

2013

# Law and Discretion in the Supreme Court: A response to Professor Lubet

Barry Sullivan

*Loyola University Chicago, School of Law*, bsullivan7@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Courts Commons](#)

---

## Recommended Citation

Sullivan, Barry, Law and Discretion in the Supreme Court: A response to Professor Lubet, 47 Val. U.L. Rev. 907 (2014)

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

## LAW AND DISCRETION IN SUPREME COURT RECUSALS: A RESPONSE TO PROFESSOR LUBET

Barry Sullivan\*

I would like to thank the organizers of this year's Tabor Lecture in Legal Ethics for inviting me to participate in this timely, important, and very interesting discussion. I would also like to thank Glenn Tabor for making this occasion possible. Encouraging "reflection on the vocation and responsibilities of lawyers," the purpose of this lecture series, is a worthy goal in any season, but particularly so today, when lawyers, the legal profession, and legal education face so many challenges. Many of those challenges are economic, of course, but some go to the very idea of vocation, denying that there is anything to the work that we do, or the way we do it, apart from economic self-interest. Those challenges antedate our current economic crisis, and I suspect that they will be with us long after economic recovery has taken hold. Finally, I want to thank Professor Lubet for a wonderful paper. It is thoughtful and thought provoking. I learned much from it, and I am honored to have been asked to respond to it.

I should say at the outset that I find myself in agreement with Professor Lubet on what I take to be his principal points. First, the Justices of the Supreme Court, like all other judges, should be subject to an integrated code of conduct that details their ethical responsibilities with as much precision as the subject matter allows. I think that the need for such a code is particularly compelling at the present time, when most of the Justices do not shun the limelight, as many of their predecessors did, but seem to savor celebrity and its trappings. Second, I agree that the Court should institute a more effective mechanism for handling recusals—meaning a mechanism that encourages greater deliberation, consistency, and transparency in decision-making, gives appropriate weight to constitutional values in adjudication, facilitates objectively reasonable results, and promotes public confidence in the administration of justice.

Like Professor Lubet, I find the Chief Justice's arguments against such reforms to be unpersuasive. To my mind, the Chief Justice's

---

\* Cooney & Conway Chair in Advocacy and Professor of Law, Loyola University Chicago; Arthur Cox Visiting Research Fellow and Visiting Professor, Trinity College, University of Dublin. The author is grateful to Megan Canty, Alfred S. Konefsky, Margaret Moses, Winnifred Fallers Sullivan, Alexander Tsesis, and Michael Zimmer for helpful comments on an earlier draft and to Abraham Souza for excellent research assistance. The author also gratefully acknowledges the generous assistance of John N. Jacob, Archivist of the Lewis F. Powell, Jr. Archive of Washington and Lee University.

arguments evidence a refusal to acknowledge the existence of a problem that clearly exists; they also give lie to the humility – and the realism – of Justice Robert H. Jackson’s famous dictum: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>1</sup> In addition, I am sympathetic to the concerns underlying H.R. 862, the so-called “Supreme Court Transparency and Disclosure Act,” even though I have serious reservations about the specific approach taken in that draft legislation. While I agree that the Supreme Court needs a code of conduct, and a better way of dealing with recusals, whether raised on the motion of a party or by a Justice sua sponte (an important consideration because litigants and counsel may either lack knowledge as to arguable grounds for recusal or be reluctant to raise the issue), there are two points on which I would like to raise some questions. First, what role, if any, should Congress have in solving these problems? For example, can or should Congress require the Court to adopt a specific code of conduct, as H.R. 862 purports to do, or should it simply require that the Court adopt some code of conduct of its choosing? Second, I have some question as to whether en banc consideration of recusal motions necessarily would provide the best solution to the problem.<sup>2</sup> Given the Justices’ apparently longstanding reluctance to take the subject as seriously as it warrants, I question whether en banc consideration would necessarily lead to more deliberation or to better or more consistent results. Might not the requirement of en banc consideration simply produce recusal determinations that are formally styled as constituting decisions “by the Court,” while actually being determinations that have been left, more or less, to the discretion of an individual Justice? Might not this diffusion of responsibility result in even less accountability? In addition, en banc consideration might not be conducive to the development of that sense of individual responsibility that is essential to the proper disposition of those cases in which possible grounds for recusal exist, but no motion has been filed, either because the putative movant is not aware of the relevant facts or because he or his lawyer believes that the potential costs or possibly negative repercussions of filing such a motion are too great.

---

<sup>1</sup> Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>2</sup> Like Professor Lubet, I believe that the solution advanced by H.R. 862 – transferring the recusal review authority from the Court to retired Justices or lower federal court judges – is too fraught with constitutional infirmities to warrant serious consideration. Steven Lubet, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883, 894 (2013) (discussing potential problems with H.R. 862); cf. Kevin Hopkins, *Supreme Court Leaks and Recusals: A Response to Professor Steven Lubet’s “SCOTUS Ethics in the Wake of NFIB v. Sebelius,”* 47 VAL. U. L. REV. 925 (2013) (providing a more positive assessment of H.R. 862).

In the first part of my remarks, I explain the basis for my general agreement with Professor Lubet. In the second part, I discuss the reservations I have noted and make some suggestions of my own.

