Explaining the Unexplained Recusals at the Supreme Court

SCOTUS Step-Asides Hit the Double-Century Mark in OT16

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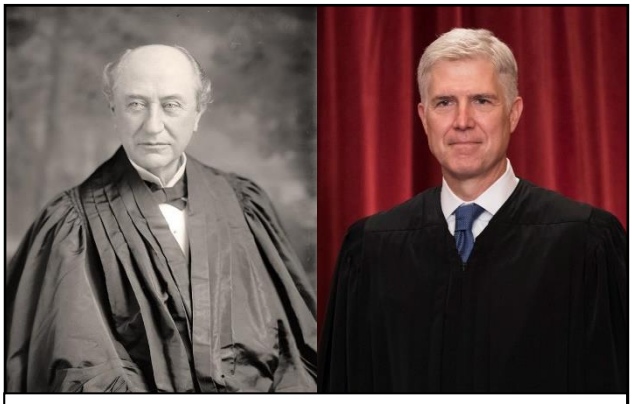
July 18, 2017

Introduction: How About an Explanation?



Every justice starts a newcomer: Brewer (left) and Gorsuch

In the decades following the Civil War and before the advent of modern medicine, it was far more common than it is today for a Supreme Court justice **not to appear in the courtroom for an oral argument or in the building for a conference**.

A recurrent culprit for these absences was the requirement, abolished in 1911, that **justices visit far-flung federal courts during their recesses**; these weeks- or even months-long excursions by carriage over the most primitive of roads caused all manner of malady and missed days of work.

While the annual journals back then (and to this day) listed which justices were in the courtroom for which arguments, the court up until 1904 was kind enough to **remind the public when a justice did not vote on a case due to an earlier absence** – or due to their not being a member of the court when arguments were heard.

"Mr. Justice [David] Brewer, **not having been a member of the court when this case was argued**," the 1889 journal states, "took no part in the decision" in a case involving elevated rail tracks and eminent domain. "Mr. Justice [Edward] White, **not having been present at the argument**, took no part in this decision" on a Georgia waterworks contract, the 1904 journal states. Another listing in the same year: "Mr. Justice [John Marshall] Harlan **did not hear the argument** and took no part in the decision of this case" concerning a fugitive jewelry thief (emphasis mine in all instances).

That year (1904) was the last one in which the court **even vaguely described the reasoning behind a justice's recusal**. Fast-forward to today, and the weekly orders lists denote a recusal – e.g., a justice "took no part in the consideration of this petition" – without referring to his or her whereabouts. Similarly, the syllabus of an opinion with a recusal will simply state a justice "took no part in the decision of the case" **without noting whether he or she heard arguments**.

We have not found in any histories of the Supreme Court a reason behind the change in policy, and in April, we asked the clerk of the court to revert to its practice from yesterday. (No response to date.)

Here is some speculation, though: **at the turn of the 20th century, the institution was going through rapid change** – eight justices (Horace Gray, George Shiras Jr., Henry Billings Brown, Rufus Peckham, David Brewer Melville Fuller, William Moody and John Marshall Harlan) departed the bench between 1900 and 1911, which meant the court often found itself shorthanded.

Several of those who left during that time were incapacitated – **either physically, mentally or both** – before their deaths or retirements[1] so were absent for a fair number of cases, as well.

Different Century, Same Story

Even as an absence from the courtroom today is much greater news than it was a century ago, **the practice of determining and disseminating recusals hasn't changed in more than 100 years**.

The justices themselves remain the only ones who make the determination as to whether they should step aside from a case at the *certiorari* and merits stages. And today, as it was in 1905 and following, there are no formal explanations as to why these recusals are occurring.

What we try to do in this report is, where we can, **explain the reasoning behind the justices' step-asides during the past term**. While OT16 does not technically end until Chief Justice John Roberts gavels in OT17 on the first Monday in October, the summer recess is an appropriate time to take stock.

So far this term, the justices have recused themselves **204 times – 200 times at the *cert*. stage and four times at the merits stage.**

Most of those recusals, or 124 of them (121 *cert.* stage, three merits stage), were due to previous work, with Justice Elena Kagan again leading the pack with 64 (62 *cert.*, two merits), followed by Justice Gorsuch with 29[2] (all *cert.*) and Justice Sonia Sotomayor with 18 (17 *cert.*, one merits). That Justice Samuel Alito and Chief Justice Roberts had to recuse from cases due to previous work, given their already lengthy tenure at SCOTUS, was a bit of a surprise.

