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United States Senate Judiciary Committee
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
224 Dirksen Senate Office Building
Washington, D.C., 20510-6050

March 29, 2018

Dear Chairman Sasse and Ranking Member Blumenthal:

Last Friday, the clerk of the Supreme Court sent a letter to the parties involved in *Washington v. U.S.*, a case on Native American fishing rights scheduled for argument on April 18, stating that Justice Anthony Kennedy would no longer be participating in it. It turns out that Kennedy had sat on an earlier stage of the case in 1985 when he was a judge on the Ninth Circuit U.S. Court of Appeals, and when the conflict came to light, the justice recused himself from the suit.

Though this error is more than excusable given the 33-year lag, **missed recusals** – due to a justice being "unaware" of his or her financial or familial interests or previous work that, by statute, require disqualification – **have become more commonplace at the high court in recent years and are in dire need of a solution**.

For example, Justice Elena Kagan twice heard *Jennings v. Rodriguez* – argued in 2016 to a 4-4 tie and then reargued last year – but recused herself only after the rehearing when she learned she had been involved in the suit while Solicitor General of the United States. Chief Justice John Roberts initially participated in cases involving Texas Instruments in 2015 (*ABB Inc. et al. v. Arizona Board of Regents et al.*) and in Thermo Fisher Scientific in 2017 (*Life Technologies v. Promega*) despite owning securities in both. And Justice Stephen Breyer overlooked his wife's stake in Johnson Controls, a party to *FERC v. EPSA*, when he sat on the case in 2015.

Fourteen years ago, the third branch was asked to study whether its judges were in compliance with the 1980 Judicial Conduct and Disability Act. Though that request did not explicitly include questions on overlooked disqualifications, the report did note contemporaneous "news reports alleging various ethical improprieties, such as […] **judges' failures to recuse in cases where they own stock**."

The report went on to recommended that the Judicial Conference of the United States consider "**requiring judges to use conflict-avoidance software**" to better determine when jurists had conflicts, thereby reducing both the frequency of missed recusals and the number of misconduct complaints filed as such. For the last decade, lower court judges have been obligated to use such software.

As the justices often point out, rules created by the Judicial Conference do not apply to them. That said, there's no reason the nine couldn't either begin using conflict-check software or create their own system for identifying the types of petitions most likely to yield a missed recusal. They could also ask the Federal Judicial Center to study why these errors are now so common. **To date, they have not done any of this**.

Much as it was Congress that wrote the disqualification statutes that bind all federal judges and justices and, more recently, required all Article III judges to submit annual disclosure reports listing their financial holdings, **Congress also has the authority to demand improvements in the area of missed recusals**.

Before legislating, though, I believe that this subcommittee would benefit from hearing the justices' views on how to counteract this trend, either through written or oral testimony, and **I encourage you to make that request**.

In order for citizens to trust that justice is being done, we must first trust that our justices are playing by the rules. Thank you for your consideration of this important issue within your subcommittee's jurisdiction.

Sincerely,

Gabe Roth
Fix the Court
Executive Director