## I.

My substantial agreement with Professor Lubet is based on what I take to be the minimum requirements of the rule of law and its application to the work of the Supreme Court. In this context, I would suggest that adherence to the rule of law requires at least three things: first, judicial decisions should be rooted in articulable, pre-existing, and pre-announced legal principles; second, judicial decisions should be supported by fully reasoned, public explanations that are subject to public and professional scrutiny; and, third, judicial decisions should normally be made by judges who are impartial and disinterested, both in fact and in appearance.<sup>3</sup> I say “normally” to acknowledge the existence, but not necessarily the relevance for present purposes, of the rule of necessity. Of course, the first two requirements are related to each other in that reasoned explanations must refer back to pre-announced legal principles.<sup>4</sup>

My central point is straightforward. As Judge Charles M. Hough of the Second Circuit wrote almost a century ago, “[T]he legal mind must assign some reason in order to decide anything with spiritual quiet.”<sup>5</sup>

---

<sup>3</sup> Impartiality does not require that Justices have no preexisting views as to the proper interpretation of the law: “Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification.” KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 245 (3d ed., 1972). As Justice Rehnquist observed in *Laird v. Tatum*, 409 U.S. 824, 835 (1972), “Proof that a Justice’s mind . . . was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.” Nonetheless, advocates know that their task is more difficult when a Justice has previously expressed strong (even if mistaken) views in deciding the same or related issues. If a Justice has confirmed those views in extra curial speeches and writings, the task of persuasion may be even more difficult. See Barry Sullivan, *The Humanity of Advocacy*, 42 *LOY. U. CHI. L.J.* xxiii, xxx–xxxii (2010).

<sup>4</sup> That is not to say, of course, that the relevant legal principles are always obvious, that the governing principle is always self-evident, that legal reasoning is not constructive in nature, or that law is unchanging. As Paul W. Kahn has suggested, “Belief in the rule of law shapes a range of possible outcomes; it is neither wholly determinate nor wholly indeterminate.” PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 115 (1999). Unlike other kinds of disputes, a legal dispute “begins with each side recognizing that the other has a position that can be defended through appeal to cognizable legal resources. The issue is what does the law require, not what outcome will a decision maker favor.” *Id.*

<sup>5</sup> *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1008 (S.D.N.Y. 1915), quoted in Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 *U. PA. L. REV.* 777, 797 (1981).

Reasons are the lifeblood of the law. Even the most seasoned judges send back reports of “the opinion that won’t write.” The judge will have read the briefs, studied the record, heard oral arguments, discussed the case with her clerks, and agreed on the proper outcome in conference with her fellow judges. But when the time comes for writing the opinion, the judge finds that “the opinion won’t write”—the reasons needed to support the outcome that everyone agreed on are just not there. The point can also be made by reflecting on the fact that many legal questions, including some of the most important, are not susceptible to any single, demonstrably correct answer. But some answers are better than others. What matters to “the legal mind” in search of “spiritual quiet” is not simply the practical attractions of an answer that may be offered, but the quality of the reasons that support one or another plausible resolution of the problem. In either case, the persuasiveness of the reasons supporting the decision will depend, at least in part, on the degree of connection between the reasons assigned for the decision and the articulable, pre-existing, and pre-announced legal principles that are relevant to the decision. It is in the effort to explain and justify our conclusions that we determine whether those conclusions are in fact explicable and justifiable. As H. Jefferson Powell has argued, “Only when [the Justices’] opinions seek to persuade our judgments, not just coerce our wills, can the decisions of the Court truly be called authoritative.”<sup>6</sup>

Perhaps naively, we are conditioned to think of the Supreme Court not only as an institution subject to the rule of law, but as one that embodies or symbolizes the rule of law. Why, then, do the Justices refuse to formulate a code of ethics to govern their behavior, and thus decline to “say what the law is,”<sup>7</sup> in Chief Justice Marshall’s famous phrase? Why do they also decline to give reasoned explanations for their recusal decisions, and thus refuse to tell the public how the law was actually applied?

---

<sup>6</sup> H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 109 (2008); *see also* JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* 212 (2006) (“Although we live in a mass culture it is nonetheless possible for our leaders—in the judiciary, in the legislature, and in the White House—to speak as responsible human beings, explaining themselves in a kind of expression that does not trivialize them and us but does honor to both. It is imaginable that in their expressions they could manifest minds that are honestly engaged in thought and expression of a deep and living kind, not the manipulation of formulas.”).

<sup>7</sup> *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

One answer to these questions may be found, I think, in the historical evolution and current operations of the Supreme Court,<sup>8</sup> and in a perhaps understandable tendency on the part of the Justices to confuse matters of law with matters of discretion. When we idealize the Court as a symbol of the rule of law, we tend to forget that the Court has evolved into an institution that is mainly characterized by the exercise of absolute, unreviewable discretion; most of the decisions it makes are not decisions on the legal merits of cases, but determinations to grant or deny review.<sup>9</sup> In earlier times, the Court decided the merits of all of the

---

<sup>8</sup> See, e.g., Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L. Q. 389, 389 (2004) (“Once a relatively passive institution which heard all appeals that Congress authorized, the Court is now a virtually autonomous decisionmaker with respect to the nature and extent of its own workload.”) (footnote omitted).

<sup>9</sup> What I mean by this, of course, is that numerically speaking virtually all the “decisions” made by the Court are decisions about whether to grant review—which present questions of discretion, rather than law. The current version of Rule 10 of the *Rules of the Supreme Court of the United States* goes to great lengths in emphasizing the Court’s absolute discretion in deciding whether to grant review. The introductory paragraph states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers[.]

SUP. CT. R. 10. Moreover, the denial of certiorari is not a decision on the merits and lacks precedential effect. See *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950) (Frankfurter, J., respecting the denial of certiorari). As Margaret Moses has shown, the Court recently has chosen, with some frequency, and with or without calling for re-briefing or re-argument, to decide questions not presented by the parties. See Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 174–97 (2011). Indeed, as early as 1990, George Kannar argued that the Court had caused damage to numerous areas of the law by its then-recent

neglect of the Supreme Court’s own traditions and procedures: its sudden and unprincipled self-reversal concerning ‘independent and adequate state grounds,’ its unpredictable spasms of ideological haste leading to the resolution of important cases before they have been fully briefed, its docketing of cases which do not, under governing criteria, deserve plenary review.

