1440 G St. NW, Ste. 800
Washington, D.C., 20005

The Hon. Scott S. Harris, Clerk of the Court
Supreme Court of the United States
One First Street NE
Washington, D.C., 20543

April 27, 2017

Dear Mr. Harris:

Thank you for recently scanning and uploading the 1889-1992 Journals to the Supreme Court's website.

Upon review, I noticed that between 1889 and 1904, justices would periodically list the reasoning behind their recusal decisions in merits cases. For example, one listing in the 1904 Journal states, "The Chief Justice did not hear the argument and took no part in this decision." Another from 1904: "Mr. Justice White, not having been present at the argument, took no part in this decision." And this from the 1889 Journal: "Mr. Justice Brewer, not having been a member of the court when this case was argued, took no part in the decision."

The justices nowadays collectively recuse themselves close to 200 times per term. For the past two years, I have been researching these recusals – the vast majority, of course, come in the *cert.* stage – and listing the reasoning behind them on FixTheCourt.com. Some of them are easy to discern, as annual financial disclosures indicate stock ownership, and several justices have well-known family members in the law. Others leave significant guesswork.

The public should be confident that the justices are not overlooking statutory or perceived conflicts of interest. Yet the fact that three times in the past year and a half a justice has considered a merits case or a petition despite a statutory conflict erodes that confidence. If the justices were more attuned to their conflict-inducing holdings and relationships – and if they were more open about them to the public – they would be less likely, I believe, to miss a conflict in the course of their work.

This objective could be accomplished by resuming the practice undertaken in the late 19th and early 20th centuries in which an explanatory phrase was added to the orders with recusals – e.g., that a justice took no part in a case or controversy "because she heard the case previously," "because he has a stock conflict" or "because he was not on the court when the case was argued."

Justices, like all of us, are going to make mistakes from time to time. That is why slip opinions are not final; the court – and thank you for this – even created a webpage two years ago to denote when opinions had been altered.

But, on the whole, if unforced errors on recusals serve to erode the public's faith in the court even a little bit, then simple fixes like recusal explanations are worthwhile for safeguarding the court's integrity.

I appreciate your consideration of this request.

Sincerely,
Gabe Roth
Executive Director
Fix the Court