Explaining Unexplained Cert.-Stage Recusals at the Supreme Court

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What do a Superfund site in Arizona and the remoteness of Staten Island, in comparison to New York City's four other boroughs, have in common?

They are both subjects of federal lawsuits from which a Supreme Court justice recused him or herself at the petition or "*cert.*" stage this fall. (For the justices to hear a case, four must vote to grant *cert.*) Had either case reached the high court, only eight jurists would have been sitting on the bench for oral argument.

In fact, more than 80 petitions thus far in the court's term that began in October (OT15) have yielded a *cert*.-stage recusal[1]. Luckily, not one of these cases has been added to the docket – though at least three cases this term[2] have been or will be argued with a justice missing. In each circumstance, the justice or justices recusing did not list a reason for recusal. Instead, the weekly orders list noting recusals simply stated that a member of the Supreme Court "took no part" in consideration of a petition.

That's where Fix the Court comes in. We have studied the reasons for recusals at the high court over the last three months and outlined below is the range of motives behind why one or more of the nine decided to step aside in a given case.

Recurrent reasons for recusal

Most often, in 55 of 85 instances of recusal, the reason was that Justice Elena Kagan (48 recusals) or Justice Sonia Sotomayor (7) had previously acted in the case in question. Sotomayor was a federal judge in New York, and Kagan, the U.S. solicitor general, before their respective nominations.

The remaining 30 recusals were divided among six other justices, with Justice Ruth Bader Ginsburg the only justice not to step aside in any single case. Among those 30 recusals, the most common reason was a justice's stock ownership (10.5[3] recusals), followed by being named in a complaint (9 recusals) and a family connection to a petition (7.5[3] recusals).

Finally, we could not determine the reasons behind three additional Alito recusals; more on those later.

Recurrent reluctance to explain recusals

In the interest of transparency, Fix the Court has petitioned the Supreme Court to explain why the justices "take no part" in considering certain petitions, and the justices have refused to disclose their reasons for recusal.

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[1] Unfortunately, we do not currently have complete statistics on recusals from previous terms.

[2] Justice Samuel Alito sat out *FERC v. EPSA* due to his ownership of stock in a company that was a co-litigant, and Justice Elena Kagan recused herself from *Fisher v. UT-Austin*, as she had participated in an earlier version of that case when she was U.S. solicitor general. Justice Sotomayor will be sitting out *RJR Nabisco v. European Commission* in early 2016, presumably due to her participation in the case nearly a decade ago when it was argued before the Second Circuit.

[3] The reason there is a half a recusal twice is that Justice Alito may have had two reasons for not considering the *cert*. petition in *Brainerd v. Schlumberger Technology Corp.*, as, first, his mostly recently available financial disclosure form noted that he owned shares in the respondent, and, second, his sister's law firm has lobbied Congress on the company's behalf.

In March, Fix the Court asked two justices via congressional intermediaries (see this link, at 49:19) why they do not publicize their motives behind a recusal. Justice Anthony Kennedy said that if a reason is publicly stated – say it's due to a family member's participation as counsel – that would indicate to the other justices that the case is of great importance to a colleague and could theoretically sway the outcome. "It's almost like lobbying," Kennedy said.

Justice Breyer, sitting next to him at the time, added resentfully, "I don't want to have to give my [reasons for recusal] if I don't want to."

This "trust us" theme emanating from the Supreme Court is one whose time has come and gone. With record low trust levels in government nowadays, the court should endeavor to reverse the trend by becoming more open than ever before.

Until it does, Fix the Court will be here to fill in the gaps and push the court to be more accountable to a 21st century democracy.

One note here on methodology: if a case has been relisted, we count it twice, as it is conceivable that the reason for a perceived conflict may have changed during the time between listings.

Previous work (55)

It may take six or eight years – and sometimes longer – for a legal action to wend its way from inception to the Supreme Court, so it comes as no surprise that justices appointed six and seven years ago are having to step aside due to their work in previous positions.

Forty-five times in OT15 Justice Kagan "took no part" in a *cert*. decision due to her prior role as U.S. solicitor general, and she sat out one case argued so far this term, *Fisher v. University of Texas*, for the same reason. Most of her *cert*.-stage recusals arose from criminal matters, the most interesting of which, *Wadford v. U.S.*, comes from South Carolina, where an employee of a water pump manufacturer who drugged and took illicit photos of his coworkers was making claims of ineffective counsel to try to obtain a new trial. (He failed.)

Seven times Justice Sotomayor sat out due to her prior role as judge in the Second Circuit Court of Appeals, and she will be sitting out *RJR Nabisco v. European Commission* in a few weeks. One the more interesting cases she stepped aside from, *Ware v. U.S.*, involved a Brooklyn man who, as part of a "pump-and-dump" stock scheme, distributed a series of press releases to disseminate positive (and mostly false) information about publicly traded companies, thereby artificially inflating share prices and reaping profits of more than $200,000 in five months.

Stock ownership (10.5)

Only three justices – Roberts, Breyer and Alito – own shares in publicly traded companies. Each of them "took no part" in *cert*. decisions due to their stock ownership.

Roberts sat out two related AOL petitions, *I/P Engine v. AOL* and *Interval Licensing v. AOL* due to his ownership of between $15,000 and $50,000 in that company's shares, and twice side-stepped *cert*. determinations in *Whitehead v. White & Case*, bizarre petitions in which Whitehead claimed major movie studios stole his intellectual property to create the films "Titanic," "Austin Powers" and "Wag the Dog," among others. The petitioner's claim extended to a host of publicly traded companies involved in the movie and technology industries, including Time Warner and Microsoft; Roberts owns between $250,001 and $500,000 in stock in each.