George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1354 (1990) (footnotes omitted). Some might also suggest that the discretionary paradigm which applies to such an overwhelming percentage of the Court’s workload may bleed into the Court’s plenary consideration of the cases selected for decision on the merits, where, for example, it sometimes finds “facts” that could not survive further judicial review. In *Citizens United v. FEC*, for example, Justice Stevens noted that “[t]he majority declares by fiat that the appearance of undue influence by high-spending corporations ‘will not cause the electorate to lose faith in our democracy.’” 130 S. Ct. 876, 963 n.64 (2010) (Stevens, J., concurring in part and dissenting in part). As Justice Stevens further noted, however, “The electorate itself has consistently indicated otherwise, both in opinion polls and in the laws

## 912 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 47]

cases that came within its jurisdiction. The Court lacked the authority to pick and choose its cases or set its own agenda. As the country grew, however, the Court's caseload became unmanageable. Congress responded in 1891 when it passed the Evarts Act, which created the circuit courts of appeals and authorized the Supreme Court to decline to hear some cases.<sup>10</sup> Further reductions in the Court's mandatory jurisdiction followed during the twentieth century. By the end of that century, the Court's mandatory jurisdiction had virtually disappeared. In addition, in the last quarter of the twentieth century, the Court also substantially reduced the number of cases that it chose to hear on certiorari each year. The result is that the Court typically considers several thousand petitions for certiorari, but actually decides the merits of only about seventy-five cases each Term.<sup>11</sup> Thus, measured simply according to the total number of cases which the Court "processes" each year, an overwhelming percentage of the Court's work involves cases in which discretion, rather than law, controls.

Given the disproportionately large number of cases that the Court "decides" as a matter of discretion, rather than law, it would not be surprising if the Justices were to consider recusal issues in that way. Indeed, there is considerable evidence to show that the Justices do just

---

its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law." *Id.* (citation omitted). See also Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975) (analyzing the Court's reliance in merits cases on sources of information distinct from those normally identified with the rigors of the adversary process).

<sup>10</sup> Judiciary Act of 1891, ch. 517, 26 Stat. 826. Prior to the enactment of the Judiciary Act, the Court had succeeded in gaining some practical control over its workload by using a deferential standard of review. See, e.g., *Newell v. Norton*, 70 U.S. 257, 268 (1865) (affirming judgment, without searching review of the record, where there was "ample testimony to support the decision"). In the period following the Civil War, efforts to reduce congestion in the federal courts, including the Supreme Court, were complicated by political debates over the relative influence of the federal government and the states. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System, Part II: From the Civil War to the Federal Courts of Appeals Act*, 39 HARV. L. REV. 35, 67 (1925) ("Throughout the post-war period the legislative history affecting judicial organization is in no small measure a story of strife between those who sought to curtail the jurisdiction of the federal courts and those who aimed merely to increase the judicial force to cope with the increase of judicial business.").

<sup>11</sup> In the final quarter of the twentieth century, the Court reduced the number of cases to which it gave plenary consideration each Term from approximately 150 to about 75. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738 (2001). The number of cases on the Court's plenary docket has remained at about that level since then. See also *Frequently Asked Questions (FAQ)*, SUP. CT. U.S., <http://www.supremecourt.gov/faq.aspx#faqgi9> (last visited May 18, 2013) ("The Court receives approximately 10,000 petitions for writ of certiorari each year. The Court grants and hears oral argument in about 75-80 cases.").

that. As noted, both the Court's unwillingness to promulgate standards beforehand and the Justices' refusal to give reasons for their decisions after the fact strongly suggest an understanding of the inquiry as involving something other than a matter to be decided according to law.<sup>12</sup> So, too, do the few public pronouncements that the Justices have made on the matter, all of which emphasize the so-called "duty to sit,"<sup>13</sup> the "scandal" caused by the mere filing of a motion to recuse,<sup>14</sup> and the

---

<sup>12</sup> In June 1981, Justice Powell prepared a characteristically thoughtful and thorough memorandum concerning disqualification, apparently in response to criticism that had been leveled at him and Justice Stewart. Significantly, the criticism to which Justice Powell was responding was not that he and Justice Stewart had sat on cases in which they should have recused themselves, but that they had recused themselves in an excessive number of cases, which recusals the critic (apparently erroneously) attributed to their ownership of publicly-traded securities. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 274-81 (1994). Justice Powell's memorandum discussed his recusal history and explained that most of his recusals were due to professional engagements, rather than stock ownership. Background Memorandum on Disqualification from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S., to Barrett McGurn, Press Sec'y, Supreme Court U.S. 4-6 (June 15, 1981) (on file with Powell Archive, Washington and Lee University School of Law Library). Significantly, Justice Powell characterized disqualification decisions as often involving "personal, subjective judgments." *Id.* at 11. He may well have been reflecting on his personal circumstances. By 1981, Justice Powell had served nine years on the Court. Since his recusal decisions largely involved his prior client relationships and the client relationships of his former firm, he may have thought that recusal decisions should depend on such factors as the relative strength of ongoing relationships with the firm, individual lawyers in the firm, and particular clients. While these factors do present complex considerations and obviously call for the exercise of judgment (as many legal questions do), that does not mean that there is no place for pre-announced rules, or that recusal decisions ultimately can be resolved only by "personal, subjective judgments." Justice Powell also argued against the public disclosure of a Justice's reasons for recusal decisions, noting that "public disclosure often would be embarrassing to other persons, and also would invite inquiries as to why there is disqualification in one case and not in another." *Id.* Justice Powell further provided that his memorandum could be shown to "any reporter who is assigned regularly to cover the Court," but not to anyone else, and to those regularly assigned to cover the Court only on the condition that it be treated as background material and "not [subject to] publication in whole or in part." *Id.* at 2. Finally, Justice Powell stated in the memorandum that he was "willing to advise a reporter [who regularly covers the Court] individually—as background information—why I disqualify in a particular case provided that the number of requests does not prove too burdensome." *Id.* at 11-12.