That three justices own shares of individual companies **– a practice whose perpetuation has no justification** – meant another batch of stock-related recusals at the court this term. Four dozen times in all, Roberts, Breyer and Alito stepped aside from cases due to the contents of their portfolios, with Alito again leading this term with 35 stock-based *cert.*-stage recusals, followed by Roberts with 11 (10 *cert.*, one merits; much more on his merits-based recusal below) and Breyer with two (both *cert.*).

This term three individuals with beefs against the justices filed cases that yielded a whopping 18 recusals, and family ties yielded another six.

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[1] Much of the detail in is section is owed to the research of Prof. David Atkinson and his 1999 book, *Leaving the Bench: Supreme Court Justices at the End.*

[2] In the April 24 orders list, released right after Gorsuch joined the court, nearly every order included the line "Justice Gorsuch took no part in the consideration or decision of this petition." We are excluding these recusals here because one does not expect a new justice to review *cert.* determinations for old petitions, and we assume that any potential "J3s" – where a case is a single vote away from being granted and a justice gives a courtesy fourth vote to grant – were dispensed with in subsequent weeks.

Finally, we end the report with a discussion of the **eight *cert*.-stage recusals for which we could not conclusively determine a reason**. After looking at the justices' prior work, investments, family ties and the like, we still came up emptyhanded, though we have some guesses that we will share. Below is a look at many of these recusals in greater detail.

Recusals Caused by Stock Ownership

Here's the good: the three justices who own individual securities shed up to $1.045 million from their portfolios in 2016. **Here's the bad**: all told, Roberts, Breyer and Alito still owned individual shares in 53 companies at the end of last year, though that is down from 60 companies at the end of 2015 and 76 companies at the end of the 2014.

And here's the ugly: once again, a justice made a stock error this term, as Roberts heard Life Technologies Corp. v. Promega Corp. despite owning more than 1,200 shares of Life Technologies' parent company, Thermo Fisher Scientific. (Last term, both Roberts and Breyer heard or considered cases in which they had a stock conflict.) **Once the mistake was caught, Roberts recused himself from the case**.

We again **urge these three justices to sell all their individuals shares** and invest in the type of retirement accounts and fixed income funds that do not yield unnecessary recusals. We appreciate that they are making an effort to move in that direction **but wish they would pick up the pace**.

Further, it is our sense that Roberts recused from a number of cases at the *cert.* stage for conflicts that he didn't have. The chief justice sold his Verizon stock in June 2015, yet more than a year later, he recused himself from three cases in which Verizon was a co-litigant. A full list of OT16 stock-based recusals follows.

Chief Justice Roberts' one merits-stage recusals based on his stock ownership:
Thermo Fisher Scientific (owned 1,212 shares, valued at about $175,000):
Life Technologies Corp. v. Promega Corp.

Chief Justice Roberts' 10 cert.-stage recusals based on his stock ownership:
Time-Warner (owned between $250,001 and $500,000 in stock):
Heath, George v. Tsujihara, Kevin, et al.
Mitchell, Blondell v. Sanchez, Rick
Affinity Labs of Texas v. DirecTV et al.

Texas Instruments (owned between $250,001 and $500,000 in stock):
Johnson, Mable v. Ford Motor Co., et al.

Nokia (owned less than $15,000 in stock):
Prather, John C. v. AT&T, et al.

Wells-Fargo (owned three retirement and money market funds with a value in the $265,000 to $565,000 range):
Photos Etc. Corp., et al. v. Home Depot, et al. (also COF)

Verizon (likely an oversight; Roberts sold his Verizon-AOL stock on June 30, 2015):
Ebanks, Verona v. Samsung Telecommunication (listed twice)
Pundt, Edward v. Verizon Communications
Nitch v. FCC, et al.