Roberts also sat out *cert.* determination in *Allvoice Developments v. Microsoft*, a patent suit over a speech-recognition interface, due to his stock ownership.

Breyer has stepped aside from only a single case this term, *Wang v. IBM*, due to his ownership of shares, worth between $50,001 and $100,000, in IBM.

Alito has sat out five cases (marked above as 4.5 due to the double-reasoning in *Schlumberger*) so far in OT15 due to stock ownership: *Content Extraction and Transmission v. Wells Fargo Bank* (owning between $15,001 and $50,000 in Wells Fargo shares), *McDonald v. Boeing* (owning between $15,001 and $50,000 in Boeing), *W.L. Gore & Associates v. Bard Peripheral Vascular* (owning between $250,001 and $500,000 in C.R. Bard) and *Tyco Healthcare Group v. Ethicon Endo-Surgery* (owning between $15,001 and $50,000 in Johnson & Johnson, of which Ethicon is a subsidiary) and *Brainerd v. Schlumberger Technology Corp.* (owning $15,000 or less in Schlumberger).

Named in a complaint (9)

It is rare for a petition to reach the high court where justices are referred to in the suit by name. That has already happened twice so far this fall.

In the first petition, *Missud v. Court of Appeals of California*, Missud, *pro se*, calls out the five conservative-leaning justices by name as part of the group of "state & federal judges who [have been bought and] sold" and who "should now be terrified of going to prison for […] corruption, racketeering and treason." A number of times in the complaint the letter "s" is replaced by "$." Also of note: Missud was disbarred in 2014.

The second petition, *Smith v. Scalia*, features not a disbarred individual but one who refused, back in 2000, to submit to a mental examination as part of fulfilling his bar requirements. In the years since, Kenneth Smith has filed a series of lawsuits against the justices of the Colorado Supreme Court, the U.S. Supreme Court (including Roberts, Scalia and Thomas) and various state and federal judges, maintaining that they have violated the Constitution and are thus "subject to criminal indictment and removal from the federal bench."

Family ties (7.5)

Justice Breyer's brother Charles is a federal judge in California, and Justice Alito's sister Rosemary is an attorney at K&L Gates in New Jersey. Between the two, these connections account for all 7.5 family-based recusals so far in OT15.

Breyer's five recusals here include four criminal matters – *Mizner v. Grounds*, *Cassidy v. Ducart*, *Saldana v. Ducart* and *Aguilera v. U.S.* – and one civil, *Wong v. Anderson*. Alito's three family-related recusals were all civil matters – *Daiichi Sankyo v. Apotex*, *Mylan Pharmaceuticals v. Apotex* and *Brainerd v. Schlumberger Technology Corp.* K&L Gates is registered to lobby on behalf of Daiichi Sankyo and Schlumberger, and the Mylan petition on drug patents here was closely related to Daiichi's.

Undetermined (3)

Fix the Court could not determine the reason for recusal in three cases, all of which were Alito recusals.

The first two cases are companion cases from Arizona, *ABB v. Arizona Board of Regents* and *Arizona v. Ashton Company*, that endeavor to recover costs incurred by the state to clean up hazardous materials at a Superfund site. It is possible the recusal happened because T. Rowe Price, the investment firm through which Justice Alito holds a small money market account and a municipal bond, owns 12.1 percent of Textron, a co-litigant in the case, but it's unclear despite an extensive listing of parties.

The third case is a class action case from the New York region, where non-Staten Island residents from a number of states sued over the fact that Staten Islanders were able to get discounted E-ZPass fares for traversing the Verrazano

Narrows Bridge. Justice Alito recused himself from this case, and we can't figure out why, though we figure that as a longtime New Jersey resident who would use that bridge to get to parts of New York, he could stand to gain financially (albeit only a few dollars each time he crossed the bridge) had the petitioners won.

Possible oversight

While we could not figure out what Alito recused in the companion Superfund cases, we found it odd that the Chief Justice did not also sit out *cert*. determination there as well given he owns between $100,001 and $250,000 in Texas Instruments stock, and the firm is named in the lawsuit as one of those potentially liable for cleanup costs.

This is reminiscent of *FERC v. EPSA*, a Supreme Court case argued in October in which one justice, also Alito, recused due to his stock ownership in an EPSA co-litigant, Johnson Controls, while Breyer, who also owned Johnson Controls stock at the time, failed to notice the conflict and heard the case.

Conclusion

Eighty-five times in the first half of OT15 a justice was recused from making a *cert*. determination due to a conflict of interests. Because the nine make these recusal decisions themselves, the public is asked to trust that the justices are fully knowledgeable about their previous work, their family ties and their stock ownership – any of which could statutorily preclude them from hearing a case.

We know from speaking to former clerks that each office has its own internal conflicts list, and often each justice puts one clerk in charge of double-checking. But as we have seen in the FERC and the Arizona Superfund cases, this system is far from foolproof.

These oversights are unforced errors that reduce the public's trust in the recusal process and in the institution. Unfortunately, given the rising interconnectedness and litigiousness of our world, this scenario – when a Breyer or a Roberts doesn't realize a company whose stock they own is a litigant in a case – only becomes more likely as time passes.

Instead, Fix the Court is hopeful the justices choose to open up the process and explain why they are stepping away from time to time.

If they are unwilling to do so, we believe they should cede this authority, as Sen. Charles Grassley of Iowa has suggested, to a judicial inspector general or internal ethics office that could ensure the chambers-based conflict lists are up-to-date and shared among the justices.

We wrote the court this fall suggesting just that but have yet to receive a response.

Until a change is made, Fix the Court will continue to inform the public of these conflicts.