<sup>13</sup> See, e.g., *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J.); *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J.); JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2011), available at [http://www.uscourts.gov/News/TheThirdBranch/12-01-01/2011\\_Year-End\\_Report\\_on\\_the\\_Federal\\_Judiciary.aspx](http://www.uscourts.gov/News/TheThirdBranch/12-01-01/2011_Year-End_Report_on_the_Federal_Judiciary.aspx).

<sup>14</sup> Avoiding what some religious groups call "scandal" (allegedly undermining confidence in a particular religious organization by acknowledging the faults of its members) is frequently given as a reason for disapproving transparency. See, e.g., Ollivier Hubert, *Ritual Performance and Parish Sociability: French-Canadian Catholic Families at Mass from the Seventeenth to the Nineteenth Century*, in *HOUSEHOLDS OF FAITH: FAMILY, GENDER, AND COMMUNITY IN CANADA, 1706-1969*, 64 (Nancy Christie ed., 2002) (explaining that, in the Church's view, "knowledge of sin was itself an occasion of sin"). In his statement in



priority apparently accorded to having every case decided by an odd-numbered, full complement of Justices, rather than by a smaller number of Justices whose impartiality is beyond dispute.<sup>15</sup> Finally, there is the distinction made by the reporter of decisions between cases in which the reporter states that “Justice X took no part in the consideration or decision of this case” and those in which the reporter states that “Justice X took no part in the decision of this case.” The former phrase signifies that the Justice did not participate in oral argument, or in the conference discussion of the case, or in any post-conference epistolary exchange, or other consideration of the case. The latter phrase means something far less, namely, that the recusal came at some point prior to the announcement of the judgment of the Court. The recusing Justice may have taken part (and may even have played a dominant role) in oral argument and in conference, and may have fully participated in the exchange of draft opinions before recusing.<sup>16</sup> That may be because the

---

*Cheney*, Justice Scalia argued that the press was undermining public confidence in the Court by raising issues relating to his extra curial activities:

While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

541 U.S. at 928. Justice Scalia seemingly suggests that it would be best for the public not to know about conduct that the Justices themselves consider to be mere “foot-faults.” Under our form of government, however, the public is entitled to know and comment on the conduct of public officials, and no branch of government is thought to be beyond public scrutiny or criticism. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64 (1964) (applying the First Amendment malice requirement of *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) to criticism of judges); Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 205 (1964) (discussing seditious libel and criticism of government officials).

<sup>15</sup> Chief Justice Rehnquist has made the point in *Laird v. Tatum* and in *Microsoft Corp. v. United States*. See *Microsoft Corp. v. U.S.*, 530 U.S. 1301, 1302 (2000) (“[T]he even number of [Justices] remaining [after one Justice’s recusal] creates a risk of affirmance of a lower court decision by an equally divided court.”); *Laird v. Tatum*, 409 U.S. 824, 837–38 (1972) (“[T]he disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court.”). Justice Scalia has made the point in *Cheney v. United States District Court*, and Chief Justice Roberts made the same point in his 2011 *Year-End Report on the Federal Judiciary*. *Cheney*, 541 U.S. at 915–16 (“Even one unnecessary recusal impairs the functioning of the Court.”); ROBERTS, *supra* note 13.

<sup>16</sup> Recusals may also occur at the petition stage, but the sheer volume of petitions to be considered has sometimes made it difficult for a Justice to identify all of the cases in which he or she should recuse at that stage. Justice Powell’s papers reflect several instances in which one or another of the Justices expressed his views on whether certiorari should be granted and subsequently recused. See, e.g., Docket Sheet of Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S. at 8, *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) (No. 76-1810) (on file with Powell Archive, Washington and Lee University

Justice was unaware of a potential conflict until late in his or her consideration of the case, or the conflict may not have existed until that time.

But there is another possible explanation as well. We know from the papers of the Justices that some of them have waited, on occasion, to decide whether to recuse until after they knew the probable outcome of a case. Even some of the most conscientious Justices have sometimes followed that course.<sup>17</sup> Such a course of action would seem to suggest

---

School of Law), available at [http://law.wlu.edu/deptimages/powell%20archives/76-1810\\_CityOfLAManhart.pdf](http://law.wlu.edu/deptimages/powell%20archives/76-1810_CityOfLAManhart.pdf) ("Brennan thinks this conflicts with Equal Pay Act and probably Title VII."); Docket Sheet of Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S. at 8, *U.S. v. Ceccolini*, 435 U.S. 268 (1978) (No. 76-1151) (on file with Powell Archive, Washington and Lee University School of Law), available at <http://law.wlu.edu/deptimages/powell%20archives/Ceccolini.pdf> ("Harry [Blackmun] thinks case presents good opportunity to 'put exclusionary rule in focus.'"). Since 1980, however, the *Rules of the Supreme Court* have specifically required more detailed disclosures concerning the identities of the parties and their affiliates, presumably to assist the Justices in making informed decisions relating to recusals at the petition stage. See SUP. CT. R. 14, 29.6; see also Bennett Boskey & Eugene Gressman, *The Supreme Court's 1980 Rules – The First Addendum*, 87 F.R.D. 513 (1980) (explaining the 1980 rule change requiring additional information concerning parent companies, non-wholly-owned subsidiaries, and affiliated companies). In addition, the *Rules of the Supreme Court* now require that amicus curiae briefs fully describe the party on whose behalf the brief is being filed and also disclose "whether counsel for a party has authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." SUP. CT. R. 37.6.