Justice Breyer's two cert.-stage recusals based on his stock ownership:
Cisco (owned between $50,001 and $100,000 in stock):
Commil USA LLC v. Cisco Systems, Inc. (listed twice)

Justice Alito's 35 cert.-stage recusals based on his stock ownership:
Proctor & Gamble (owned between $15,001 and $50,000 in stock):
Gillette Co., et al. v. California Franchise Tax Board, et al.
Steele, Ellenie, et al. v. Proctor & Gamble
Sonoco Products Co., et al. v. Michigan Dept. of Treasury
Skadden Arps Slate etc. v. Michigan Dept. of Treasury
Gillette Commercial Operations v. Michigan Dept. of Treasury
IBM Corp. v. Michigan Dept. of Treasury
Goodyear, et al. v. Michigan Dept. of Treasury
DirecTV Group Holdings v. Michigan Dept. of Treasury

PNC (owned between $15,001 and $50,000 in stock):
Ashe, Keith A. v. PNC Financial Services Group (listed twice)
Ford, Carolyn W. v. Rohr, James F., et al. (listed twice)
Rios, Richard J. v. PNC Mortgage, et al.
Batista, Susan v. Countrywide Home Loans, et al.
Hasan, Larry A. v. Pennsylvania Dept. of Education, et al.
Batista, Susan v. Countrywide Home Loans, et al.

Johnson & Johnson (owned between $15,001 and $50,000 in stock):
Johnson & Johnson Vision Care v. Rembrandt Vision Technologies
Ethicon Endo-Surgery v. Covidien LP et al.
LifeScan Scotland Ltd. v. Pharmatech Solutions, Inc.
Medinol Ltd. V. Cordis Corp.

Merck (owned between $15,001 and $50,000 in stock):
Merck & CIE, et al. v. Gnosis S.P.A.
Merck & CIE, et al. v. Watson Laboratories

Abbott Laboratories (owned $15,000 or less in stock):
Mason, Valerie v. Tap Pharmaceutical, et al. (listed twice)
Baron, Clive v. Abbott Laboratories

Oracle (owned between $50,001 and $100,000 in stock):
Geotag, Inc. v. Google, Inc.
Avco Corp. v. Sikkelee, Jill

Schlumberger (owned $15,000 or less in stock):
Skinner, Richard v. Schlumberger Technology, et al.
WesternGeco. v. Ion Geophysical Corp.

Du Pont (owned between $15,001 and $50,000 in stock):
MacDermid Printing Solutions v. E.I. Du Pont De Nemours & Co. (listed twice)

Johnson Controls (owned less than $15,000 in stock, sold it later in the year):
Wiest, Jeffrey A., et ux. v. Tyco Electronics Corps.

Jacobs Engineering (owned between $15,001 and $50,000 in stock):
Jacobs Field Services v. Hugler

J.P. Morgan (held two money market accounts at up to $65,000 in value):
Photos Etc. Corp., et al. v. Home Depot, et al.

Vanguard (held 19 retirement and money market funds with a value in the $745,000 to $1,840,000 range):
Harris, Leigh A. v. Vanguard Group

Recusals Caused by Being Named in Suit

On Jan. 18, 2008, a man wearing a bulletproof vest, with a shotgun in his hand and a sword on his back, was arrested by the U.S. Capitol Police two-and-a-half blocks from the Supreme Court building. That man, Michael Gorbey, claimed that he was on his way to meet Chief Justice Roberts. (Thank goodness for the Capitol Police.) Understandably, Roberts recused himself from the five cases Gorbey brought before the court this past term.

Roberts also stepped aside in case filed by Harold Hodge, whom you may remember is the man who protested on the Supreme Court plaza six years ago and whose appeals court loss in that case was affirmed last year when the justices denied *cert*. Here, Hodge was suing the College of Southern Maryland and its officers to get his intro level math grade changed from a D to a C.

In addition, two individuals filed claims against justices: James Aggrey-Kweggyirr Arunga, a frequent pro se litigant in federal court, named four of the justices (Kennedy, Ginsburg, Breyer and Kagan) and President Obama in his suit detailing the alleged abuses of the federal government, Arunga, James A. v. Obama, et al. Robert Jaffe named all but Gorsuch in his, Jaffe, Robert J. v. Roberts, Chief Justice, et al. In both cases, each named justice recused himself or herself from *cert*. determination.

Recusals Caused by Family Ties

Five cases that crossed the desk of Justice Breyer's brother Charles, a senior district judge in San Francisco, reached the Supreme Court this past term: Alfriend, Kimberly J., et al. v. U.S. District Court for the Northern District of California (listed twice); Bank Melli v. Bennett, Michael; Tieu, Cuong M. v. U.S.; and Prather, John C. v. AT&T, et al.

