Blog/2010/0528/Back-to-basics-by-getting-back-to-civics-education?nav=522450-csm\\_article-bottomRelated](http://www.csmonitor.com/Commentary/Editorial-Board-Blog/2010/0528/Back-to-basics-by-getting-back-to-civics-education?nav=522450-csm_article-bottomRelated).

<sup>41</sup> Mark Hansen, *Flunking Civics: Why America’s Kids Know so Little*, A.B.A. J. (May 1, 2011), available at <http://www.abajournal.com/magazine/article/civics/>.

manipulation if, for example, there are five conservative Justices who exclude a liberal Justice from sitting or vice versa. This could harm the legitimacy of the institution. As Justice Breyer stated in his speech on judicial independence:

[A] serious discrepancy between our own view of our own efforts and the view of a large segment of the public is cause for concern in a democracy. That is because the judicial system, in a sense, floats on a sea of public opinion. . . . [T]he judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake.<sup>42</sup>

H.R. 862 proposed a different approach whereby retired justices or judges of other federal courts would review recusal decisions.<sup>43</sup> Whether Congress has the power to enact such a provision is questionable,<sup>44</sup> but by having outsiders conduct the review, this approach would address concerns about an appearance of outcome manipulation by the Court. Perhaps there is a hybrid approach that would address the outcome manipulation perception problem but also keep the Court involved. For example, if a Justice denied a motion to recuse, the Justice would provide a written decision. If the party who made the motion was not satisfied with the Justice's reasoning, the party could ask the full court to assess whether an outside review was warranted. If a majority of the Court agreed that an outside review was warranted, then it would be referred to a body of other judges and/or retired justices for a dispositive ruling. If a majority of the Court did not find that an outside review was warranted, then the Justice's decision would stand.

In conclusion, Lubet's article addresses many legitimate concerns about the Supreme Court's current recusal practice and its impact on the integrity of the Court. If the Court enacted a code of conduct, that could begin to address some of the concerns. The issue of enforcement, however, would still need to be addressed. Lubet's proposal for a full Court review of recusal decisions could address that issue in the area of

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<sup>42</sup> Breyer, *supra* note 12.

<sup>43</sup> H.R. 862, 112th Cong. § 3(b) (2011).

<sup>44</sup> Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1225-26 (2011); see also John Gibeaut, *Sitting This One out: Health Care Case Again Raises Recusal Controversy*, A.B.A. J. (Mar. 1, 2012), available at [http://www.abajournal.com/magazine/article/sitting\\_this\\_one\\_out\\_health\\_care\\_case\\_again\\_raises\\_recusal\\_controversy/](http://www.abajournal.com/magazine/article/sitting_this_one_out_health_care_case_again_raises_recusal_controversy/).

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recusals, but it does raise some concerns about how the public would perceive the process. In my opinion, the most curative prescription would be for the Court to require written decisions from Justices for every recusal decision. This would help develop uniform standards for recusal, which could have an indirect impact on accountability by guiding future recusal decisions. It would also provide transparency so the public would have a better understanding of why Justices chose to sit in cases where there has been extensive public commentary on whether or not they were impartial enough to do so.