<sup>17</sup> For example, in *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), Justice Powell participated in the oral argument and conference, but later recused because his former law firm had been involved in the case in the lower courts. Justice Powell's conference notes suggest that he made his recusal decision after he determined that his vote would make no difference because a clear majority of the Court would vote to reverse. See Conference Notes of Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S. at 19, *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981) (No. 79-1068) (on file with Powell Archive, Washington and Lee University School of Law), available at [http://law.wlu.edu/deptimages/powell%20archives/79-1068\\_EEOCAssociated%20Dry%20Goods.pdf](http://law.wlu.edu/deptimages/powell%20archives/79-1068_EEOCAssociated%20Dry%20Goods.pdf) (in the spirit of full disclosure, the author notes that he was one of the attorneys for the EEOC in this case). Of course, it is not possible to reconstruct the thinking that led Justice Powell to reach the decision he did at the time that he reached it. However, his apparent indecision might have been the result of such factors as the length of time that had elapsed since he had practiced law with the firm, the possibility that the party was not a client of the firm at the time he was a partner, the possibility that he did not have a close personal relationship with the firm lawyers who had represented the client in the lower courts, and the fact the client had decided not to continue to retain his firm in the Supreme Court phase of the litigation, although the client's decision to terminate the engagement might have been made for a variety of reasons, ranging from questions of cost and expertise to speculation about Justice Powell's likely view of the merits and tactical concerns about minimizing the likelihood of his recusal. Other case files demonstrate the extent to which Justice Powell struggled with recusal decisions, particularly as time passed and his connections with his former law firm and its clients presumably became more remote. As early as 1975, however, Justice Powell

that the Justice was genuinely undecided about the need for recusal, based on the particular facts and circumstances of the case and his or her relationship to counsel or the parties. Once it became clear that the Justice's vote would not affect the outcome, the difficulty simply disappeared. Presumably, the Justice would have been confronted with a more difficult decision if his or her vote had mattered; and those, of course, are the cases with which we should be particularly concerned.

Like most legal questions, recusal motions require the application of legal judgment, but they cannot properly be classified as discretionary matters in the way that petitions for certiorari are. A litigant may have no right to Supreme Court review, but she does have the right to an impartial decision-maker, both in connection with the decision to grant or deny certiorari, and, if certiorari is granted, in connection with the rendering of a decision on the merits. Just as there is no recognized exception to the hearsay rule for "really important hearsay," there can be no exception to the requirement of judicial impartiality based on the fact that a particular Justice believes that he or she has a unique perspective and contribution to make to the decision of a case, even if his or her colleagues agree that the Justice's participation is desirable or "really needed." What is at stake, of course, is the litigants' right to an impartial decision-maker.

The Supreme Court repeatedly has upheld the constitutional right to an impartial decision-maker. Most recently, in *Caperton v. A.T. Massey Coal Company*, the Court held that a state court judge's failure to recuse in a case involving a major campaign contributor violated the due process clause.<sup>18</sup> In *Caperton*, the Court noted that the scope of the due process

---

wondered about how long he should continue to recuse in cases involving his former firm. In *Train v. NRDC*, 421 U.S. 60 (1975), for example, Justice Powell decided to recuse after hearing oral argument in the case, but he noted in a memorandum to the Chief Justice that "[t]he doctrine of 'remoteness' must come into play at some point." Memorandum from Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S., to Warren E. Burger, Chief Justice, Supreme Court U.S. at 23 (Jan. 23, 1975), *Train v. NRDC*, 421 U.S. 60 (1975) (No. 73-1742) Case File (on file with Powell Archive, Washington and Lee University School of Law), available at [http://law.wlu.edu/deptimages/powell%20archives/73-1742\\_TrainNatural%20Resouces.pdf](http://law.wlu.edu/deptimages/powell%20archives/73-1742_TrainNatural%20Resouces.pdf). Significantly, Justice Powell further noted that he "continue[d] to be puzzled as to how long one should stay out of cases such as these." *Id.* at 24. Justice Powell also recused in *NLRB v. Sears*, 421 U.S. 132 (1975). In a hand-written annotation contained in that case file, Justice Powell noted, "I stay out of Sears cases . . . this Term and reexamine my position next Term." Preliminary Memorandum from Robert I. Richter, Law Clerk, Supreme Court U.S., to Lewis F. Powell, Jr., Assoc. Justice, Supreme Court U.S. at 1 (April 1, 1974), *NLRB v. Sears*, 421 U.S. 132 (1975) (No.73-1233) (on file with Powell Archive, Washington and Lee University School of Law), available at [http://law.wlu.edu/deptimages/powell%20archives/73-1233\\_NLRBSears.pdf](http://law.wlu.edu/deptimages/powell%20archives/73-1233_NLRBSears.pdf). Clearly, some bright-line rules would have made Justice Powell's decision-making process less burdensome.

<sup>18</sup> 129 S. Ct. 2252, 2264 (2009).

clause is not limited in this context to requiring recusal only in those circumstances in which recusal would have been required at common law. The *Caperton* Court observed, “As new problems have emerged . . . the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances ‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”<sup>19</sup> In such circumstances, the question is “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”<sup>20</sup>

It is difficult to imagine how the constitutional right discussed in *Caperton* could be trumped by the arguments from judicial convenience put forth by the Chief Justice and other members of the Court. It is obviously desirable, for example, for decisions to be made by all qualified members of a collegial body, whether that body be the Court or the Congress, but the desirability of full participation cannot justify the inclusion of persons who are otherwise disqualified from serving. Moreover, there is no logical or constitutional necessity for having a particular case decided by an odd number of Justices. As Professor Lubet has noted, the Justices may find it easier to do their work with an odd number, but the judicial power does not extend to setting the number of Justices. Congress has that power, and it has sometimes chosen to set the full complement of Justices at six or eight or ten. As Professor Lubet has also pointed out, the number of possible recusals is not likely to be great in any event, and the number of cases in which a recusal might affect the outcome would be even smaller.<sup>21</sup> That is undoubtedly correct. In addition to the reasons given by Professor Lubet, I would point out that such motions always entail costs to the movants and their lawyers—not simply in terms of out-of-pocket expense, but also because of the way in which members of the Court may view such motions and those who make them. A proper

---

<sup>19</sup> *Id.* at 2259 (citation omitted).