Justice Alito's sister remains at partner at K&L Gates, which has done some lobbying for Mylan Pharmaceuticals, hence the recusal in Mylan Pharmaceuticals, et al. v. Acorda Therapeutics, et al. His son's work on the Senate Judiciary Committee caused a recusal in a human trafficking case against Backpage.com, as the committee was investigating Backpage at the time, but since that recusal occurred on Sept. 13, 2016, it was technically part of OT15 and was not included in the statistics in this report.

Alito did take part in the determination of another Backpage petition for which *cert*. was denied in Jan. 2017.

Recusals Caused by Previous Work

Though Justices Sotomayor, Kagan and Gorsuch combined for more than 100 recusals this term based on their previous work, both Chief Justice Roberts and Justice Alito stepped aside from cases this term due to prior positions, even though both have been on the high court for more than a decade.

Alito stepped aside from at least 12 cases there were under his purview on the Third Circuit during his nearly 16 years there, and Roberts, who sat on the D.C. Circuit from 2003 to 2005, stepped aside from a case that stemmed from a string of armed robberies in the District in 2004.

Three of the four merits-stage recusals in OT16 were due to previous work. Justices Sotomayor and Kagan stepped aside in Ziglar v. Abbasi due to their prior work in the case, and Kagan recused in Beckles v. U.S. for the same reason.

At least one of Gorsuch's prior-work recusals stemmed from his time in private practice, not on the 10th Circuit. On June 12, he stepped aside from *cert.* determination in Nacchio v. U.S.; Joseph Nacchio is the former CEO of Qwest Communications, which was one of Gorsuch's clients when he was working at law firm Kellogg Huber.

Undetermined Recusals

There were eight cases whose recusals we could not definitively figure out. Six were Alito recusals: a case concerning an arbitration error, Masimo Corp. v. Ruhe, Michael, et al.; one about who's responsible for faulty car parts, Johnson, Mable v. Ford Motor Co., et al.; one concerning the bankruptcy of an Oklahoma-based energy storage company, Whyte, Bettina M. v. Barclays Bank PLC, et al.; one against a Michigan judge, Taitt, Deborah v. Wayne Circuit Ct. Judge, et al.; and two criminal appeals, Concepcion, Albert v. U.S., and Russell v. Holt, Warden.

Our best guess on the Masimo and Ford cases is that some company whose securities Alito owns or owned was part of the case in an earlier iteration, and the energy case from Oklahoma could possibly have something to do with the justice's "mineral interest" in Grady County, Okla., which has an estimated value of up to $100,000.

Justice Thomas, who rarely recuses, stepped aside in Soo Line Railroad Co. v. Werner Enterprises. Our best guess here is that his recusal is related to his wife's ties to Nebraska, which is where Werner is headquartered.

Finally, Justice Kennedy, another stranger to the recusals report, stepped aside from Gordon, Chance E. v. CFPB. (The case was captioned as "Gordon, Chance E. v. Consumer Protection Bureau," and we have alerted the clerk of the Supreme Court to that error.) None of Kennedy's children – who work in finance, real estate and the arts – has ever worked for the CFPB, and none of the co-litigants, listed here, has a tie to Kennedy that we could identify.

The day before this report was released, *National Law Journal*'s Tony Mauro noted that Gordon earned a degree from the McGeorge School of Law, where Kennedy often teaches. The recusal here could be related to that fact.

Anyone having a thought as to why these eight recusals occurred is invited to alert us at Info@FixTheCourt.com.

In Conclusion, A Recommendation

Checking the 7,000 petitions that cross the court's threshold each year for potential conflicts of interest – especially when many of those conflicts are not immediately obvious – is a significant amount of work for the human law clerks the justices employ, and we don't blame them or their bosses for periodic oversights.

But as mistakes continue, one solution would be to adopt the 2006 Breyer Commission report recommendation that has been implemented in all federal courts of appeals: a software-based conflict-check system. Software isn't perfect, but it would be an improvement over the current error-prone method.

As the court frequently updates its technological capabilities, and with an FY18 budget that will include $1.5 million for tech upgrades, adding a digital conflict-check system, which already exists and works well elsewhere in the federal judiciary, would be a prudent fix.