<sup>20</sup> *Id.* at 2262. In *Caperton*, Chief Justice Roberts and Justice Scalia dissented in terms quite consistent with the views on recusal that they have otherwise expressed. *Id.* at 2274 (Scalia, J., dissenting). According to Justice Scalia, for example, the public risks losing confidence in the judiciary not because of the judiciary’s actions, but because of the insistence of lawyers and their clients that the judiciary be held to a high standard, which Justice Scalia brushes aside as simply strategic behavior by lawyers and clients. *Id.* (Scalia, J., dissenting); see also Lincoln Caplan, *Justice for Sale: How Big Money Is Overwhelming Judicial Elections and Corroding Our Confidence in the Courts*, AM. SCHOLAR, Summer 2012, at 20 (discussing the impact of *Citizens United* and *Caperton* on state judicial elections).

<sup>21</sup> Lubet, *supra* note 2, at 900-02.

understanding of those costs will likely discourage parties and their lawyers from urging recusal unless there is a solid basis for doing so.<sup>22</sup>

In addition, the Court's ostensible concerns about the possibility of non-full-strength decisions, as well as the possibility of cases ending in deadlock, seem overblown. After all, if conflicts are dealt with at an early stage, the Court could simply deny certiorari when one of the Justices is recused. That would avoid the waste of resources involved in litigating a Supreme Court case that is destined to produce an evenly-split decision. That might seem to be strong medicine, but the possible disruption to the administration of justice might not be as serious as it might initially appear. The Court seldom grants certiorari to decide an issue that is unique to one case, and there normally are other cases raising the same issue waiting in the wings.<sup>23</sup> Moreover, the reasons for a Justice's recusal are likely to be case-specific and will not affect his or her participation in a subsequent case. As Professor Lubet suggests, however, few cases are likely to result in an evenly-split decision, and scarce resources are not likely to be wasted for that reason. Thus, it might be better in most cases for the Court to go ahead and hear the case. Even if the Court were to split evenly in the end, the issue would remain available for decision in another case. Finally, if these concerns are so serious, why did the Court grant certiorari in *Fisher v. University of Texas*

---

<sup>22</sup> Numerous commentators, including then-Judge John G. Roberts, Jr., have noted that Supreme Court cases have increasingly been argued by a smaller number of experienced Supreme Court advocates in recent years. See John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. S. CT. HIST. 68 (2005). When lawyers appear repeatedly before a court, they are not likely to jeopardize their credibility by filing ill-founded motions, particularly recusal motions. Nor are clients likely to insist on filing an ill-founded recusal motion when they have been properly counseled by experienced Supreme Court advocates. Like their lawyers, clients have nothing to gain, and much to lose, by filing an unfounded recusal motion. Of course, greater transparency would be helpful in determining whether there is a solid basis for seeking recusal. I should note, however, that my argument assumes that only the actual parties to the case would have standing to move for the recusal of a Justice. I would not favor extending the right to amici curiae or somehow giving formal recognition to extra curial "suggestions." On the other hand, a Justice should always be free to decide to recuse sua sponte.

<sup>23</sup> See Barry Sullivan, *Essay Review of 'Supreme Court Practice'*, R. STERN, E. GRESSMAN, & S. SHAPIRO, 4 CONST. COMMENT. 452, 454 (1987).

New Supreme Court decisions and new legislation beget further unresolved constitutional and legal questions that begin to be litigated in various courts throughout the country, and then work their way up through the system. Because many cases are proceeding to the Supreme Court at various speeds along parallel tracks, timing is important.

*Id.* (footnote omitted).

at *Austin*,<sup>24</sup> potentially one of the most important cases of the current Term, despite Justice Kagan's recusal?

If one takes *Caperton* seriously, it seems clear that the due process clause requires that standards be announced and reasons be given. Of course, there is no constitutional requirement that standards be announced in a code of ethics rather than in case law, but here we have neither. What we have is "secret law," and that clearly does not comport with due process. If I am correct, however, in thinking that we are not likely to see any substantial increase in the number of recusal motions, we can also assume that we will not see a large number of recusal decisions emanating from the Supreme Court, even if the Justices begin writing opinions on recusal motions. Thus, it seems preferable to have the Court promulgate a code of conduct for itself, rather than relying entirely on case law development. Of course, a code of conduct would be preferable for the additional reason that subjects in addition to recusal could be covered in such a code.

## II.

As I noted at the beginning, I have two reservations. The first concerns the appropriate role for Congress to take in this area, while the second involves the wisdom of relying on en banc review of recusal motions. I will deal with them briefly in that order.

First, the duty to recuse is set forth in § 455 of Title 28, which enumerates certain reasons warranting recusal and purports to apply to all federal judges, including the Justices of the Supreme Court. The Chief Justice has somewhat ominously observed, "As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested," but he also has been quick to add that the Justices have actually followed "the same general principles respecting recusal as other federal judges."<sup>25</sup> Moreover, as Professor Lubet has wisely observed, "[I]t is all but inconceivable that any Chief Justice would simply ignore ethics legislation, whether it had been 'tested' or not."<sup>26</sup> Although the Supreme Court would necessarily have the last word on whether § 455 is constitutional (and at least one scholar, Louis J. Virelli, III, has opined that the section is unconstitutional as applied),<sup>27</sup> it seems unlikely that a majority of the Justices would want to

<sup>24</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345) (mem.).

<sup>25</sup> ROBERTS, *supra* note 13, at 7.

<sup>26</sup> Lubet, *supra* note 2, at 903.

<sup>27</sup> Louis J. Virelli III, *The (Un)constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1185 (2011).

provoke a constitutional stand-off over the question whether Congress has the right to insist that the Justices act with the same degree of probity as other federal judges.

It seems, therefore, that the Justices, if left alone, will continue to adhere to § 455 in their own way and according to their own lights, whatever they think of its constitutionality. But how would the Justices respond to new ethics legislation, such as H.R. 862? Here, it may be important to consider a point that Professor Virelli makes in the conclusion to his article, where he seemingly limits his argument as to unconstitutionality with the observation that “[c]onstitutional text, history, practice, and structure all suggest that the Court, rather than Congress, should be the sole arbiter of its substantive recusal standards.”<sup>28</sup>

Of course, H.R. 862 would meet Professor Virelli’s criterion for unconstitutionality: it imposes substantive recusal standards by requiring that the Justices adopt a specific code of conduct, namely, the code that the Judicial Conference has promulgated to govern lower federal court judges. If Professor Virelli is correct, H.R. 862 would be constitutionally problematic, and the Justices would be on firm ground if they simply ignored it. Whether they actually would do so is another question. They might still be reluctant to make legislation of this kind into an occasion for a show-down with the political branches. On the other hand, they might well consider such legislation as veering too far into their territory to be ignored. But what if Congress simply required the Justices to promulgate a comprehensive, integrated code of conduct to guide their decision-making in this area, without requiring them to adopt the Judicial Conference’s code of conduct or any other specific code? That legislation would not constitute the imposition of any “substantive recusal standards”; nor would it be unlike a myriad of other regulations that Congress regularly and constitutionally enacts to regulate the work of the federal judiciary, including the Supreme Court.<sup>29</sup> By the same token, Congress could also impose on the Justices a legal obligation to give reasons for their recusal decisions. Those reforms

---

<sup>28</sup> *Id.* at 1233 (emphasis added).

<sup>29</sup> Congress exercises extensive authority with respect to the Supreme Court. For example, Congress defines the Court’s appellate jurisdiction, establishes the number of Justices to sit on the Court, and sets the compensation of the Justices. 28 U.S.C. §§ 1, 5, 1253-54 (2006). David Stras and Ryan Scott have recently suggested that Congress properly could attempt to influence the Justices’ retirement decisions by increasing the Court’s workload as well as providing for more generous retirement compensation. See David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1419 (2006). See generally David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L. Q. 1397 (2005).

would go a long way towards solving the problem without raising colorable constitutional issues that members of the Court could use to deflect attention from the substantive problem. Indeed, if the Court wanted to object to the new regulations, it would have to begin by objecting to § 455, which it has not previously been willing to do. These are steps that the Court should take, whether or not it is required to do so by legislation.<sup>30</sup>

Second, I have reservations concerning the wisdom and feasibility of en banc review. On the one hand, I do not think it inconceivable that en banc consideration of recusal motions might strain collegiality in a court already well-known for its polarization and sometime lack of civility.<sup>31</sup> I also think that en banc consideration of recusal motions may provide some possibility for strategic alignments among the Justices, perhaps not with a view towards changing outcomes—(Professor Lubet has persuaded me that this is mathematically impossible, assuming majority voting in connection with recusals)—but perhaps for other purposes, such as silencing what might be anticipated as a forceful dissent on plenary review.<sup>32</sup> But I think both probabilities are remote.

My main concern comes from the opposite direction. Given the Justices' apparently longstanding reluctance to treat recusal issues in a way that comports with ordinary judicial practice, it seems unlikely to me that they will now change course to the extent of taking up the additional responsibility of policing each other's ethical practices, at least

---

<sup>30</sup> Chief Justice Rehnquist noted in his statement on recusal in the *Microsoft* case that he had consulted with his colleagues before denying the motion. See *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301 (2000) (Rehnquist, J.) (mem.). According to Ross Davies, other Justices do so as well. Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 91 (2006). While consultation is certainly a salutary practice, it is not an adequate substitute for pre-announced standards and fully articulated reasons.

<sup>31</sup> See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 386, 399–400 (2000) (expressing concern about Justice Scalia's rhetoric and the example it sets for law students and lawyers as to what counts for acceptable legal discourse).

<sup>32</sup> While the Supreme Court originally followed the practice of delivering seriatim opinions, Chief Justice Marshall emphasized consensus, a practice which was in turn abandoned. See generally M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283 (2007). According to Justice Brennan,

[S]ome contend that the dissent is . . . a "cloud" on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law. Learned Hand complained that a dissenting opinion "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."

William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986) (quoting LEARNED HAND, *THE BILL OF RIGHTS* 72 (1958)).



in the sense of passing judgment on each other's recusal motions. In this respect, the main danger seems to be that opinions will be issued which appear, as a formal matter, to be opinions of the Court, but effectively represent the work product of only the Justice whose recusal is requested, with little or no independent review by the other Justices. If social science studies are to be credited, most Justices are not likely to participate fully in the decision of recusal motions aimed at a colleague's participation in a case, but will be inclined to defer to the colleague's decision.<sup>33</sup> "Going-along" decision-making, as Judge Richard A. Posner and others have called it, is a well-known phenomenon in the general conduct of multi-judge judicial panels.<sup>34</sup> Moreover, the reluctance to rule against a judicial (or quasi-judicial) colleague in the recusal context has been confirmed by studies of the recusal voting behavior of arbitrators; those studies suggest that the making of recusal motions to be decided by two members of a three-person arbitration panel is almost always futile because the two non-challenged arbitrators are generally disposed not to find that their colleague should be disqualified.<sup>35</sup>

It seems unlikely that the Justices will suddenly become interested in each other's recusal motions and treat them as if they were merits cases. Decisions on recusal motions most likely would come to be single-Justice opinions dressed up as opinions of the Court. If I am right about that, en banc consideration will give the illusion of collegial decision-making and an aura of authority and regularity that the opinions will not warrant.

---

<sup>33</sup> Not surprisingly, social science studies suggest a reduced level of conflict where participants anticipate future interactions and transactions. See, e.g., Jacob M. Rabbie, *Determinants of Instrumental Intra-Group Cooperation*, in COOPERATION AND PROSOCIAL BEHAVIOR 238, 239 (Robert A. Hinde & Jo Groebel eds., 1991) (discussing studies which suggest that selfish behavior of group members is reduced when members' contributions can be personally identified); Scott T. Wolf, Taya R. Cohen, Jeffrey L. Kirchner, Andrew Rea, R. Matthew Montoya & Chester A. Insko, *Reducing Intergroup Conflict Through the Consideration of Future Consequences*, 39 EUR. J. SOC. PSYCHOL. 831, 839 (2009) (discussing studies which suggest a reduction in intergroup conflict when groups consider future consequences).

<sup>34</sup> See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 22 (1993). During his Supreme Court confirmation hearing, Judge Clement F. Haynsworth, Jr. attempted to explain his purchase of stock in a company during the pendency of a case in which the company was a party, and he was a non-writing judge, by explaining that he generally considered his work to be finished once the impression vote had been taken and the opinion assigned to someone else. *Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 91st Cong., 1st Sess. 271* (1969) (testimony of the Hon. Clement F. Haynsworth, Jr., Nominee to be Associate Justice of the Supreme Court of the United States), available at <http://www.loc.gov/law/find/nominations/haynsworth/hearing.pdf>.

<sup>35</sup> Margaret L. Moses, *Reasoned Decisions in Arbitrator Challenges*, in VOLUME III OF THE YEARBOOK ON INTERNATIONAL ARBITRATION 199 (2013).

The diffusion of responsibility will also preclude the kind of accountability that would be possible if the individual Justice whose recusal is sought were simply required to give written reasons, which could then be subject to appropriate public and professional criticism.<sup>36</sup>

But there is another aspect to the problem that also counsels against en banc review as a solution to the recusal problem. In many cases, the individual Justice must consider the possibility of recusal not because a motion has been made, but because of facts that the Justice knows to be true. It may be that the facts which counsel in favor of recusal are not known to the putative movant; alternatively, the putative movant may know the relevant facts but choose to refrain from filing a motion, because he believes that that course of action is unlikely to produce any result other than a negative reaction from the Justice who should recuse. Where no motion has been made, therefore, everything depends on the attitude of the Justice who should recuse. Cultivating among the Justices a real sense of individual responsibility, and an individual receptiveness to taking the question of recusal seriously in every case, is essential if issues of recusal are to receive the consideration they deserve. There is no reason to believe that en banc consideration will necessarily further that goal.

The most that can be expected, I think, is that some Justices, if required to write opinions to justify their own recusal decisions, will take the task seriously and thereby raise the bar for all the Justices. Absent en banc consideration, there will not be peer review, of course, in an individual case, but I think that meaningful peer review is unlikely to occur in an individual case in any event. On the other hand, a body of case law will develop and be discussed and evaluated by the Justices themselves, as well as by the practicing bar, academic lawyers, and the public. Indeed, it was a fear of putting that very kind of pressure on other members of the Court that Justice Rehnquist once gave as the reason for not publishing his recusal opinions: "I have simply thought it best not to publicly announce a reason, because it might well be a reason with which some of my colleagues would agree and some would not."<sup>37</sup> Moreover, according to Justice Powell's biographer, "[O]ne of the few criticisms Rehnquist ever made of Powell was that he was 'a little overly

---

<sup>36</sup> See, e.g., Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 229 (2004) (calling Justice Scalia's recusal opinion "disappointing and disingenuous").

<sup>37</sup> Letter from Justice William Rehnquist to THE DES MOINES REGISTER (Dec. 15, 1981), in *The Justices Answer*, THE DES MOINES REGISTER, Dec. 15, 1991, at 6A, quoted in JEFFRIES, *supra* note 12, at 276.

fastidious about disqualification,' which put pressure on his colleagues to conform to his extremely conservative standard."<sup>38</sup>

I recognize that there are powerful arguments on the other side, most importantly, the inability of individuals to be totally impartial in assessing their own impartiality, which is a point that Professor Lubet and others have made.<sup>39</sup> I also recognize that en banc consideration of recusals is the norm in some states, as Professor Lubet notes, as well as in some foreign courts of last resort.<sup>40</sup> This is obviously a close question. Given the tradition and culture of our Supreme Court, however, I doubt that en banc review would necessarily lead to better recusal results than might be possible under some other reform schemes.

### III.

In sum, the Supreme Court needs to adopt a code of ethics and a better system for handling recusals. Above all, the Court needs to begin treating recusals seriously, as matters involving legal and constitutional rights, rather than as matters calling for the simple exercise of judicial discretion. The Justices need to articulate standards and give reasons for their decisions, if they are to act, and to be perceived as acting, in the way in which courts normally are thought and expected to act. Otherwise, as one great judge said about other judges in other circumstances, the Justices risk acting like good King Louis:

The good French king used to sit under a spreading oak tree, not presiding even-handedly as a judge at a trial, but dispensing justice subjectively, arbitrarily, hit-or-miss, according to his fancy of the moment as to what was best for his subjects and when it was best for him to tell them about it.<sup>41</sup>

---

<sup>38</sup> JEFFRIES, *supra* note 12, at 276 n.\*.

<sup>39</sup> See, e.g., Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 107 n.1 (2004).

<sup>40</sup> See, e.g., R. Matthew Pearson, Note, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1828 (2005).

<sup>41</sup> *United States v. Barnett*, 346 F.2d 99, 106 (5th Cir. 1965) (Wisdom, J., dissenting); see also *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia & Kennedy, J.J., concurring in part and concurring in the judgment) ("The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed [in *Federalist 78*], is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained." (citation omitted)). The requirement that judges give reasons for their decisions is another.